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THE IMPLICATIONS OF THE RAREST OF THE RARE CASE DOCTRINE IN THE PRESENT SCENARIO

- ***Priya Kotwani***[1]

"A punishment to be just should have only that degree of severity which is sufficient to deter others."

- Cesare Beccaria

INTRODUCTION

The structure of Indian constitution is the blend of many constitutions of the world including the American, British, Canadian and Russian. *"*No person shall be deprived of his life and personal liberty except according to the procedure established by law*"*[2], the provision relating to the Right to Life is one of the basic but one of the most essential fundamental rights contained in Article 21 of the constitution which was adopted from the American Constitution. It is one of the most essential human rights that are important for surviving in this world. But, this fundamental right has not been created or conferred by the constitution; it has just been recognized as an indispensable right.

The bare reading of the provision itself depicts that no one has the right to take away the right to life conferred on any person except through the procedure established by law. It means that if it is appropriate and it is in the interest of the society then the legislature can take such right away. Punishing a person for an act which is illegitimate in the eyes of society has been followed as a custom. The rulers/kings of their dynasties were quite popular for awarding brutal punishments to the wrong-doers. Even today the death penalty is awarded in various circumstances.

But when the consequences are life and death it is just to stipulate the same standard for our system of justice. The legislation from the very beginning emphasizes on punishing the wrong doer. Such punishments have been codified in the penal provisions of the country depending upon the severity of crime. For instance, in India the Indian Penal Code deals with the provisions regarding the punishment of criminal offences.

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[2] Indian Constitution. (1950) art. 21.

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But when it comes to death penalty, it becomes harsh to decide the punishment as many of us believe that it is against the moral turpitude. There has been a global trend for abolishing the said penalty but India, still has not adopted such a position. It is different from other forms of punishment in a way that when a man is once executed for a crime, he can never be brought back to life. Thus, any error in deciding the punishment cannot be ratified at later stage. In India, the Indian Penal Code, 1860 awards death sentence for various offences such as murder,[3]waging war against the government of India[4], dacoity with murder[5] and more but time and again the question as to the constitutional validity of imposing such punishment has been raised in numerous cases
.

Furthermore, there have been no uniform guidelines for the cases where death penalty has to be awarded. But, in the 1980's, a doctrine emerged, namely 'Rarest of rare case' doctrine which stated that the death penalty shall be awarded only in exceptional cases where the gravity of the offence is very heinous. The doctrine came into light in the case of Bacchan Singh V. State of Punjab[6] and has been followed till date while awarding the capital punishment.

But, the question as to whether the case falls into the category of rare of the rare case has always been difficult to be answered. There has always been inconsistency in awarding the death sentence due to the varying nature of the facts and circumstances of each case. Apart from that, there are many other factors that influence the decision of the judge while awarding such punishment. Through the medium of this paper, an effort has been made to throw a light on the doctrine and probing the implications of such doctrine in the present scenario.

EMERGENCE OF THE DOCTRINE

The structure followed by the Indian legislature while giving the death penalty has neither a supportive view for the same nor has it abolished it completely.

Until 1973, the courts were supposed to give reasons for not awarding death sentence and preferring life imprisonment over it. At the time, Death sentence was a rule and life imprisonment was an exception to it. In the case of Jagmohan Singh V. State of UP[7], for the first time the question as to the constitutional validity of imposing the death penalty was raised in India. Certain major points were put forward by the counsel for the appellant such as the fact that awarding death penalty was completely on the discretion of the judges, and not on the basis of any particular uniform standard, such unguided discretion being a violation of Article 14. Another important point was that execution takes away all the fundamental rights guaranteed

[3] The Indian Penal Code S. 302 (1860).
[4] The Indian Penal Code S. 121 (1860).
[5] The Indian Penal Code S. 396 (1860).
[6] (1980) 2 SCC 684.
[7] AIR 1973 SC 947.

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under clause (a) to (g) of sub-clause (1) of Article 19. After going through such arguments, the five-judge constitutional bench upheld the constitutionality of death penalty and held that deprivation of life is constitutionally permissible. Later on, in the case of Rajendra Prasad V. State of UP[8], the apex court was of the view that special reasons needed to be recorded that must relate to the criminal rather than the crime itself. And the death penalty shall be the last step; it should be awarded only if it is in the interest of the society and public order.

But, later on in the landmark decision of Bacchan Singh V State of Punjab, the Supreme Court made an attempt to carve out a doctrine that shall specifically lay out some guidelines to be followed while awarding death sentence. The aim was to reduce the ambiguity faced by the courts and the judges to go for imposing the highest punishment of the land and henceforth, the Doctrine of Rarest of the rare case emerged.

WHAT IS A 'RAREST OF THE RARE' CASE?

The phrase which has found its place in numerous case laws had its origin in the year 1983 in decision made by Supreme Court in, Machhi Singh V. State of Punjab[9], the case which followed the precious decision of the said court in Bacchan Singh V. State of Punjab, where it upheld the constitutional validity of the capital punishment but with that it also added a caveat that is now one of the famous phrase adopted by the jurists.

In Machhi Singh's case, the court discussed and formalised the formula of 'rarest of the rare case' and made an attempt to lay out certain guidelines that shall be adopted in identifying the case to be fit for capital punishment. As per the guidelines, what needed to be considered was-

- Manner of the commission of crime.
- Motive for commission.
- Anti-social nature.
- Magnitude of the crime.
- The personality of the victim.

These were the few major factors that had to be kept in mind by the judges, while deciding the quantum of the punishment for the accused person. It also emerged that while deciding such kind of matters and opting for the death penalty the circumstances of the offender has also to be kept in mind. Life imprisonment is a rule and death sentence is an exception to it.[10] But again, awarding capital punishment would only be up to the discretion of the judges.

[8] (1979) AIR 916.
[9] (1983) 3 SCC 470.
[10] Shodhganga- Doctrine of Rarest of Rare- A myth or reality, http://shodhganga.inflibnet.ac.in/bitstream/10603/129451/14/14_chapter%205.pdf

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Every judge has their own reasoning and opinion while considering the case to be fit match for applying the rarest of the rare case doctrine. The guidelines given in the case of Bacchan Singh showed a path to the judges but it never gave any specific reasoning of applying the doctrine and leaving it completely up to the conscience of the judges themselves.

So, the doctrine has been applied till date but there has been no uniformity in the structure followed by the judges who decide the same while awarding capital punishment. There are numerous instances where application of the doctrine has not been justified clearly.

AFTERMATH OF THE DOCTRINE

After the guidelines laid down by the Supreme Court in Bacchan Singh's case, there have been a number of cases where the courts either enabled or avoided the said doctrine. The following instances depict that there was no specific reasoning that can restrict the opinion of the judges while deciding the cases, as, it is up to their own discretion and the application of their own mind. In the case of Gurmeet Singh V. State[11], the accused was responsible for killing 13 persons of a family and it was agreed by the both High Court and The Supreme Court that the case fits in the category of the rarest of the rare case but still it took almost 2 years to commute the sentence in the judicial process.

In the case of Shivaji V. State of Maharashtra[12], where a 10 year old girl was raped and murdered but the case was suspicious. The nature of the crime was heinous but the court refused to award death sentence on the basis of circumstantial evidences. It is not understood that how the doctrine is applied every time in the cases. There is no acceptable definition of what could be the rarest of the rare case, there are numerous instances, where the facts and circumstances of the case are almost similar but the doctrine has been applied differently.

In 2008, the supreme court again, in Prajeet Kumar Singh V. State of Bihar[13], court was of the opinion that death sentence shall be awarded only "when a murder is committed in extremely brutal, diabolic or drastic conditions". The doctrine has been applied till date after the Bacchan Singh's case but due to lack of any specific it becomes controversial when death sentence is awarded in a particular case and the debate goes on and on.

What makes the judge to come to the conclusion that whether the case is a perfect fit for applying the doctrine? It is still an unresolved puzzle. Should the age of the victim be a major factor in deciding the case? Because, in this one case, the Bombay High Court, confirmed the death sentence of the accused guilty for rape and murder of a 2 year old girl. Where as in the

[11] 2005 Cri. LJ 4384 (SC).
[12] AIR 2009 SC 56.
[13] (2008) 4 SCC 434.

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case of Mohd. V. State (NCT of Delhi),[14] the Supreme Court commuted the death sentence for rape and murder of a 1 year and 6 month old girl to life imprisonment.

There have been instances where the facts and circumstances of the two cases were almost similar but in one case the court chose to apply the doctrine and in other it completely avoided it. In Swami Shraddananda V. State of Karnataka[15] the accused committed the murder of his wife for acquiring her wealth but in the opinion of the court the case fell short for the application of the rarest of the rare case doctrine. But in Ravindra Chouthmal V. State of Maharashtra[16], where the facts were almost similar to that of mentioned above, the husband with the help of his father killed his 8 month pregnant wife for Dowry. The court opined that it was under the ambit of the rarest of the rare case doctrine and awarded death penalty for the same.

Rather than being a principle oriented doctrine, it has become judge-oriented nowadays. It is the judge who has to decide the fate of the accused by applying his own mind and reasoning. The previous year, the Centre on Death Penalty released a report featuring an opinion study of 60 former Supreme Court judges on Death penalty which states that there has been no uniformity on the rarest of the rare case doctrine while awarding the death penalty.

CONCLUSION

The Doctrine which was born in the arms of Bacchan Singh V. State of Punjab becomes one of the most popular doctrines which have been applied till now. The doctrine came up with certain guidelines but it was unable to give a definite reasoning and a definition to the words that exactly would fall under the ambit of 'rarest of the rare case'. It gave a wide discretion to the court to apply the doctrine by carefully examining the facts and circumstances of each case. It succeeded in finding a place in the judgements regarding numerous heinous crimes but the there is no uniformity in the application of such doctrine.

There are numerous cases where the facts and circumstances are similar but when it comes to awarding the capital punishment, the views have been different. It is not understood that how the doctrine is applied every single time in a different manner. A crime which is heinous in the eyes of one judge may not be of that gravity for another. So, it can be said that there are various factors that affect the judge while he takes his decision in computing a death sentence or awarding the same. So, what actually affects the decision? What leads to so much of variation in awarding the death penalty? Is it the crime? Is it the criminal or the judge?

[14] (1998) 107 Cr.LJ 3739.

[16] (1996) 4 SCC 148.

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Does age of the victim also plays a crucial role in determining the quantum of punishment? In the case of Bacchan Singh, circumstances as to both the criminal and the crime were considered when it comes to Machhi Singh's case; the focus was on the crime rather than the criminal. The doctrine is surrounded with severe loopholes due to which there has been uncertainty in the application of the doctrine. And such uncertainty is violating the fundamental right to equal protection of laws enshrined under Article 14".

Although, the recent ordinance passed by the President for amending the POCSO Act and penalizing the person accused for raping a minor shall be liable for death penalty[17] is laudable and would help in specifying the compulsion of death penalty in these types of cases. But this step was taken only after the country faced a series of rape case of minors in past 2 years. Why the legislature opens its eyes after happening of certain major events? The loopholes in the present structure for awarding death penalty in the country is not unforeseeable.

The doctrine which was formulated to be based on principles is becoming more of a judge oriented doctrines. That is applied solely on the discretion of the courts. Not the judges but the society is also playing a significant role in deciding the faith of the accused convicted for such heinous crime. It was more reasonable if a proper provision would have been made by the legislature. But here, the judiciary took the burden in its own shoulders, which is leading to some sort of subjective interpretation of the said doctrine.

With the changing needs of the society, the countries have abolished death penalties and in India such doctrine would fade away if the legislature does not interfere sooner. Therefore, it is high time that a clear code of conduct should be prepared so that the ambiguities in the present system of awarding death penalty can be removed.

[17] The Times of India, Death Penalty for Rape of Minors: President approves ordinance, Apr 23, 2018.

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DNA EVIDENCE AND ITS ADMISSIBILITY IN COURTS

- *Divtej Singh Thind*[18]

INTRODUCTION

DNA Evidence refers to any form of DNA or genetic substance that can be collected and be used to prove a case. DNA is an abbreviation of Dioxy-ribo Nucleic Acid and is the basic genetic material in all human body cells. To take DNA evidence uses a method called DNA profiling or typing, that helps analyze the DNA and characterizes it based on certain traits, after which it can be matched to any specific individual. This DNA can be collected from physical evidence such as blood, hair and semen. DNA typing is proven to be 100% accurate and forming laws for the legal admissibility of the same will lead to a lot more cases being proved faster and with a lot more accuracy.

As of today, there exist no specific laws or legislations in place for the use of or the procedure for the use of DNA in courts as evidence, and the courts have full discretion to decide whether they want to admit the same as evidence or not. A formation of laws for DNA will help streamline and channelize the use of the same.

ADMISSIBILITY OF DNA EVIDENCE

The admissibility of DNA Evidence in the courts of law always depends on the discretion of the courts. They take into account a lot of factors such as the method of colle[19]ction of the evidence and the proper profiling and typing methods used. The courts require that there must have been a proper collection, preservation and documentation of the DNA, which can satisfy the court that the evidence which has been put in front of it is credible and reliable.

There exist no laws or legislations in India that provide specific guidelines and procedures to the investigating agencies or the courts, to deal with DNA evidence. This lack of laws is what leads to the investigating officer facing a lot of trouble in collecting the evidence and getting it admitted into the courts.

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All other evidence get their admissibility from legislations such as the Code of Criminal Procedure – 1973 and The Indian Evidence Act – 1872.

The Indian Evidence Act does not speak of any provisions for the admission of DNA evidence, however, there is a section of the Code of Criminal Procedure that the investigating officer might use to collect such DNA evidence, although with no guarantee of it getting admitted in court.

DNA EVIDENCE AND THE CODE OF CRIMINAL PROCEDURE, 1973

Section 53 - Code of Criminal Procedure, 1973

Examination of accused by medical practitioner at the request of police officer- (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub- inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner. Explanation.- In this section and in section 54," registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

Section 53 of the code of criminal procedure, 1973 gives the police officer the authority to get assistance of a medical practitioner for the purpose of the investigation. However, it doesn't enable him to collect, store or produce DNA evidence such as blood, hair or semen in the courts of law to prove a case and to prove criminal charges against an accused.

However, the Criminal Code Amendment Act of 2005 has added in two new sections to the Cr.P.C. that allow for collection of DNA samples such as semen, in case of rape. This amendment gives the police power to collect the DNA of the accused, with the help of a medical practitioner. These sections allow for the examination of person accused of rape by a medical practitioner and the medical examination of the rape victim respectively.

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DNA EVIDENCE AND THE INDIAN EVIDENCE ACT

Section 112 - The Indian Evidence Act, 1872

Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Section 112 of the Indian Evidence Act, 1872 determines a child's parentage and states that a child born of a valid marriage between a mother and a man within 280 days of the dissolution of the marriage, the mother remaining unmarried shows that the child belongs to the man, unless proved otherwise but again no specific provision which would cover modern scientific techniques.

DNA analysis is of utmost importance in determining the paternity of a child in the cases of civil disputes. Need of this evidence is most significant in the criminal cases, civil cases, and in the maintenance proceeding in the criminal courts under Section 125 of the Code of Criminal Procedure.

All of these statutes and the lack of some have led to a need for an amendment to the Indian Evidence Act and the Code of Criminal Procedure, to accommodate the new advancements in the sphere of science and technology. India, through these amendments, should form laws with respect to the admissibility and the use of DNA as evidence in the courts. A lot of developed countries have also been forced to change their legislations to introduce DNA testing in their legal systems.

DNA EVIDENCE AND ITS CONSTITUTIONALITY:

A lot of constitutional jurists in the country debate over the constitutionality of DNA evidence and whether it shall be allowed to be taken and admitted in the courts, or for investigative purposes.

Constitutional jurists argue that admission of DNA as evidence would violate a person's right to privacy. They argue that DNA evidence would go against a person's right against self-incrimination, as given under the Article 20 (3) of the Indian constitution.

Article 20(3) - The Constitution of India, 1949

(3) No person accused of any offence shall be compelled to be a witness against himself.

Jurists argue that if a person is asked to submit or if his/her DNA is taken for investigation of a case, that might prove them to guilty, in which case it would be considered to be against that person's right as guaranteed under the constitution. It is also argued that collection of such

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incriminating evidence, if done involuntarily by the investigating officer would be an infringement of the right to privacy of the person, as guaranteed to him by Article 21.
However, the courts have taken a different view of the matter.
In State of Bombay vs. Kathi Kalu Oghad[20], it was held that "the constitution makers could not have intended to put obstacles in the way of efficient and effective investigation into a crime and for doing justice by punishing the real culprits. Even otherwise, mere examination of a person and taking of blood sample in itself is not an incriminating circumstance and therefore, it cannot be said that by mere taking a blood sample of a person, he is compelled to be a witness against himself".

In another judgment[21], it was held that: "As stated earlier, this amendment was brought to overcome the difficulty of the prosecuting agency to detect the serious offence of rape. This section is not ultra vires of the Constitution. Drawing of the blood sample for the purpose of civil proceedings without the consent of the party is not desirable. But drawing of the blood sample for detection of the offence of rape wherein the investigating agency has to establish its case beyond reasonable doubt, cannot be termed as violative of Article 20(3) of the Constitution. The offence of rape is a very serious offence and it is an offence against the society at large."

Article 21 - the Constitution of India, 1949

Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

According to Bhagwati, J., Article 21 "embodies a constitutional value of supreme importance in a democratic society."
Iyer, J., has characterized Article 21 as "the procedural *magna carta* protective of life and liberty.
As per Black's Law Dictionary, privacy means "right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned."

In **Kharak Singh v. State of U.P.[22] a** question was raised whether the right to privacy could be implied from the existing fundamental rights such as Art. 19(1)(d), 19(1)(e) and 21, came before

the court. "Surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution.

[20] AIR 1961 SC 1808
[21] 2010 Crl.LJ 4341,Para-31
[22] AIR 1963 SC 1295

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Regulation 236(b), which permitted surveillance by "domiciliary visits at night", was held to be in violation of Article 21. A seven-judge bench held that:

"the meanings of the expressions "life" and "personal liberty" in Article 21 were considered by this court in Kharak Singh's case. Although the majority found that the Constitution contained no explicit guarantee of a "right to privacy", it read the right to personal liberty expansively to include a right to dignity. It held that "an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man -an ultimate essential of ordered liberty, if not of the very concept of civilization"

*However, i*n **Govind v. State of Madhya Pradesh[23],** The Supreme Court took a more elaborate appraisal of the right to privacy. In this case, the court was evaluating the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations, which provided for police surveillance of habitual offenders including domiciliary visits and picketing of the suspects. The Supreme Court desisted from striking down these invasive provisions holding that:

"It cannot be said that surveillance by domiciliary visit would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead a criminal life that are subjected to surveillance."

From the text of the Article 21, one can infer the rights under the same to not be absolute. It has also, on several occasions been held by to courts that the right to life and personal liberty in not an absolute right. It is a right with an exception for law. By this logic, all rights under the ambit of Article 21 are subject to the same exceptions of the law. It will, in such a case be true to suggest that the provisions of the Article 21 can be curtailed or refused if the law deems it fit to do so. Hence, the argument in favor of DNA evidence being a violation of the provisions of Article 21 is invalid. It can also be held from the case of Govind v. State of Madhya Pradesh[24] that in case there being a suspect of a crime, there is a relaxation of this right to privacy, for the good of the society at large.

This argument can also be used in favor of any case that is sub judice and needs the use of DNA evidence, in order to be proved.

When a person knocks the doors of the Courts, seeking justice, it is the paramount duty of the Judges to render justice especially in criminal proceedings where the prosecution has to prove its case beyond reasonable doubt. The parties should know for what reason he/she is convicted and for what reason he/she has lost the case.[25]

[23] AIR 1975 SC 1378, 1975 SCR (3) 946
[24] Ibid
[25]Rudresh @ Rudrachari S/O. vs The State Of Karnataka

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CONCLUSION

There is a severe need for formation of laws for DNA evidence in the country. An ingredient as important in proving a case, as DNA can be, must not be left to the complete discretion of the courts with regards to its acceptance or non- acceptance.

As evidence, DNA can be used in corroborative form, to give a direction to the investigation in general, or it can be used to prove a part of a case that might be key to proving the case at large.

There is also a need for there to be an amendment to be made to the Article 20 (3) of the Constitution of India to include the words ***"****except according to procedure established by law"* with the same meaning as under Article 21. This will give the investigation more dynamics to work with and prove a case.

In case of a voluntary submission of DNA evidence, there should be a set procedure prescribed by the law, with some discretion of the courts to be allowed in the admission of the same, to ensure that a uniform system of profiling can be followed.

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MARGINALIZATION- THE HINDERANCES AND THE WAY FORWARD

- *Tejas Sateesha Hinder*[26]

ABSTRACT

Marginalization, derived from the word 'margin', means to keep certain sections of the society out of representation, growth and exercise of legitimate power, to the extent that their EXISTENCE comes into question.

The act of marginalizing breeds countless problems; to name a few would include breach of Dignity and Human Rights. It also hinders upward social mobility and diminishes a country's or a society's world image.

The purpose of this write-up is to bring in view problems of targeted groups such as women, people with disabilities, aged people, children and sexual minorities by ingeminating their history, along with developments on a world scale to address the same. Special emphasis has been laid on Indian scenario, since it is a country with altogether different structure and societal systems, hence having unique divisions and marginalization such as hierarchy in caste system and formation of Scheduled castes (SCs) and Scheduled Tribes (STs) community.

As it is said in legal terminology- 'ubi jus ibi remedium' i.e., where there is a right, there is a remedy; in similar way, many steps have been taken in this regard by governments and states worldwide, to preserve the rights of these distressed groups and it also explores to what extent these steps have been successful and has also tried to present decent retort.

The author sincerely hopes that this write-up, through analytical and relational approach, will prove to be a comprehensive whole and will provide a deep and different insight on the topic.

INTRODUCTION

Marginalized sections of the society encompass groups which experience structural discrimination in the form of physical, psychological, emotional and cultural abuse, which in turn is granted a legitimate status by the social structure and the integrated social system. Individuals and groups subject to marginalization usually have little or no control over their lives and the resources which are readily available to them. As a result of this, these individuals or groups do not get an opportunity to contribute to either their material development or the material development of the society. The creation of a vicious circle restrains them from the day

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to day societal proceedings, which leads to their segregation and isolation from the rest of the society.

An integration of marginalized individuals is known as a marginalized group. In common parlance, 'marginalization' refers to the overt acts committed against or tendencies to dominate a targeted minority of the society by fellow beings of upper classes and many a times even the privileged classes of the international community at large. This involves subordination of individuals or groups perceived to be undesirable or considered to have no point of existence, and also involves atrocious acts committed against them.

Peter Leonard defines marginality as, "Being outside the mainstream of productive activity and/or social reproductive activity." According to the Encyclopaedia of Public Health, marginalization is defined as, "To be marginalized is to be placed in the margins, and thus excluded from the privilege and power found at the centre."

It has been observed by Latin that, marginality affects an individual's economic well-being, physical security and dignity. Members of a marginalized society can be identified by the members of a dominant community, and will face irrevocable discrimination.

Characteristics of marginalized sections of the society: -

- Affected by discrimination and subordination;
- Possession of physical and cultural traits that set them apart, and the same are disapproved by dominant groups of the society;
- Sharing of sense of collective identity and common burdens;
- Common tendency to marry within the group.

HISTORY OF MARGINALIZATION

Marginalization has been existing since centuries. As discussed earlier, to be marginalized means to be discriminated or treated badly on the grounds of race, financial status, ethnic group or even gender.[27] Since time immemorial, marginalized individuals and groups have been treated as if they were of lesser value, than the dominant individuals or groups, which have been able to do so due to the belonging to a majority.

Marginalization of the Poor

Those who have been deprived of economic wealth and material resources, which also includes a decent standard of living, have been belittled, starting with the untouchables of caste system in ancient system Egypt and India. The homeless have always been looked down at. Lack of

[27] Aditya Anupkumar. "Introduction to sociology project – The Concept Of Marginalization" nd. 1-13. Web. http://www.adityaanupkumar.com/files/TheConceptOfMarginalization.pdf

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offering help to the homeless was promoted notably in the Northern region of the American subcontinent and Eastern Europe in the 1900's. 1 in 7 people were at the risk of suffering from hunger in the United States. They amounted to 13.2% of the American Population in the late 1900's. 3.5 million people in this very nation were forced to sleep in cars, under bridges and in the shelter of cars.

African American Marginalization

For the major part of the 1800's and 1900's African Americans and those of darker skin have been treated unfairly. Although slave trade was prohibited from 1808, internal slave-trading still prevailed, and it were these African Americans who were the objects of slavery. Of all the 1,515,605 free families in the fifteen slave states in 1860, nearly 400,000 held slaves (roughly one in four or 25%). The wage pay for the forcefully employed workers was below the minimum pay scale.[28]

The advent of slavery began in 1861, during the Civil War in America, in the South. Protests and standings by African Americans lead to punishment, lynching and hangings. Segregation till the 1980's forced Africans to feel and look as if they were of lesser value.[29]

Immigrant Marginalization

Marginalization of Immigrants has been a deeply rooted type of marginalization since the late 1800's. It all started with Mexicans, and today it stands against Syrians. This act involves domination of immigrants by natives or indigenous groups in majority in the emigrant nation. This can be on grounds of nationality, culture, religion, heritage, etc. In the early 1900's immigrants from Mexico were subject disparage on grounds of their heritage. They were also referred to as illegal immigrants even if they were registered. A number greater than 890,000 legal Mexicans came to The United States of America between 1910 and 1920. They were made to do the construction work of railroads, and were payed the bare minimum wages for the same.

HISTORICAL MARGINALIZATION OF WOMEN

For a very long time, and even today, women did not have the same rights as men. The were forced into households, and made to stay within the four walls of the house. They were also denied opportunities in politics and other spheres of employment. Moreover, they were denied basic rights such as right to vote. Women fought for their rights from 1848 all the way down till 1920.

[28] Freire, P. & Faundez, A. (1989). Learning to question: A pedagogy of liberation. Geneva: World Council of Churches.
[29] World Wildlife Fund Eastern Africa Regional Programme Office & British Standards Institutions, Ltd. (2006). Poverty and environment issues: Governance institutions, institutional frameworks and opportunities for communities. Poverty and Environment Initiative: Nairobi, Kenya.

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VARIOUS MARGINALIZED GROUPS AND THEIR PROBLEMS

Most vulnerable marginalized groups in the society can be summarised as below:

Women

Under varied economic conditions and the influence of specific historical, cultural, legal and religious factors, one of the manifestations of gender equality is marginalization. Generally, women are always marginalized as compared to men in most of the countries and cultures existing in the 21st century.

A homogeneous category encompassing members having common interests, abilities or practices is not presented by women. Women who belong to lower castes and lower classes have different levels of marginalisation than their better off counterparts.[30]

People with disabilities

Biased assumptions, harmful stereotypes and irrational fears have been used by the members of the dominant groups, which constitute abled persons (in this case), to suppress disabled persons. The stigmatization of disability resulted in the social and economic marginalization[31] of generations with disabilities, and like many other oppressed minorities, this has left people with disabilities in a severe state of impoverishment for centuries. [32]

Various barriers are faced by the disabled while seeking access to healthcare and health services. Among the disabled, it is the women, children and aged, who are more vulnerable and need attention.

Scheduled Caste

The caste system may be described as a hierarchical social system, formulated on the basis of notions of 'purity' and pollution'.

Marginalization of the lower castes influences all the spheres of the lives of the members of the lives of the members of these castes, which involves the civil, political, economic and cultural spheres of their lives, thus violating the inalienable and egalitarian privileges they possess. Majority of the lower castes are still dependent on others for livelihood. These groups are continuously in a state of oppression and social disability, and are mostly helpless and poor. Literacy rates among these groups are mostly very low.

[30] Barry, B. 1998. Social exclusion, social isolation and the distribution of income. Casepaper No. 12. London, London School of Economics, Centre for Analysis of Social Exclusion.
[31] Bourdieu, P. (ed.). 1999. The weight of the world: Social sufferings in contemporary society. Cambridge, Polity Press
[32] Kagan, C. (1995). Regional development in health and social services in the U.K. 'Edge effects' and sustainable change in welfare organizations. Manchester: IOD Research Group

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Many of their lives are characterized by meagre purchasing power, poor housing conditions and low access to resources and entitlements. These groups experience structural discrimination in the form of physical, psychological, emotions and cultural legitimate status by the social structure and social system. The physical segregation they experience forces them to live in unhygienic and inhabitable conditions, and this coupled with the lack of access to health services leads to high rates of malnutrition, mortality, morbidity and anaemia.

Caste-based discrimination entails the following: -

- Exclusion from social and economic affairs;
- Segregation in housing;
- Refusal and restriction to access to private services and employment;
- Enforcement of certain jobs, which may prove to be modern day bonded labour or slavery.

Scheduled Tribes

Like the scheduled castes, the scheduled tribes encounter structural discrimination within Indian society. Unlike the scheduled caste, the scheduled tribes have experienced marginalization on the basis of their ethnicity.

The Scheduled Tribe population is around 84.3 million in the nation of India. The Scheduled Tribes, are mainly landless, with little or no control over resources such as land, forest and water. The members of Scheduled Tribes constitute a large proportion of agricultural labourers, casual labourers, plantation labourers, etc.

As a result of this, there exists poverty, law levels of education, poor health and reduced access to healthcare services. They belong to the poorest strata of the society and have severe health problems.

Elderly or Aged People

One of the most inevitable and inexorable processes in life is ageing. The rapidly growing aged population in India has become a serious concern for the government and policy makers.

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According to the 2011 census there are a little over 76.6 million people over 60 years, thus constituting 7.2 per cent of the total population, as opposed to the former constituting 6.8 per cent of the population.[33]

According to the 2011 census conducted in India, 33.1 per cent of the elderly in India live without their spouses. The widowers among older men form 14.9 percent as against 50.1 percent widows among elderly women. Among the elderly, 80 years and above, 71.1 per cent among them women were widows while widowers constituted only 28.9 percent of men.

Lack of economic independence has an adverse impact on their access to food, clothing and healthcare among the elderly.

One of the major concerns with respect to the elderly is healthcare, as ageing is often accompanied by multiple illness and physical ailments.

Children

Mortality and morbidity among children are caused and compounded by poverty, their sexual orientation and belonging, and the position of the caste they belong to in the society. The above-mentioned factors have a direct adverse impact on their nutrition intake, their access to healthcare, environment and education.

A female child in India is more likely to be subject to discrimination and differential access to food and nutrition, and the falling sex ratio over the years coupled with the use of technology to eliminate the female child serves as evidence for the prevailing gender-based discrimination.[34]

Manifestations of the violation of child rights are many. They range from child labour and child trafficking to consumers to commercial sexual exploitation and other forms of violence and abuse.

With an estimated 12.6 million children engaged in children labour (2011 census), India has the highest number of children under the age of 12 engaged in hazardous employment. Children residing on streets and children of sex workers face discrimination, which may include things from forced prostitution to usage as objects of sex. A large number of children are notably trafficked to neighbouring countries.

NEED TO REMOVE MARGINALIZATION

Following the concept of social fact given by Emile Durkheim, I see marginalization or an act of marginalizing as a social fact, or something which affects and has relevance for society at large.

[33] Atweh, B., Kemmis, S. & Weeks, P. (1998). Action research and social justice: Partnerships for social justice in education. London: Routledge.
[34] Eldering, L & Knorth, E.J. (1998). Marginalization of immigrant youth and risk factors in their everyday lives: the European experience. Child and Youth Care Forum, 27(3), 153-169.

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We know that the act of marginalizing creates a lacuna in the society and need for removing the same should be realized by all, because in one or the other way it has its secondary response on every individual dwelling in particular societal arrangement.

Some of the rationales for addressing the same are –

- Right to dignity – right to human dignity, enshrined in art 21 of Indian constitution as fundamental right, is intertwined with right to exist as human being, not as an animal with the contours of civility. Right to exist does not mean mere existence; it would include the right to live with human dignity; a right to minimum subsistence and would include all those aspects of life which make a life meaningful, complete and worth living. Greater emphasis has been laid on human dignity which can be proved through international documents such as The Preamble of UN Charter of Human Rights, International Covenant on Civil and Political Rights etc. Human Rights specify both, forms of life that are worth of being with inherent moral worth and provide legal and political practices to realize a life of dignity that vindicates the inherent worth of human beings must not left in abstract philosophical and religious domain but rather must be expressed in everyday life through practices that respect and realize human rights. Hence, to preserve human dignity is one of the most important reason for abandoning the practice of marginalizing certain groups of society.
- Human Rights – certain human rights which are indispensable to living should be preserved. Right to equality is one such right, our Preamble guarantees equality of status and opportunity. It protects individuality- every individual is unique and hence has constitutional right to choice against choice of majority. It protects socio-economic interests viz., distributive justice or equality in access to justice. Justice should be available to all, irrespective of their status, class, background etc. Similarly there should be equality in providing medical care, shelter, food, education and other basic necessities. It must protect rights of those who are legally dependent on the state for instance, prisoners, victims of crime, juveniles, child workers, contractual workers and others whom society traditionally treated as without dignity.
- Upward social mobility is being limited- the progress and growth of the society socially and economically gets limited because certain sections of the society or rather large chunk of the population is not even participating and are not getting equal opportunity to prove their worth.[35]
- World Image- a country which protects the needs, rights, dignity of its people looks safe and develops a certain image in the world perspective which consequentially is beneficial for its prosperity and development, economically and politically.

[35] Choudhury,M. & Kagan, C. (2000). Inter-generational understanding in the inner city: 'Edge effects' and sustainable change in community organisations. Pp. 58-70, In C.Kagan (Ed.), Collective action and social change. Manchester: IOD Research Group.

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CURRENT LEGISLATIONS AND THE WORLD SCENARIO

Efforts at the world level include various charters of UN such as The Preamble of Universal Declaration of Human Rights, which declares that human beings are born free and equal in dignity and rights. Hence, everyone should have recognition of the inherent dignity and of equal and inalienable rights in the similar vein. Other than this, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on Elimination of All Forms of Rational Discrimination, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Convention on Elimination of forms of Discrimination against Women and Convention on the Rights of Child also, lay emphasis on rights of the distressed and needy groups and try to make sure that their prerogative is entitled to them according to the world standards. World summits and Conventions focus on maintaining and giving such rights as collective responsibility since to empower someone is not the matter of a single day, week or month or for that matter duty of an individual. A sustainable change will take place only if everyone will take a step forward as iterated in Vienna Declaration and Programme of Action, 1993.[36]

The status of different countries, including Germany, India, Canada, South Africa, Hungary, and Israel, in this respect includes development of jurisprudence of Dignity. For example Canada's charter does not mention dignity at all, Hungary's constitution mentions it as one of the many rights, Israel's evolving Basic Law emphasizes it, so does South Africa's post-apartheid (racial segregation) constitution which calls it as a founding principle, in Germany, it is Fundamental and non-derogable.

RECOURSES TAKEN BY THE GOVERNMENT OF INDIA

Marginalized sections were sincerely considered by the framers of The Indian Constitution while making laws, keeping in mind the divisions that exist in the Indian society.

There are social divisions, which includes, RELIGION- Hindus are in the majority and hence enjoy the dominance in the society over the other castes and GENDER- India is till date a male-dominated society, hence women have been suppressed over the centuries. There is also a horizontal division of Caste System, which is very unique to the Indian society and is highly prevalent. Certain castes like Brahmins and Kshatriyas are considered to be the upper castes because of the type of the work they carry or form of occupation, as pervasive in the Vedic period; and the lower castes like Shudras and Vaishyas, who do menial work are considered to be at the lower rung of the social stratum.[37] These lower castes were given empowerment by the laws made for them and were called as 'Harijans' meaning the people of God, in order to remove

[36] D.N. Weisstub, "Honour, dignity and framing of multiculturalists value" The Concept of Human Dignity in Human Rights Discourse, 2002
[37] S. R. Padhi and B. Padhi, "Educational scenario of tribes in India," in Educational Scenario of Tribes in India: Current Issues and Concern, S. R. Padhi, Ed., New Delhi: Mangalam, 2011

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their past identity which carries stigma. These sections are now legally divided into Scheduled Castes, Scheduled Tribes and Other Backward Classes. There are other divisions on basis of age (elderly people and children), health (physically disabled) and economy (higher, middle and lower (poor, below poverty line (BPL) and above poverty line (APL)).

One of the most debated upon recourse that India has taken for the empowerment of marginalized sections is the policy of reservation- which is a process of reserving certain percentage of seats (maximum 50%) in Government educational institutions, government jobs, etc. Though this policy is regulated properly by law, yet it is the most debated issue because the purpose for its adoption is not fulfilled now and the people that should actually be benefitted are not being benefitted, and others are reaping benefits of the reservation system, who are actually not meant for it. Certain articles which guarantees reservations are—

- Article 15(4)—Special Provision for Advancement of Backward classes.
- Constitution (93rd amendment) Act, 2006: Provision for Reservation of Backward , SC and ST classes in private educational institutions (article 15(5))
- Article 16(3)—Reservation of posts in public employment on the basis of residence.[38]

Other steps taken by State and Government gearing on 'growth with stability' are as under—

- Active role of the state in planning – planned intervention in use of economic and social policies is necessary to ensure fair access and participation in development of the country.

State introduces certain policies and schemes and develops commission for addressing the issue of the upliftment of the marginalized sections (SCs and STs). For example-Article 338-A- National commission for SCs and Article 338-B- National Commission for STs. Certain Schemes and Programmes which were launched are- Pre-examination coaching: to coach candidates belonging to OBCs whose parent's /guardian annual income is less than Rs. 1 lakh, pre and post metric scholarships, equitable availability or ICDS services, Modernizing Madrasa education, upgradation of skill through technical training, food programmes, etc.

Special laws and legislations for empowering women such as-73rd and 74th CAA, with this women were given 33.33 % reservation in seats at different levels of elections in local governance, The Equal Remuneration Act,1976; The Dowry Prohibition Act, 1961; The Immoral Traffic (Prevention) Act, 1956 etc. Elderly -Section 125(1)(2) of CrPC, Hindu adoption and Maintenance Act 1956(section 20).

Children-Right to Education Act, 2009; Prohibition of Child Marriage Act, 2006. Physically Disabled- Rehabilitation Council of India Regulations, 1997; Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

[38] India Const. 1950

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1. **PROBLEMS ASSOCIATED WITH MINORITIES IN INDIA**
   - Low level of education among the members belonging to these classes.
   - Low per capita income among the minorities, which forces them to live in poor living conditions and lead avocations which they are not suited to.
   - Lack of availability of economic opportunities, and absence of requisite skills and vocational training to utilize the same when available.
   - Forced victims of communal violence.
2. **PROGRAMMES INTRODUCED FOR THE UPLIFTMENT OF MINORITIES IN THE REPUBLIC OF INDIA**
   - Availability of equity and introduction of ICDS services.
   - Improvement in access to school education.
   - Modernization of Madrasa education.
   - Grant of scholarships to meritorious students coming from the minority communities.
   - Improvement of educational infrastructure through the Maulana Azad Education Foundation.
   - Provision of technical and vocational training specifically for the minorities and deprived classes with the aim of upgrading their skills.
   - Ready Rehabilitation of victims of communal riots.
   - Grant of self-employment to the minorities, i.e. providing employment opportunities.
   - Recruitment of members of minorities to State and Central Services.
   - Enhancement in credit support for economic activities carried out by the members of these classes.
3. **SOLUTIONS TO ERADICATE THE ISSUE OF MARGINALIZATION**
   a. **Improved access to agricultural land**: - The purposes behind the high frequencies of destitution and hardship among the minimized social gatherings are to be found in their proceeding with absence of access to wage procuring capital resources (horticultural land and non-arrive resources), overwhelming reliance on wage work, high joblessness, low training and different components. Along these lines, there is a need to centre around arrangements to enhance the responsibility for procuring capital resources (agribusiness arrive, and non-arrive resources), business, human asset and well-being circumstance, and counteractive action of separation to guarantee reasonable cooperation of the underestimated network in the private and the general population segments.
   b. **Granting them an active role in the state of planning**: - It is important to perceive that for by far most of the segregated gatherings, State mediation is urgent and vital. Essentially, the utilization of financial and social arranging as an instrument of arranged advancement is similarly vital. In this manner, arranged State mediation to guarantee reasonable access and cooperation in social and financial advancement in the nation is vital.

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c. **Improved Access to Capital thus preventing the advent of poverty**: - The destitution level among the SC and ST cultivators is 30% and 40% separately, which is considerably higher contrasted and non-planned cultivators (18%). Thus, the destitution occurrences of those in business is high 33% for SC and 41% for ST contrasted and just 21% among non-booked organizations. The feasibility and efficiency of independently employed family units should be enhanced by giving satisfactory capital, data, innovation and access to business sectors. It is a pity that however the STs do possess some land, they do not have the significant innovative contributions to enhance the efficiency of their farming.

d. **Improved Employment for the minorities in the Public and Private sectors, which may or may not be through legislations:** - There is a need to survey and fortify work ensure plans both in rustic and urban territories, especially in dry spell inclined and destitution ridden zones. Rustic foundation and other gainful capital resources can be produced through vast scale business programs.[39] This will fill the duel need of lessening destitution and guaranteeing monetary development through change in the supply of capital resources and foundation.

e. **Introduction of food security programmes**: - The general population conveyance framework ought to likewise be resuscitated and reinforced. In circulating Reasonable Value Shops in towns, need ought to be given to the SC/ST female and male gatherings, as various examinations have called attention to that they are segregated upon in People in general Appropriation Framework and in Early afternoon Supper plans

f. **Devising a public health system**: - The public health system in country territories has additionally been overall ignored. In this way, the essential health system for provincial zones and public health system in urban zones must be resuscitated and more assets ought to be apportioned for the same.

g. **Enforcement of untouchability and discrimination**: - The practice of untouchability and the large number of atrocities inflicted on Dalits continue even today mainly because of hidden prejudices and neglect with respect to officials responsible for the implementation of Special Legislations; i.e. the Protection of Civil Rights Act (PCRA) and the Prevention of Atrocities Act (POA). The Government should make a meaningful intervention in this regard in order to mitigate the sufferings of Dalits due to practice of untouchability and atrocities inflicted upon them and ought to likewise treat this matter on a priority basis to ensure that the officials and the civil society everywhere are sensitized on this issue.

[39] Estivill, J., Concepts and strategies for combating social exclusion. An overview Geneva, International Labour Office, 2003

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NEED FOR TRANSPIRANCY IN ALLOCATION OF WORK FOR SUPREME COURT JUDGES

- *Prahalad Sriram*[40]

ABSTRACT

The judicial system of a country, especially that of a democracy such as India, is an integral necessity to maintain the equanimity and sacrosanct nature of the very political system it is in place to protect. Thus, it goes without saying that such a judicial system has to exhibit transparency and accountability if it is to protect the integrity of the principles of democracy.

There have been recent cases, wherein the system of allocation of cases to judges have been brought to the spotlight, with accusations cropping up about the inherent arbitrariness and bias in the current system of allocation of work to justices of the highest court of the land. These accusations emanate from a series of alleged miscarriages of justice in the Supreme Court, leading to four of the senior-most judges in the Apex Court, after the Chief Justice, issuing a letter to the Chief Justice, as well as holding a press conference, stating their apprehensions about the current system.

This paper attempts to study the lacunae in the current system of allocation of work to justices of the Supreme Court and why such a lacunae is problematic, tracing the need for a transparent system of allocation of cases with respect to natural law, and culminates in a proposition to curb the existing lacunae, realising a system that is transparent and befitting the needs of a democracy.

INTRODUCTION

The issue of allocation of work to the judges of the Supreme Court came up with regard to recent events that took place over the course of the subsequent year. These events, such as the mishandling and misallocation of the inquiry into Late Justice Loya's death to a junior Bench by the Chief Justice as well as the Chief Justice himself presiding over a case alleging corruption against certain justices in the Supreme Court, one which he himself had a vested interest in, all led to public and societal outrage the current system of allocation of cases to judges in the highest court of the land.

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The media took to reporting this heavily and voiced the public's demand of a system of allocation of work to the judges in the Supreme Court that is both transparent, as well as accountable. This outrage is understandable as such a misallocation is grave considering the fact that the Supreme Court is the highest judicial authority in the nation, and no further appeals lie anywhere beyond it. Further, every democracy works on a system of checks and balances within its internal structures owing to the fact that too much power might lead to arbitrary use of the same. The Constitution does effectively maintain the system of checks and balances to a certain extent, considering other aspects such as allowing the other organs of the government to maintain a system of checks. However, a certain oversight may be Article 145 of the Indian Constitution which allows for the Supreme Court to make rules for regulating the practice and procedure of the Court, seeking approval of only the President. The power that the judiciary currently has, to allocate cases on its own will, is a reflection of the same and such arbitrary use has already been shown in the above instances of miscarriage of justice.

It is thus pertinent and the need of the hour to analyse the problematic scenario in status quo and suggest alternatives that amend the situation, thus resuming the system of checks and balances befitting of Montesquieu's political doctrine.

RESEARCH PROBLEM

In a country such as India, where the instances of corruption and power accumulation are large and widespread, there is a compelling need for a system of transparency and accountability. This system is especially crucial in the judicial system of the country, where the practical integrity of democracy is often considered. Thus, a deviation here, would necessarily mean a deviation from the system of democracy that our Constitution framers aspired to create.

RESEARCH QUESTIONS

1. Whether there exists any lacunae in the status quo with respect to allocation of work to the justices of the Supreme Court?
2. Whether such lacunae, if any, are a threat to the system of democracy?
3. Whether an alternative method can be proposed which will counteract the lacunae in the status quo?

RESEARCH METHODOLOGY

This paper is a literature review of the current Supreme Court rules governing its current system of allocation of cases. The author also attempts to understand the principles of natural law and utility and apply it to the problem at hand and attempt to show that the current system in place is inconsistent with such jurisprudential principles.

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RESEARCH OBJECTIVE

The following are the objectives of the research paper:

a) To understand the lacunae in the current system of distribution of cases to judges of the Supreme Court.
b) To understand the threat that such lacunae pose to the system of democracy and principles of natural law and equity.
c) To suggest viable alternatives to the status quo that would effectively counteract the above lacunae.

SCOPE OF THE STUDY

This study has attempted to identify the problems in the current system of allocation of work to the judges in the Supreme Court of India, following recent allegations of corruption and favouritism and bias in the conduct of the Chief Justice of India. It also offers certain alternatives and suggestions to fix the problems identified in the paper.

ANALYSING THE CURRENT SYSTEM IN THE SUPREME COURT

The Supreme Court, as the apex court of India currently has 25 judges in its roster[41], with 6 slots remaining vacant, as increased by the Parliament in 2008. The Supreme Court currently has a system of allocation of cases that is based on a computerised system. This automatic allocation is overseen by the Registrar of the Supreme Court. However, the Roster of the Supreme Court itself is prepared by the Registrar, upon the orders of the Chief Justice of the Supreme Court.[42] Chapter VI of the Procedure of the Supreme Court, 2017 also states that the aforementioned order may also contain general or specific instruction on assignment or allocation of work to a Bench and includes allocation of work of a Bench, on account of non-availability, to another Bench. The Chief Justice, in order to meet contingencies, may also direct the Registrar to prepare roster amendments for re-allocation of work[43]. When a Bench directs the listing of a case before another Bench (more appropriate or larger, as the case may be), the Registrar shall place the matter before the Chief Justice for orders.[44]

Further, when it comes to fresh cases, they are allocated through automatic computer allocation, unless coram is given by the Chief Justice. The Chief Justice can also direct a case to not be listed before a particular judge.[45] The regular hearing cases are allocated as per the subject

[41]"Chief Justice & Judges". www.sci.gov.in. Supreme Court of India. Retrieved 12 October 2017.
[42]Order VI, Rule 1. Supreme Court Of India Handbook On Practice And Procedure And Office Procedure 2017.
[43]supra note at 2, rule 2.
[44]supra note at 2, rule 4.
[45]Order XIII, Cases, Coram and Listing, rule 2. Supreme Court of India Handbook on Practice and Procedure and office Procedure 2017.

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category, unless coram is given by the Chief Justice.[46] Also, whenever a case is referred by a two judge Bench to a larger Bench, the coram is allocated by the Chief Justice.

In the case of a division Bench, subject to Order VI, Rule 1[47], every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice[48]

In cases of Review Petitions[49] under Order XLVII of the Rules[50] read with Article 137[51] of the Constitution and shall, be circulated to the same Judge or Bench of Judges that delivered the judgment, provided that in case of non-availability of a Judge or Judges of the Bench, an application for review shall be heard by a Judge or Bench of Judges, as may be ordered by the Chief Justice.

Rule XIII[52] also talks about how the Registrar shall list the cases before the Benches in accordance with the roster under the directions of the Chief Justice.

A look at the above rules of procedure of the Supreme Court shows the amount of power the Chief Justice has in allocating work to the judges of the Supreme Court. Further, the above power is completely up to the discretion of the Chief Justice of the Supreme Court and there exists no further system to ensure that this discretionary power is not used arbitrarily or is biased or influenced by corruption. This essentially means that the Chief Justice can allocate cases based on his whims and fancies, with no other body having the authority to direct him otherwise. This also means that there is no system of accountability, with the Chief Justice being the final authority on such matters. The Chief Justice thus has a Constitutional power under Article 145[53] to arbitrarily and without transparency allocate work to the judges of the Supreme Court. This power stems from the article granting the Supreme Court to make its own rules.[54]

Also, recently, the Chief Justice has made public the Supreme Court's roster. However, the Chief Justice also announced his intention to hear all public interest petitions, while ensuring the other senior judges do not get to hear any such petition.[55] Public Interest Litigations are often the only tool that the public has in its arsenal to counteract arbitrary decisions made which are out of their

[46]supra note at 5, rule 12.
[47]supra note at 2.
[48]Order IV, sub-order II, rule. 1. Supreme Court of India Handbook On Practice and Procedure and office Procedure 2017.
[49]Order V, rule 1, cl. (i).
[50]Order XLVII, Supreme Court of India Handbook On Practice and Procedure and office Procedure 2017.
[51]Art. 137, INDIA CONST.
[52]Order XIII, rule 1, cl. (i).
[53]Art. 145, INDIA CONST.
[54]Id.
[55]A Vaityanathan,After Rift, Chief Justice Dipak Misra Makes Public Supreme Court Judges' Roster, NDTV, (Feb 01, 2018 16:26 IST), https://www.ndtv.com/india-news/chief-justice-dipak-misra-makes-public-supreme-court-judges-roster-1807352.

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direct reach. This change has the possibility of affecting this Constitutional remedy under article 32.[56]

THREATS THAT THE CURRENT SYSTEM POSES

The current system as studied above poses a particular danger to society as a whole, and thus the system of democracy that India has chosen to adopt. Firstly, we need to understand why such a system is problematic to the status quo. As established in the preceding section of this paper, there exists undue power in the hands of the Chief Justice. The Chief Justice has the power to arbitrarily allocate cases to the judges based on no rational or laid down procedure and thus has the power to essentially allocate judges the cases which they have an interest in, to further his own political agenda.

Natural law and the rule against bias:

Essentially, the power that the Chief Justice wields violates the principle of equity, derived from the Latin maxim - *nemo judex in causa sua*, that is, no man shall be the judge of his own cause. This doctrine, also known as the rule against bias, is the minimal requirement of natural justice that the judge giving the decision must be free from prejudice and bias.[57] This rule against bias fights those factors which may improperly influence a judge from reaching a decision of a case. It is based on the premise that it is against basic human psychology to decide against a person's own interest.[58] The objective of this rule is to ensure public confidence in the impartiality of the judicial process, for according to LORD HEWART CJ in *R v. Sussex*[59], "justice should not only be done, but also manifestly and undoubtedly seen to be done."

This principle is thus expressly violated if such power resides in the hands of the Chief Justice of India. This is hypocritical considering the fact that the Supreme Court itself frowns upon such actions as is evident in the case of *Jeejeebhoy vs. Assistant Collector,Thana*[60] the then Chief Justice P. B. Gajendragadkar reconstituted the bench when it was established that one of the members of the said bench was a member of the cooperative society for which land had been acquired in the case. Thus, this principle is pertinent, and more importantly, judicially recognized. Thus a violation of this principle goes against the very doctrine of natural law that the citizens, and by consequence, the judiciary, must value.

Utility and the harms posed in the status quo:

Utilitarianism was a philosophical movement which flourished in the nineteenth-century England. Some of its roots can be traced back to the Scottish eighteenth-century philosopher

[56]Art. 32 INDIA CONST.
[57]NEIL PRAPWORTH, CONSTITUTIONAL AND ADMINISTRATIVE LAW, (Butterworth's publication, 2000).
[58]I.P. MASSEY, ADMINISTRATIVE LAW, (6th ed., Eastern Book and Co.,2007).
[59](1924) 1 KB 256.
[60]AIR 1965 SC 1096.

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David Hume.[61] Bentham proceeds from the axiom that nature has placed humankind under the governance of two sovereign masters, pleasure and pain. The good, or conversely, the evil of an action, according to him, should be measured by the quantity of pain or pleasure resulting from it.[62] The business of government (and consequently, the judiciary), according to Bentham, was to promote the happiness of the society by furthering the enjoyment of pleasure and affording security against pain. "It is the greatest happiness of the greatest number that is the measure of right and wrong"[63]

The societal pleasure is maximised in a country where there is in practice, a fair, unbiased, and transparent judiciary which is accountable to the people. More than the effectiveness of the judiciary, it is the transparency and adherence to the principles of equity and natural law that psychologically influences the society to place trust in the system. Unfair accumulation of power in the hands of the Chief Justice to allocated cases arbitrarily effectively induces bias into the system and forces upon the society, the belief that the system is flawed and prejudiced, even when it might not be in a particular instance. It thus causes more pain and harms to the society when such unbridled power vests in the hands of one person who is inherently predisposed to utilize such power for personal benefit rather than society's collective gain. This is more so true in cases of the Chief Justice rerouting all Public Interest Petitions to his own Bench rather than letting the other senior judges handle them. The latter scenario would introduce a fair amount of chance in the allocation of cases which would again make the public place faith in the system. Thus, the Chief Justice wielding such power collectively causes much more harm and pain to the society than it creates pleasure. It thus needs to be struck down or subject to checks and balances which will be proposed herewith to reset the scales of justice that are currently weighed down by personal bias of the Chief Justice.

PROPOSAL OF ALTERNATIVES TO STATUS QUO

Proposal of alternatives to the status quo:

After the above study, the author tries to propose a system of checks and balances to ensure no further instances of bias or misallocation occurs with regard to allocation of cases to judges in the Supreme Court of India.

Firstly, following the United Kingdom, the author suggests the creation of a 'listing office'[64]. This office is a body that is independent of the judiciary, in that it cannot be influenced by the decisions of the Supreme Court. This body shall be an autonomous statutory body created by the legislature that is akin to a Constitutional body such as the Election Commission. The statute shall include the term, qualifications and number of members of the listing office. This office

[61]EDGAR BODENHEIMER, JURISPRUDENCE, 84 (5th ed., 2006).
[62]JOHN PLAMENTAZ, THE ENGLISH UTILITARIANS 59-61 (1949).
[63]A Fragment of Government, ed. F.C. Montague, 93(Oxford, 1891).
[64]Reza Banakar, et al, 13-15 (2005), http://www.johnflood.com/pdfs/Case_Allocation_2005.pdf (last visited Mar 5, 2018).

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should be preferably set up within the Court premises to reduce delay as much as possible. The office shall be presided over by the Listing Commissioner, who shall be an officer elected by the President of India, upon recommendation by the Attorney-General and Chief Justice of India. The Listing Commissioner shall then have the power to select the members that constitute its office. The Chief Justice, along with a panel of four senior judges shall, from time to time, depending on the tenure fixed by the legislature, prepare a list of candidates for the post of member that they deem fit depending on the qualifications fixed by the legislature in the statute.

The members from this list shall be selected by the President on advice of the Listing Commissioner. The Listing authority shall have the power to review all cases filed in the Supreme Court and allocate them to Benches of the Court based on three deciding criteria:

a) Date of filing of the case.
b) Subject matter of the case (Area of law it concerns).
c) Severity or potential impact of the case.

Before finalising the allocation, the office shall also ensure that there exists no conflicts of interest with the allocation it has deemed fit. This shall be done through cursory research and shall not be extensive for want of time. However, this may be changed to extensive research in cases of significant importance or those which bear significant consequences to society. This body shall thus take away power from the Chief Justice and allocate cases solely based on the above three criteria.

The body shall also have the power to suo moto take cognizance of cases wherein the public alleges a conflict of interest in matters that are of significant import. This power shall be highly restricted to ensure it is not exploited. The body shall also make all its records, allocations, special reasons for allocations in important cases, observations and any a report of any study it conducts or is tasked with by the President public and shall be published in a manner that is readily available to the masses.

This body will thus introduce a system of checks and balances and into the allocation of cases to judges of the Supreme Court. This system will ensure transparency in the process and leaves little to no scope for exploitation or bias by any particular judge of the Supreme Court, especially the Chief Justice.

CONCLUSION

It is thus concluded that, through the course of this study, the current system prevailing in the Supreme Court with regard to allocation of cases to judges is arbitrary, and is open to exploitation and allows bias and prejudice to creep in. It is also in violation of basic doctrines of natural law, and generally not preferable from the application of the concept of utility as propagated by Jeremy Bentham. It is thus beneficial and in the interest of democracy to implement a mechanism whereby the scope for exploitation of such power is severely limited

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and creates a fair and transparent mechanism to ensure the smooth conduct of an event that is of paramount importance to the very idea of democracy.

This study focuses on the problem currently faced in the status quo regarding the allocation of cases to judges in the Supreme Court. It also provides suggestions in order to implement a fair and transparent system to safeguard this procedure from exploitation and arbitrariness. This suggestion could be implemented in the future to ensure that problems currently faced that are discussed in this paper do not arise in the future.

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ONLINE GAMBLING AND CYBER ADDICTION AS A SOCIO-LEGAL PROBLEM

- *Samkeet Surana*[65]

ABSTRACT

Online gambling has become a fast growing but controversial industry. The initial part of the paper deals with providing the reader with the basic idea of what constitutes a cybercrime, its background and the various types. The next segment deals with the inclusion of online gambling as a cyber crime. This research paper seeks to provide a correspondence between online gambling and its relation to law. Next, the paper will have a comparative analysis of the merits and demerits of legalization of online gambling. The paper's focal point is to give an in-depth understanding between online gambling and cyber addiction as a socio-legal problem. From a psychosocial perspective, the paper will attempt to demonstrate how a social condition can be transformed into a potential legal aspect. The paper also emphasizes perfunctory overview about the era of online gambling in the era of globalization. The paper will also substantiate its arguments by providing real life, working examples of online gambling. The current paper aims to provide an overview of the research to date as well as highlight new and interesting findings relevant to online gambling addiction. The next part seeks to provide an overview of significant trends and developments in research that relates to disordered Internet gambling. This paper presents research to inform a greater understanding of adult as well as youngsters' participation in internet gambling, features of this interface that may impact problem severity, the relationship between internet gambling and related problems, as well as considering the role of the wider spectrum of gambling behavior and relevant individual factors that moderate this relationship. The crux of this paper is to provide an insight into current perspectives on internet gaming addiction using a holistic approach, taking into consideration the mass appeal of online games in the context of internet gaming addiction. The later part of the paper discusses the unbridled

nature of online gambling, and the various avenues of scams and other fraudulent practices that it opens the door to. The pivotal objective is to suggest means to develop a better standard of norms and regulations in order to legalize online gambling in a safe and supervised manner.

INTRODUCTION

Crime, in whatever structures it is, straightforwardly or in a roundabout way, dependably influences the general public. In this day and age, there is monstrous increment in the utilization

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of Internet in each field of the general public and because of this expansion in use of Internet, various new violations have developed. Such wrongdoings where utilization of PCs combined with the utilization of Internet is included are comprehensively named as Cyber Crimes. [66]

Be that as it may, under Indian law "Cybercrime" accordingly has not been characterized under any enactment. One enactment that arrangements with the offenses identified with such violations in India is Information Technology Act, 2000[67], which was additionally changed as IT Amendment Act, 2008[68]. In any case, these two essential enactments likewise exclude any definition for "cybercrime". On the off chance that investigated reasonableness, it isn't at all simple to characterize this term. To characterize such an offense, when the idea of such offense is seen, it is a blend of wrongdoing and the use of a PC. In this way, one might say that, when in commission of any offense PC is utilized, that can be named as "digital wrongdoing".[69]

Expression "digital law" will be traded off of by taking a gander at the working meaning of cybercrime, through which one can achieve a conclusion that digital law is a term which is identified with all the lawful issues including PC and Internet. It is significantly harder to think of a definition for the term digital law as it is a convergence of different fields. It includes security issues, purview issues, licensed innovation rights issues and various other legitimate

inquiries. In India, what can essentially be named as digital law are the IT demonstration 2000 and its changed form as the IT (Amendment) Act, 2008.

There are a great many sites; all facilitated on servers abroad, that offer web based betting. Truth be told, it is trusted that a significant number of these sites are really fronts for illegal tax avoidance. Instances of hawala exchanges and illegal tax avoidance over the Internet have been accounted for.

THE CONTEXT AND BACKGROUND OF THE RESEARCH

Cyber crimes can be defined as the unlawful acts where the computer is used either as a tool or a target or both. The term is a general term that covers crimes like phishing, credit card frauds, bank robbery, illegal downloading, industrial espionage, child pornography, kidnapping children via chat rooms, scams, cyber terrorism, creation and/or distribution of viruses, spam and so on.[70]

[66] Ahmed Farooq, Cyber Law in India (Allahabad Law Agency, 2015).
[67] Information Techonology Act, 2000.
[68] Information Technology Act, 2008 (amended).
[69] Mali Prashant, Cyber Laws & Cyber Crimes, 1st edition (Snow White Publications, 2012).
[70] Hiremath,Uma R, Information Technology and Cyber crimes(Facet Publication, 2018).

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Cyber crime is a broad term that is used to define criminal activity in which computers or computer networks are a tool, a target, or a place of criminal activity and include everything from electronic cracking to denial of service attacks. It also covers the traditional crimes in which computers or networks are used to enable the illicit activity.[71]

Online gambling is unlawful in the province of Maharashtra under the "Bombay Wager Act".[72] Different acts/enactments are silent regarding web based betting/internet gaming in India. The latest law to address betting on the web was the Federal Information Technology Rules where such unlawful exercises might be obstructed by Internet suppliers inside India. Another demonstration is the Public Gaming Act of 1867[73]. States have a tendency to work individually in this aspect.

Internet gambling issues in India are convoluted in nature as gambling in India is controlled by various states laws and web based betting is a local subject. To discover the situation of Indian government, the Supreme Court of India looked for the assessment of local government in such manner yet the same was declined by the local government. This has made playing of online cards amusements like rummy, poker, and so on lawful yet risky.

On 3 September 2015, Central Board of Direct Taxes (CBDT) issued a Circular titled "Illumination on Tax Compliance for Undisclosed Foreign Income and Assets" under the dark cash act which coordinates the online poker players in the nation to pronounce their cash exchanges on outside poker destinations through the e-wallets and virtual cards.[74]

ANALYSIS OF MERITS AND DEMERITS OF ONLINE GAMBLING

Preferences of Online Gambling:

1. They're Easily Accessible – the atmosphere at a clubhouse consists many a times of one prospective player breathing down the neck of the player sitting tight at the game, hoping for him to halt play as soon as possible. However,with online clubhouse, one simply visits a site, picks a username/secret word, and sits down to play, regardless of the fact that another hundred different players are taking a seat to play blackjack at the same time. In this way, innumerable people have access to the game at the same time.

2. They're Convenient –Sometimes, people wish to bet for two or three dollars and don't think that an excursion is justified for the same. The accommodation of an online clubhouse is the

[71]Id. at 7.
[72] Bombay Prevention Of Gambling Act, 1887.
[73] Public Gaming Act, 1867.
[74]Central Board Of Direct Taxes. https://www.incometaxindia.gov.in/,

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'grand slam' key point for the upsides of web based betting. People thus save a great deal of cash in transportation, and additionally won't need to pay additional for supper and stopping.

3. Solace – Since people are betting from the solace of their homes, they can do whatever as they please. They can easily enjoy their most loved betting games from in complete comfort at their home.

4. You Have Better Odds – Online clubhouse don't have even a small amount of the overhead costs that a physical gambling club has. With far less workers, no power bills to pay, zero property duties, and many different costs, online gambling clubs can keep their payout return structures far higher than at your nearby clubhouse since it is considerably less demanding for them to breakeven on a month to month premise.

5. You Can Play For Less – If one needs to play blackjack at your neighborhood clubhouse, they cannot hope to pay less than $10 per hand. That is the base sum permitted at generally gambling clubs. The same can be said for most table diversions in a gambling club – roulette, bacarrat, poker, and so on. Be that as it may, in an online gambling club one can play table amusements for as meager as $.10 per hand.

6. They're More Private – Unless you are a hot shot, consistent supporters can't demand to play at a private table in the VIP area of a gambling club. When a person plays in an online club, the main individual who can watch the person play is the individual sitting alongside them on PC or cell phone.

7. Wellbeing – This is plainly a twofold edged sword, yet with an online clubhouse one doesn’t need to stress over conveying a lot of cash in your pockets through a dim parking structure outside of the gambling club at 3:00AM.

8. Less Downtime – One may despise the hold up between each hand of blackjack, each turn in roulette, and the slack between each activity in video poker. With online gambling clubs, there is no pause. Truth be told, a person can even turn activities off – this works incredible for roulette players who couldn't care less about the 'immense uncover' related with sitting tight for the roulette wheel to quit turning.[75]

[75] Canadian Social Work Review / Revue canadienne de service social, Canadian Association for Social Work Education (CASWE), 83-100 (2013).
http://www.jstor.org/stable/43486761

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Impediments of Online Gambling:

1. Expenses – Depositing/pulling back cash from online gambling clubs as a rule includes some significant pitfalls. And keeping in mind that the charge is for the most part on a few dollars, after some time it can include.

2. Specialized Issues – When one is managing a gambling club online, all things considered. Albeit the fact that specialized mistakes happen rarely, it is possible for them to happen too. Many of the time-specialized issues happen while storing cash, however there have been instances of machines failing and different instances of general gambling club detachments.

3. Installment Timeframes – Unlike in a physical gambling club, one can't money out rewards instantly. One needs to hold up a week or so before one can see that cash in their own financial balance once more.

4. Confirmation Documents – Due to the mysterious idea of web based betting, most (if not every) online clubhouse require their supporters to check their character before pulling back. Check records are just used to guarantee that people are whoever they claim to be.

5. Wellbeing – Despite a push to control betting in an online gambling club, there are as yet a modest bunch of rebel clubhouse systems open on the web. Some have been maverick for a considerable length of time, yet others began honest to goodness before being boycotted. In the event that you mean to bet in an online clubhouse, one must give careful consideration to any news encompassing the online gambling club you pick as it can't hurt to do prior examination before choosing an online gambling club.

The above advantages and disadvantages gives us all an insight about the reality that is prevailing in the society. By comparatively analyzing the above, we get to know that the advantages are even more as compared to disadvantages, so people get inside into this as this activity which then becomes a source of income that is easily available. They are more private as a person's information does not get disclosed to any untrusted person, so people nowadays are moving into these kind of things in ways that are hard to stop. [76]

THE SOCIAL IMPACTS OF ONLINE GAMBLING

Confirmation of betting has been found in all societies and social orders going back about 40,000 years. For instance, an early delineation of shell amusement was found in an Egyptian graveyard going back 2,500 years; Moses partitioned the domain west of the Jordan River by parcel; and the old Romans kept up the custom of wagering on dice, creatures, gladiatorial battles, and so forth. By and large, history shows us that despite questionable circumstances and occasions,

[76] Id. at 10.

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purported "crude" holiness and equity were regularly chosen by possibility. Religious and otherworldly customs were likewise used to offer significance to flighty occasions. The reason for occasions thought to be unverifiable was then translated by relating them to heavenly will. Generally, betting has dependably been a piece of human condition, the present furor for this sort of action is outside social ability to comprehend. What used to be viewed as a transgression, a bad habit, freak conduct, and a bandit industry is currently observed as an ailment, a mental pathology sharing of loss of control, and a drive issue. Betting is likewise introduced as a true blue type of amusement, an impetus for economic advancement, a wellspring of income for different levels of government, and an instrument for work creation. Actually, we are seeing a broad change and development at two levels. On one hand, there is the ebb and flow and prevailing talk in North America and around the globe that partners bling with illness or pathology, which was not the situation before 1980, when it was incorporated into the DSM-IV as a psychological pathology. Then again, there is a social and institutional procedure of authorizing recreations of shot, which has turned into a noteworthy instrument of ideological legitimization government officials and the private gaming industry. We likewise discover government experts endeavoring to juggle the inconsistencies in the administration this "social issue".[77]

Tragically, the confirmation base that is expected to address a large number of the Contentions encompassing the social effects of betting is, in numerous territories, lacking. Research into the effects of betting is still in its early stages, and is plagued with issues. Although some information on the social effects of betting exists from a universal point of view, the proof base for the U.K., and especially Scotland, is thin to a great degree. What's more, a great part of the accessible material is methodologically frail and open to elucidation. Albeit some monetary impacts that are measurable, the social effects are less simple to evaluate, and, to date numerous examinations have delivered uncertain or opposing outcomes.[78]

This can compound the debate that encompasses betting, with a proof base that is frequently not ready to determine the most argumentative issues, and which can be translated contrastingly by the individuals who are extensively 'for' and the individuals who are 'against' the development of betting. For instance, evaluations of the predominance rates of issue betting have a tendency to be deciphered contrastingly by treatment suppliers. Furthermore, the betting business, with the previous featuring the most astounding appraisals to bolster their case for financing, and the last underlining the most reduced ones to redirect consideration from the potential damages of their item. [79]

At the finish of a long and thorough examination of the writing, the U.S. National Research Council (NRC) inferred that the proof base was so powerless in numerous zones as to make

[77] The World Today, Claire Yorke, Royal Institute of International Affairs 19-21(2010). http://www.jstor.org/stable/41963033
[78] Sally. M Gainsbury, Online Gambling Addiction, Springer US (2012).
[79] Id. at 13.

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conclusions troublesome or difficult to make. It composed that the investigation of the expenses and advantages of betting is "still in its earliest stages", and reprimanded the "used techniques so insufficient as to refute their conclusions", the absence of "methodical information", the substitution of "suppositions for missing information", "random" uses of estimations in numerous investigations, and a general absence of ID of the genuine expenses and advantages to be contemplated in the first put.[80]

REAL LIFE EXAMPLES

As an illustration, the recent announcement of online gambling Quebec represents a significant increase in the availability of gambling. Despite the serious consequences for public health, the Quebec government did not see fit to hold public discussions on its plan beforehand. Researchers and public health authorities were excluded from the decision. They had requested a moratorium in order to quietly assess the scope of the issue and its impact on citizens. More specifically, they had asked the government to immediately suspend the project to make online gambling available, and to create an independent organization that would report to the National Assembly and be responsible coordinating preventive and research efforts, and for proposing concrete measures to reduce dangers associated with gambling, including reduced access to online gaming.[81]

A number of points are worth noting. In Scotland, there was no significant difference between the proportion of men (70%) and women (69%) who said they had taken part in at least one gambling activity during the year prior to interview. Interestingly, men in England and Wales were more likely than women to have taken part in at least one gambling activity (76% and 68% respectively). Scottish men were also below the British figure for taking part in any gambling activity in the year prior to interview (70% compared with 76%).[82]

CONCLUSION

Taken together, the proof inspected here proposes that Online Gambling does not cause betting issues in, and of, itself. Be that as it may, utilization of Online Gambling is more typical among exceptionally included card sharks, and for some Internet players, this medium appears to fundamentally add to betting issues. Web players are a heterogeneous gathering, and the effect of this method of access on betting issues is directed by a scope of individual, social and ecological factors. As Internet betting keeps on advancing and cooperation increments, especially among youngsters who are exceptionally acquainted with Internet innovation and online trade, it is likely that related issues will develop. Research and control should advance to encourage the comprehension of the effect of this method of access on the experience and occurrence of betting issue.

[81]www.scotland.gov.uk/socialresearch
[82]Id. at 16.

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It is imperative to return to these reasonable models to confirm in the event that they represent neurotic betting among Internet card sharks and whether any new factors or connections ought to be incorporated to clarify the rise of betting issues. Research will probably keep on distinguishing the qualities (arbiters and mediator) that might be utilized to recognize web based players who are in danger for betting related issues. This is important to build up a more exhaustive comprehension of how individuals create betting issues.

Research is expected to see how to diminish the probability of individuals progressing to disarranged betting. Improving the arrangement of a capable betting condition will require participation between free scientists to configuration, assess and check methodologies, administrators to empower access to suitable information and actualize techniques and controllers to require the utilization of compelling dependable betting approaches. Treatment and avoidance techniques must be returned to guarantee that these are pertinent and viable for Internet card sharks. Brief online mediations and additionally inside and out online treatment projects might be pertinent for Internet card sharks.

The discoveries displayed here are imperative for approach producers because of confirmation that Internet betting in itself isn't unsafe. The exploration is likewise significant for clinicians, as it recommends that notwithstanding some betting structures will probably prompt issues, how people get to these additionally affects consequent damages.

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AN ANALYSIS OF THE RIGHTS OF THE JARAWA TRIBES: A RACE NEARING EXTINCTION

- *Rupantar Chatterjee*[83]

HISTORY

History affirms the separate presence of the Andaman Islanders in the course of the last 2 centuries, subject just to visits from slave bandits and asset gatherers (Cooper 1988). Seafarers have immovably stayed away from contact in view of the fearsome of the tenants, leaning toward rather the since a long time ago settled port of call in the neighboring Nicobar (Cooper 1988). The British established a reformatory province at Port Blair in 1858, with frightening consequence for the indigenous population, whose numbers declined quickly on account of illness and social disturbance (Man 1932; Portman 1990; Temple 1903). Of the 13 semantically characterized bunches known in the mid-nineteenth century, just three survive which are the Jarawa, Sentinelese, and Onge.[84] This triad was connected with the Greater Andamanese language clade on a typological—rather than a cognatic—basis, suggesting a historical separation of considerable depth.[85]

The linguistic division seems to have been coordinated by phenotypic variety since E. H. Man depicted the Jarawa as not looking somewhat like their neighbors (the Aka-Bea), being taller, contrastingly proportioned, and having another sort of hair morphology. Then again, the tenants of North Sentinel Island were associated with the Jarawa based on physical, and in addition semantic, likenesses. Furthermore studies grouped each of the 13 speech communities and exhibited that the Onge, Jarawa, and Sentinelese could likewise be separated from the Greater Andamanese by material culture structures and social practice. These sociocultural, phenotypic, and semantic depictions are fortified by the topographical circulations of populaces experienced by the British in 1858. The Onge and Sentinelese are on islands toward the south, while the Jarawa seem to shape a wedge among the Aka-Bea, with whom they were unendingly at war.[86]

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[83] Christ University

[84] Phillip Endicott,1 M. Thomas P. Gilbert,1 Chris Stringer,2 Carles Lalueza-Fox,3 Eske Willerslev,4 Anders J. Hansen,4 and Alan Cooper1, The Genetic Origins of the Andaman Islanders , https://www.ncbi.nlm.nih.gov/pmc/articles/PMC378623/.

[85] Phillip Endicott et al., Current neurology and neuroscience reports.(2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC378623/ (last visited, 2018).

[86] Phillip Endicott et al., Current neurology and neuroscience reports.(2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC378623/ (last visited, 2018).

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The epigenetic information proposes that the Andaman Islanders originated from either two colonization occasions or a solitary establishing population that has been subdivided for an expanded time allotment. The geographic and social isolation of the Andaman Islands implies that these hypotheses can be tried utilizing genetic data, however tragically that the majority of Andamanese people groups and their dialects are long dead. The Sentinelese and Jarawa (neither of whom is currently thought to number >100)[87] survive because of their continuing hostility toward colonialism, and are, therefore, inaccessible. However, although powerless to prevent the decline of the Andamanese, Victorian anthropologists were keen to preserve a record of physical variation among humans and obtained collections of skeletal material.[88] These collections now represent a unique scientific resource for genetic research by analysis of ancient DNA.

INTRODUCTION

A crowd rushes into your house without declaring its intention, by definition, it is an invasion. A society in its basic sense a collection of a various group of individuals who come together for their well-being. The mainstream ideology of a society amongst the majority of the citizens restrict themselves to the very aspect of the urban areas and developing communities. It is to be noted that India, even though in the current status is called a developing nation yet it has the second largest tribal population in the world. Right from the North East to the Southernmost point of the country there are in numerous tribes existing away from the eyes of the developed world.

The Indian tribes form an important part of the total population. It represents an element in Indian society which is integrated with the cultural mosaic of our civilization. The tribal population of India comprises almost 8 percent of the aggregate population. There have been efforts made by the government to take necessary steps in order to protect and safeguard the interests of such tribes residing in various parts of the country. Despite all the necessary precautionary and prevention methods to protect these tribes in India, they have faced a lot of disturbance and discomfort which affects their living in entirety. In light of this information, the focus will be laid on the Jarawa tribe of the Andaman and Nicobar Islands. They are recognized as the Adivasi group in India. The Jarawas of the Andaman and Nicobar Islands are one of the most noted and famous tribes in India, this is not because of any great invention or discovery by them but due to their actual extinction owing to the various human interventions faced by them.

[87] Phillip Endicott et al., Current neurology and neuroscience reports.(2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC378623/ (last visited, 2018).

[88] Phillip Endicott et al., Current neurology and neuroscience reports.(2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC378623/ (last visited 2018).

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Today approximately 400 members of the nomadic Jarawa tribe reside in groups of 40-50 people in chad has - as they call their homes.[89] Like most tribal peoples who live self-sufficiently on their ancestral lands, the Jarawa proceed to flourish, and their numbers are steadily growing. They hunt pig and turtle and fish with bows and arrows in the coral-bordered reefs for crabs and fish, including striped catfish-eel and the toothed ponyfish. They additionally gather organic products, wild roots, tubers, and nectar. The bows are produced using the school wood, which does not grow all through the Jarawa territory. The Jarawa often have to travel long distances to Baratang Island to collect it.[90]

Jarawa people gather wild nectar from elevated trees. Amid the nectar accumulation, the individuals from the gathering will sing songs to express their joy. The honey-collector will chew the sap of leaves of a bee-repellent plant, such as Ooyekwalin,[91] which they will then spray with their mouths at the bees to keep them away. Once the honey bees have gone the Jarawa can cut the honey bee's nest, which they will put in a wooden bucket on their back. The Jarawa dependably bathe after consumption of nectar. These are a couple of things which the Jarwas do in their places.

PROBLEMS FACED BY THE TRIBE

The various Andaman Island tribes, it is the Jarawa's situation that is the most precarious. The following are the problems faced by the Jarawa tribe :

- The road that cuts through their territory and brings a great many outsiders, including visitors into their land.[92] The tourists treat the Jarawa like creatures in a safari stop. The sightseers who enter treat them as creatures. They throw stones, they feed them with bread rolls or bananas and so forth when Jarwas attempt to hit these individuals they are terrified and throw stones on them. They look at them as a creature yet the reality is Jarwas are likewise people who have feelings and ethnicity which ought to be given due respect. Outsiders, both nearby pioneers, and universal poachers enter their rich backwoods save to take the diversion the clan needs to survive. There are numerous outside diversions played by the poachers and other people who enter their rich timberland. When somebody snatches the sustenance of one, the one raises against him and secure their items for them. But these Jarwa people are helpless. These people come to invade, sell the products in the forest which are required for the Jarwas for their survival. This is one main reason for the reduction in the number of Jarwas in Andaman.

[89] Survival International, Jarawa Jarawa - Survival International, https://survivalfrance.org/tribes/jarawa (last visited, 2018).
[90] Survival International, Jarawa Jarawa - Survival International, https://survivalfrance.org/tribes/jarawa (last visited, 2018).
[91] Survival International, Jarawa Jarawa - Survival International, https://survivalfrance.org/tribes/jarawa (last visited, 2018).
[92] Survival International, Jarawa Jarawa - Survival International, https://survivalfrance.org/tribes/jarawa (last visited, 2018).

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- They constantly suffer to outside diseases to which they have little or no immunity. An epidemic could devastate them.[93] Jarwas doesn't have specific healing hospitals or doctors in that capacity, the administration has arranged a couple of doctors to check these Jarwas yet few Jarwas don't permit them. As per them, their reality is something different. They don't need others to interfere. At the point when the tourists enter, they get new diseases as a result of them. At the point when the tourist enters with the autos and jeeps and vans, the pollution attacks them gravely. They don't have a proper immune system to sustain the sicknesses which a typical individual can do in the society.[94]
- Sexual abuse of Jarawa ladies by settlers, transport drivers and others. Prior, tourists made them dance and pose for food; now poachers sexually assault them.[95] Jarawa, whose population indicates 420 in the Andaman and Nicobar Islands, is being exploited by poachers who have introduced liquor and ganja into the reserve forests, the Andaman Chronicle has reported. A Jarawa man told the paper-which it imparted to The Guardian, London-that their ladies and young ladies are being forced to have intercourse with poachers and fishermen. An unidentified Jarawa man said poachers have established a barter framework with an area of the community. They offer them liquor and marijuana to poach assets in the tribal territories and sexually abuse the ladies and young ladies.[96] There are numerous Jarawa ladies who are sexually assaulted by the outsiders which result in numerous diseases. The people can't raise their voices. In a sound chronicle acquired by Survival International, the association campaigning for the rights of tribal people, and reported by the British daily paper. The Observer, a youthful Jarawa man reports that poachers regularly enter his clan's ensured reserve and lure youthful Jarawa ladies with liquor or medications to sexually exploit them. In the name of growth and development, the government wanted to change their livelihood and habit. This is not possible. They had to live their own life. They can't adjust with the normal people. Respect should be given to their respective culture and traditions.

These are the most observed and profound problems faced by the Jarawas. Owing to these problems the Indian legislation laid down a certain set of statutory legislation to protect these tribes namely:

1. A&N Islands (Protection of Aboriginal Tribes) Regulation, 1956;

2. Scheduled Castes and Scheduled Tribes (Prevention of Atrocity) Act, 1989 (and Amendment Act, 2015)

[93] Lisa, Protecting Jarawas of Andaman and Nicobar Islands https://www.oneindia.com (2016), https://www.oneindia.com/feature/protecting-jarawas-andaman-nicobar-islands-2082151.html (last visited, 2018).
[94] Survival International, Jarawa Jarawa - Survival International, https://survivalfrance.org/tribes/jarawa (last visited, 2018).
[95] Survival International, Jarawa Jarawa - Survival International, https://survivalfrance.org/tribes/jarawa (last visited, 2018).
[96] Lisa, Protecting Jarawas of Andaman and Nicobar Islands https://www.oneindia.com (2016), https://www.oneindia.com/feature/protecting-jarawas-andaman-nicobar-islands-2082151.html (last visited, 2018).

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3. Policy on Jarawa tribe of Andaman Island, 2004

4. Policy on Shom Pens tribe of Great Nicobar Island, 2015

The biggest threat to the Jarawa tribe came from the building of the Great Andaman Trunk Road through their newer western forest homeland in the 1970s. The effect of the highway, with respect to widespread encroachment, poaching and commercial exploitation of Jarawa lands, resulted in a lawsuit to be filed with the Calcutta High Court, which has jurisdiction over the islands. The case escalated to the Supreme Court of India as a Public Interest Litigation (PIL). The Society for Andaman and Nicobar Ecology, the Bombay Natural History Society and Pune-based Kalpavriksh joined in the petition, resulting in a landmark High Court judgment in 2001, the organization to find a way to shield the Jarawa from infringement and contact, and in addition, pre-emptively deciding out any program that included migrating the Jarawa to another reservation. Arranged expansions of the parkway were likewise restricted by the court. A brief period prior, the Indian Supreme Court chose to shut not far off that leads into the Jarawa territory, trying to secure the clan's natural surroundings. Therefore, individuals from the clan can meander around openly without travelers gazing at them. Specialists see this choice as a proportion of securing indigenous individuals around the globe and protecting them off from tourism and other outside impacts. Contact with the outside world has had a lot of negative effects on the Jarawa tribe, all new diseases and addictions have reached the area. Environmentalists against the whole project of the building of the Great Andaman Trunk road said that it puts the general population to come in contact with the Jawar tribe on a daily basis bringing along with it various unwanted diseases, for which the tribe has no protection, into the area. Until fifteen years ago there was almost no contact between members of the tribe and the Indian population living on the island. When the road through the jungle was finished in the 1980s, it became clear that isolation would end Islanders contend that the street is expected to bring supplies between individuals who live in different parts of the islands. The wilderness is likewise populated by seekers, fishers, and poachers who misuse it. In any case, the Light of Andamans editorialized that the differences to the Jarawa were likely irreversible and ought to have been evaluated all the more altogether before the street started functioning. The Jarawas have reported 14 cases of ill-treatment faced by them in the last few years and the current year. According to study, it is seen that these cases are much lower than the actual threats and cases of ill-treatment that usually are faced by the Jarawa tribes on the Andaman Islands.

IMPACT OF TOURISM

The Indian Supreme court responded after a British daily paper found that indigenous women and kids uncovered themselves in an exposed fashion just to please sightseers and get sustenance. A noteworthy issue is a volume of touring visits that are worked by privately owned businesses, where visitors view, photo or generally endeavor cooperations with Jarawas, who are

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regularly asking by the interstate. These are illicit under Indian law, and in March 2008, the Tourism Department of the Andaman and Nicobar organization issued a crisp cautioning to visit administrators that endeavoring contact with Jarawas, capturing them, ceasing vehicles while traveling through their property or offering them rides were disallowed under the Protection of Aboriginal Tribes Regulation, 1956 and would be arraigned under a strict understanding of the statute. It has been charged, in any case, that these guidelines are being ridiculed with more than 500 travelers being taken to see Jarawas every day by private visit administrators while being appeared as traveling to genuine goals and bringing about proceeding with day by day cooperation between the Jarawa and day visitors inside the same region. In 2006, the Indian travel organization Barefoot had set up a resort 3 km far off from the Jarawa hold. The advancement was the subject of an ongoing court case brought by a little area of Andaman specialists who needed to stop the resort and requested against a Calcutta High Court administering enabling it to proceed. In the principal open meeting since the Jarawa started to reach the outside world, an individual from the clan has approached to challenge the sexual abuse of young women from the clan by outsiders. The man, whose name is being withheld to ensure the character of the individuals who helped him give his meeting, guaranteed that other Andaman islanders and poachers had begun to enter the timberland to annoy the clan. The tribesman stood up days after eight Jarawa young women were professedly abducted by men who arrived at Jao Khana in dinghies. Seven men were captured. That occurrence took after a few different reports of the sexual abuse of women from the clan. On 21 January 2013, a Bench of Justices G.S. Singhvi and H.L. Gokhale passed a between time arrange forbidding travelers from taking the storage compartment street going through Jarawa zone. As a reaction to this break arranges, a request of was documented for the benefit of neighborhood tenants which expressed that the Andaman Trunk Road is an extremely indispensable street and interfaces in excess of 350 towns. The Supreme Court, in this way, on 5 March 2013 switched its interval arrange, enabling the road to be completely re-opened, yet with vehicles just being permitted to movement in extensive escorts four times each day.

SOLUTIONS TO SOLVE THE PROBLEMS

- Jarawa Tribal Reserve has been created where the entry is restricted for unauthorized persons.
- Traffic on the Andaman Trunk Road has been regulated for protection and welfare of the tribe.
- Andaman and Nicobar (A&N) Administration provides financial related help to tribals for education and other facilities by wellbeing offices through Andaman Adim Janjati Vikas Samiti (AAJVS).[97]

[97] Lisa, Protecting Jarawas of Andaman and Nicobar Islands https://www.oneindia.com (2016), https://www.oneindia.com/feature/protecting-jarawas-andaman-nicobar-islands-2082151.html (last visited, 2018).

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- Scholarships to schedule caste students and implementing Tribal Sub-Plan as a part of UT plan for socio-economic development tribals and the measures.
- A&N Administration has established A&N Tribal Research and Training Institute (ANTRI) for research on bringing out conceivable mediations for ancestral advancement.

CONSTITUTIONAL PROVISIONS

There are many Articles in Constitution of India to protect the rights of the tribes in India. The framers of the Constitution were diligent to safeguard the interests of the Scheduled Tribes.

- **Article 46** epitomizing the policy calls upon the State (Central & State government) to promote with special care the educational and economic interests of Scheduled Castes and Scheduled Tribes also, shield them from social foul play and all types of misuse.[98] It is a comprehensive article comprising both the development & regulatory functions. The inquiry is dependable that if this Article truly works at the unborn individuals. It is clear when we take a gander at the Jarwas in Andaman. Their financial and the instructive status of these individuals isn't at all minded. Provisions relating to fundamental rights have been qualified with 'reasonable restrictions' in favor of Scheduled Tribes.

Article 15 prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth: but **clause (4)** thereof enables a State government to make special provisions for headway of individuals from Scheduled Castes and Scheduled Tribes. This Article additionally isn't extremely powerful on clans in India. Despite the fact that if there are few arrangements which are for the progression of the Tribes in India, they are not exceptionally successful. The government needs to look into the grassroots levels in order to safeguard the interest of the tribe.

Article 16 provides for opportunities for all citizens in matters relating to employment or appointment or post in favor of Scheduled Castes and Scheduled Tribes.[99] This Article is not at all effective. Where and what type of employment do these tribal people get? Even if they get, they get a low salary and they are discriminated among others.[100] There is lack of exposure given

[98] Constitutional provisions for development of Scheduled Tribes, Scheduled Tribes in India - Vikaspedia, http://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes (last visited, 2018).
[99] Constitutional provisions for development of Scheduled Tribes, Scheduled Tribes in India - Vikaspedia, http://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes (last visited, 2018).
[100] Hariharan, The Struggle for Dignified Livelihood by Tribes Of India: A Study on Jarwa Tribe in Andaman and Nicobar Academike (2014), https://www.lawctopus.com/academike/the-struggle-for-dignified-livelihood-by-tribes-of-india-a-study-on-jarwa-tribe-in-andaman-and-nicobar/ (last visited, 2018).

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to such tribes in the first place, which leads to lack of opportunity in granting jobs and proper recognition for sustainable employment.

Article 19 grants the rights to freedom of speech, Assembly, Association, union, movement and residence throughout the country practice of any profession, occupation, trade or business. But for protection of the interests of Schedules tribe **clause (5)**[101] permits reasonable restrictions on the exercise of rights of free movement, residence, and settlement in any part of the territory of India.

Article 23 prohibits the trafficking of human beings.[102] Where is freedom of speech and expression for these people? Why aren't these people given this right, there are special provisions for them to stay in certain areas but these areas are also not protected. Many people enter their territory and disturb their privacy.

The Constitution provides for special staff for the protection of the interest of scheduled tribes **(Article 338)**[103] and also for a commission to look into the social educational conditions of these groups and to report to the Parliament on measures needed to improve these conditions. The *Constitution 65th Amendments Act 1999* provides for the establishment of National Commission for Scheduled Caste and Scheduled Tribes.

Article 339(2) empowers the Centre to give directions to a State asking them to draw up and execute schemes[104] for the welfare of Scheduled Tribes. The **fifth schedule [Clause (I) Article 244]** contains provisions regarding administration and control of the Scheduled areas and Schedules tribes. Even though there are these many provisions and even more for the welfare of the tribes in India only a few are effective. To look at the Andaman tribes these provisions never work despite their existence. This requires implementation at the very basic levels of such provisions in order for their better functioning to help and safeguard such tribes (Jarawa). The rights of such backward classes need to be granted at full length in order for their sustainable living conditions.[105]

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[101] Constitutional provisions for development of Scheduled Tribes, Scheduled Tribes in India - Vikaspedia, http://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes (last visited, 2018).
[102] Constitutional provisions for development of Scheduled Tribes, Scheduled Tribes in India - Vikaspedia, http://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes (last visited, 2018).
[103] Constitutional provisions for development of Scheduled Tribes, Scheduled Tribes in India - Vikaspedia, http://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes (last visited, 2018).
[104] Constitutional provisions for development of Scheduled Tribes, Scheduled Tribes in India - Vikaspedia, http://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes (last visited, 2018).
[105] Hariharan, The Struggle for Dignified Livelihood by Tribes Of India: A Study on Jarwa Tribe in Andaman and Nicobar Academike (2014), https://www.lawctopus.com/academike/the-struggle-for-dignified-livelihood-by-tribes-of-india-a-study-on-jarwa-tribe-in-andaman-and-nicobar/ (last visited, 2018).

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CONCLUSION

The feelings of the tribes must be respected. The tourists and poachers must understand the culture and the inner feelings of these tribal people. The special provisions of these tribal people should be upheld. The rights and freedom of the tribal people should be fully given to them. The Jarawa tribe in the Andaman Islands are to be protected in their own ways, in their own environment, and in their own circumstances, and they should be left alone from disturbing them due to any sort of development. The land belongs to the tribe for a very long time and they have their rights upon it. The disturbance caused ur to tourism especially should be mellowed down and restricted for the safeguarding the tribe's interest and livelihood. The Jarawas have been showing a drastic change in their culture and then have slowly adapted to the changes. Though the Government and the Supreme Court play their role to protect the interests of the tribe in the best possible way, by restricting entry without authorization and direct contact of tourist with the tribe, illegal acts keep happening and the tribe faces ill-treatment. They should be treated with respect as they too are humans and have certain rights. In time with the law, the Jarawa tribe is looked forward to having a livelihood without any disturbance by any means.

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UNDERSTANDING SEXUAL ASSAULT AND SEXUAL ASSAULT PERPETRATORS: IT'S PREVENTION

- *Fathima Naha Hassan*[106]

ABSTRACT

"Prevention is better than cure"
The problem of Rape in India is ever increasing. More women are being raped and in an even more brutal manner. Our laws are not entirely effective in combatting the problem of rape and seem to have no real deterrent effect. Thus, it is important to look into the problem of rape from a different perspective. Understanding the offense of rape and the cause of sexual assault perpetration in a socio-economic setting can greatly help in solving this problem. Setting our laws and policies in a way of eliminating the factors that cause proactively in sexual assault perpetrators is a more efficient way of solving the rape crisis in India. This paper looks into the factors that cause sexual assault perpetration and the consequent methods and policies that could be followed to help reduce the problem of rape.

INTRODUCTION

"... when a woman is ravished, what is inflicted is not merely physical injury, but the deepest sense of some deathless shame"[107]
Rape is linked with power, that is, the power that men enjoyed in society.… Rape brings out, and enlarges opposition between the sexes nakedly, unlike other forms of gender based oppression, such as lower wages for women. Rape, and the fear of rape therefore is an instrument for terrorising and paralysing women, contributing to a low sense of self worth[108].
Rape accounts for 12% of crimes against women in India. In the year 2016, a sum of 38,947 instances of rape were reported in the nation under Protection of Children from Sexual Offences Act (POCSO) and additionally Section 376 and other related provisions of the Indian Penal Code. The actual numbers are obviously much higher due to under reporting.[109] The data available on rape statistics cannot entirely be determined as accurate. Victims are hesitant, especially in India, to classify their experience as rape. They are quite hesitant to identify the act

[106] Christ University
[107] State of Maharasthra v Chandraprakash Kewalchand Jain, 1990 AIR 658
[108] Gothoskar, 1980
[109] National Crimes Bureau Report, 1980 (September 13, 2018, 7 PM) http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf

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occurred against them as rape. This is mainly because they live in a society that places blame and shame on victims than the perpetuators.

DEFINITION OF SEXUAL ASSAULT

Sexual assault includes all non-consented sexual acts by one person to another with a sexual intent. When one person is unwilling to engage in a sexual activity, and the other forces himself/herself over the person the act constitutes as sexual assault. Victims claim to be sexually assault when the act engaged occurred unwillingly or completely without their consent. In India, several legislations specific to sexual assault crimes and certain sections of the Indian Penal Code address sexual assault and provide penalties towards the same. Section 375 of the Indian Penal Code addresses rape. It defines rape as sexual intercourse by a man with a woman that is carried out against her will and without her consent. Consent obtained under duress, misrepresentation, and intoxication and consent of a minor is not consent. The Criminal Law Amendment of 2013 expanded the definition of rape to include penetration of the penis or any object, manipulation of the body of a woman to cause penetration into the mouth, vagina, anus or urethra of a woman. It also includes the application of the mouth to the vagina, anus or urethra of a woman. The Indian Penal Code does not define sexual assault separately. The Protection of Child from Sexual Offenses Act,2012 defines Sexual Assault of a child as an act with sexual intent which involves physical contact between the offender and the child.

The Handbook for Legislation on Violence against Women calls for broader definition of rape by making it inclusive under the term sexual assault. Sexual assault must be defined as a violation of bodily integrity and sexual autonomy, and not as a crime against the family or society. It must go beyond the framework of morality, public decency and honour[110].

Various countries do not define rape categorically, but address it through the definition of sexual assault. The Canadian Criminal Code does not define rape, but addresses sexual assault by defining assault as an application of force to another person without his/her consent. Turkey in its Penal Code defines Sexual assault as an offense of violating a person's bodily integrity through sexual means. This removes sexist undertones of morality, modesty or chastity and makes sexual assault a crime against the individual.

Sexual assault occurs through various ways. It stands inclusive of rape, groping, and harassment. Sexual assault can be classified into the following types:

1. Sexual assault of a Child

Sexual assault against a child includes child sex abuse where an adult involves in sexual activity with a child for sexual gratification. This is considered as sexual assault as the child is unable to provide informed consent towards the sexual act. A child is unaware of the circumstances and actions involved in the activity and hence is considered to be exploited. The Protection of Child

[110] Department for Economic and Social Affairs (Division for the Advancement for Women), Handbook for Legislation on Violence against Women, (UN New York 2010), pg. 26

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from Sexual Offenses Act, 2012 was legislated to address sexual abuse and sexual exploitation of children. The Act covers acts of sexual assault categorising them into sexual assault, penetrative sexual assault, and aggravated sexual assault. The meaning of sexual assault under this Act covers penetration to any extent, touching and any act carried out with a sexual intent with a child.

2. Sexual assault of the elderly

Sexual assault of an elderly is non-consensual sexual activity with an elderly, generally over the age of sixty. The elderly cannot convey consent or express their unwillingness due to physical and mental inability. They often suffer from dementia wherein they fail to provide consent in the first place.

3. Groping

Groping is the inappropriate non-consensual touching or fondling of a person, especially the buttocks, breasts, vulva, or penis. Groping occurs normally in crowded places and generally regarded as minor and inconsequential.

4. Rape

Rape is a form of sexual assault, which is the non-consented penetration of the penis or any object to any extent into the mouth, vagina, urethra or anus of a person

5. Sexual Harassment

The Sexual Harassment of Women at Workplace Act defines sexual harassment as unwelcome acts or behaviour. Unwelcome physical contact and advances amount to sexual assault. Consent here may not be expressly given or denied as the perpetrator most often holds a position of authority over the victim.

6. Mass Sexual Assault

Sexual assault of a large number of women and sometimes children in public by a collective group generally to perpetuate a propaganda is mass sexual assault. Mass sexual assaults witness all sorts of non-consensual sexual acts like groping and penetration.

In this paper, the author has focused more on the sexual assault of rape.

Rape is sexual assault that involves sexual intercourse or other forms of penetration that is forced and carried out without the other person's consent. The term rape by itself means "rapere" which means" to seize"[111]. In India, Section 375of the Indian Penal Code defines Rape. The Criminal Amendment of 2013 changed the definition of rape and expanded it to include all forms of forced penetration. According to the legislation and the subsequent Criminal amendment, the offense of rape is committed if a man penetrates his penis, or any other object, or manipulates any part of the body of a woman to cause such penetration, to any extent into her vagina, mouth, anus or urethra without her consent, wherein consent obtained by putting her in fear of her death or any person she is interested in fear of death, or in misrepresentation of his identity where she believes him to be her lawful husband and consents, or where consent is obtained while she is intoxicated or under the influence of any substance/drug given to her and she is unable to

[111] Compact Oxford Dictionary, New Delhi, 2001

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understand the nature and consequences of that to which consent has been given, or if she is under the age of eighteen regardless if consent has been given or not, is not constituted as consent. This term consent is defined under the same legislation as an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.[112]

Legislations of various countries define rape within their definitions of sexual assault. The World Health Organisation states rape to be a form of sexual assault, while the CDC (Centres For Disease Control and Prevention) defines rape as a form of sexual violence within sexual assault. Some legislation differentiate between rape and sexual assault as rape constituting as penile penetration, whereas other forms of non-consensual sexual activity constitute as sexual assault.[113]

THEORIES & FACTORS

The word "rape" applied to violence in the context of both property and person, being synonymous to abduction. But when a woman is abducted and molested violently, the crime is not against her body, but is seen as a theft of a woman against the consent of her guardian or any other who has legal control over her. According to Susan Brownmiller, ancient patriarchs used rape of women to forge their male power and hence failed to see rape as a crime committed by a man against a woman. They considered woman as wholly owned subsidiaries and not as exclusive independent beings. She also suggests that these sexual perpetuators use rape as a model of controlling woman and sometimes provides sufficient threat to keep them in a constant state of intimidation. Rape, has therefore, played an important role in society's evolution and is very much a part of patriarchy.[114]

Susan Miller's Radical Feminist Theory has found corroboration in other writings too. Rape is identified as terrorism that makes women less independent and more dependent on men. A rapist is born out of the political system of patriarchy which finds itself in the traditions of families. Rape, is hence, a mechanism through which men exert their dominance over women.[115] The Feminist Theory hence, sees rape not as an act initiated by sexual desires but by the desire to assert dominance over the other gender. It is a by-product of patriarchy rampant in our society and strongly reflects the social inequality present among the sexes.

According to the Social Learning Theory of Rape, rape is a learned behaviour comprising of four stages. The first one is the modelling effect, wherein a man observes the violence against women shown in real life or in the media and imitates it. This sex-violence linkage is a second step where men associate sex with violence by witnessing violent and pornographic films or visiting

[112] Indian Penal Code 1860, Acts No. 45 of 1860
[113] Kalbfleisch & Pamela j & Cody & Michael J, Gender Power and Communication in Human Relationships, Routldge Kalbfleisch, Pamela J.; Cody, Michael J, Gender Power and Communication in Human, Routledge
[114] Susan Brownwmiller, Against Our Will:Men, Woman & Rape, Simon & Schuster, New York, 1976
[115] Susan Griffen, Rape: The All American Crime, in Leroy.g.Schultz, Victimology, Springfield, Charles Tomas, 1975

internet sites. The third stage is related to rape myths that glorify the act of rape, hence excusing and justifying it. An example is the raping of women of other communities during communal violence, where rape is used as a tool to defame the community itself. Lastly, there is a sort of desensitisation effect associated with rape. Society is desensitised as to the painful experience of the rape victims. They instead put their moral integrity in question. This mentality is what motivates the act of rape when one wants to dishonour any individual member or a particular community. Rape is the easiest way to achieve this.

The Evolutionary theory looks in to the biological differences between men and women and states rape is used as a reproductive alternative for men who cannot obtain a mate for lack of resources[116]. Hence, it can be assumed that rape is simply a manifestation of deep individual frustration.

There has been research done to examine the common characteristics of male sexual assault perpetrators who prey on female victims. Understanding these common characteristics associated with sexual assault perpetrators becomes useful in understanding the ethology of perpetration and hence can be useful in realising methods of intervention and prevention.[117]

CHILDHOOD ABUSE

Childhood abuse inclusive of sexual, physical, and emotional abuse has been purported to be related to perpetration later on as an adult. Research indicates there is a link between childhood abuse and sexual assault perpetration in adulthood.[118]

Childhood sexual abuse

Theory of Victim to Victimiser realised research carried out by Hanson and Slater in 19888 says that exposure to sexual abuse in childhood leads the victim to purport this behaviour on victims as an adult It has been hypothesized by research carried out by Bandura, Underwood, and Fromson in 1975 that the trauma experienced as a child was associated with lack of being able to provide humane treatment and decreased ability to empathise with others as an adult. Persons with a history of sexual assault perpetration were researched to be engaged in sexual aggressive behaviour nine times more than persons without a history.[119]

Childhood Physical Abuse

It has been seen that boys subjected to physical abuse at home in their childhood are more likely to be involved in sex crimes as an adult. The experience of physical violence as a child establishes a pattern of violence for interpersonal relationships (Widom and Ames, 1994)[120]

[116] R. Thornhill & N.W. Thornhill, Huma Rape: An Evolutionary Analysis, in Ethology & Sociobiology, Vol.4, 1993

[117] Sarah Michal Greathouse & Jessica Saunders & Miriam Matthews & Kirsten M. Keller & Laura L. Miller, A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviours, Rand Corporation, 2015

[118] Ibid

[119] Ibid

[120] Ibid

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Childhood Emotional Abuse

Exposure to emotional abuse as a child can have a disturbed state of mind effect including negative emotions like anger and irritability, and difficulty in adult relationships. (Teicher, 2006) Thus it has been hypothesized that emotional abuse as a child may be associated with sexual assault perpetration as an adult.[121]

Childhood Exposure to Family Violence

The Widom research in 2001 has found that along with childhood abuse, exposure to family violence can be associated with violence as a youth and adult. (Kaufman and Zigler research in 1987). A study found that college freshman who witnessed domestic violence during childhood were more likely to commit sexual as well as physical assault against an intimate partner. (White, 2008)

Through these research carried out, we can see that there is a link between childhood abuse and sexual violence.[122]

PRIOR SEXUAL EHAVIOUR

Another area of research looks into the link between prior sexual behaviour and the likelihood of adult sexual aggression.

Multiple Partners and Early Initiation of Sex

Surveys taken with college students found that there is a link between multiple sexual partners and/or early commencement of sexual activity and self-reported perpetration of sexual violence (Abbey and McAuslan, 2004).It has been hypothesized that this link develops as individuals have a higher degree of interest in sex and the increased frequency of sexual activity makes them engage in sexual coercion.[123]

Casual Attitudes Towards Sex

Studies have suggested a determined link between impersonal attitudes towards sex and sexual assault perpetration. It saw that there was a relationship between the beliefs and practises that sex outside marriage is acceptable and perpetration. The Malamuth study, 1991 say that men with such attitudes are motivated to engage in sex for sexual gratification rather than for intimacy. In a study by Abbey (2006) and Zawacki (2003), college freshman with attitudes of "sex without love is ok" are more likely to commit sexual assault perpetration.[124]

[121] Ibid

[122] Susan Griffen, Rape: The All American Crime, in Leroy.g.Schultz, Victimology, Springfield, Charles Tomas, 1975

[123] Sarah Michal Greathouse & Jessica Saunders & Miriam Matthews & Kirsten M. Keller & Laura L. Miller, A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviours, Rand Corporation, 2015

[124] Ibid

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Past Sexual Violence Perpetration

Researchers have estimated recidivism rates for sexual assault perpetration to be between 14 percent and 68 percent (Hanson and Morton-Bourgon, 2005, and Zinzow and Thompson, 2014). In one case, researchers conducted a ten-year study on sexual aggression (Malamuth, 1991) where they found that earlier offenses are predictive of sexual assault aggression, and these sexually aggressive men are likely to offend multiple times. [125]

Hence, we can see that an individual's past sexual behaviour may be an indicator of future sexual assault perpetration. One of the most identified behaviour is if a person has committed sexual assault previously.

INTERPERSONAL SKILLS

Studies have also looked into whether sexual assault perpetrators display deficits in their interpersonal skills, inclusive of social skills and empathetic deficits, and intimacy issues in their personal relationships.

Social Skill Deficits

A study carried out by Geer, Estupinan, and Manguno-Mire in 2000 perpetuate a theory that persons may carry out the act of sexual assault only to achieve sexual gratification in order to compensate for difficulties experienced in interacting with members of the opposite sex. Quiet, shy and an introverted character could be a factor. Another study (Gudjonsson and Sigurdsson, 2000 and Overholser and Beck, 1986) saw that sexual assault perpetrators are more likely to display skill deficits compared to non-sex offenders. But the dearth of research in this aspect, has also led researchers to conclude that social skills do not come into play (McFall, 1990)[126]

Empathy Deficits

Scientists have estimated that rape culprits need compassion, or the capacity to identify with another person's sentiments. Studies inspecting a connection between empathic shortfalls and rape execution have delivered distinctive outcomes, contingent upon the kind of sympathy estimated. A few examinations estimating summed up sympathy have neglected to discover noteworthy contrasts in empathic levels between rape culprits and correlation gatherings. (Langevin, Wright, and Handy, 1998)[127]

Attachment

Some exploration has investigated the connection among connection and rape execution. This line of research draws from connection hypotheses, which attest the need of shaping passionate bonds to others amid the developmental years, especially amid youth. (Marshall and Barberee,

[125] Ibid
[126] Ibid
[127] Ibid

1990) As indicated by connection hypothesis, if these bonds are not shaped, people create unreliable connection styles. Rape scientists have placed that people with shaky connections to others neglect to create vital parts for imply grown-up connections (for instance, relational aptitudes and fearlessness), which thus can prompt sexual hostility(Ward, 1995).[128]

Sexual Misinterpretation

Research on male expectancies shows that sexually forceful men are more probable than nonaggressive men to misperceive a lady's agreeableness as an indication of sexual interest. (Abbey and McAuslan, 2004; Abbey 2001; Abbey 2002) Analysts have speculated that there are a few pathways in which sexual confusion could prompt rape execution. (Farris 2008s) For instance, a man who confuses beginning associations with a lady as demonstrative of sexual intrigue may feel drove on right when a lady's real lack of engagement turns out to be clear, which drives him to wind up furious and vicious. On the other hand, the facts may confirm that distortion of sexual intrigue is a general trouble in the understanding of nonverbal signs from others.[129]

There is at any rate some exploration demonstrating that rape culprits may indicate contrasts in connection styles, have bring down compassion toward rape casualties, and confuse sexual prompts. Some examination with detained tests demonstrates that rape culprits may show shortages in social expertise, yet various investigations have neglected to discover an impact in tests that incorporate tyke molesters, raising doubt about the connection between social ability and grown-up rape execution. Research looking at a connection between relational abilities and rape execution is fairly blended. More research is expected to clear up the components through which these relational shortfalls have an impact and the job that different variables play in intensifying troubles in relational abilities.

GENDER RELATED ATTRIBUTES

Research has discovered various sex related states of mind and discernments identified with an improved probability of submitting rape, including negative contemplations and dispositions toward ladies, philosophies about sex jobs and manliness, and misperceptions about ladies' job in rape. The job of sex related mentalities and discernments has been among the most contemplated factors in the rape execution inquire about, partially in light of the fact that assault is regularly conceptualized as a statement of resentment against ladies or a technique for getting strength and authority over ladies.

Hostility towards woman

Some examination has inspected whether men who express threatening demeanours toward ladies will probably submit rape. Threatening vibe toward ladies is commonly estimated however the Hostility Toward Women scale, which surveys angry and distrustful states of mind

[128] Ibid
[129] Ibid

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toward ladies. (Check, 1985). A lot of studies have foiund a relationship between sexual assault perpetration and higher Hostility Towards Woman scores (Abbey 2001;Abbey and McAuslan 2004; Forbes, Adams-Curtis, and White 2004)[130]

Rape Myth Acceptance

Various examinations have inspected connects between rape execution and the support of assault legends. Assault legends are characterized as usually held misperceptions that give legitimization to assault—for instance, the support of convictions that ladies unwittingly want to be assaulted or convictions that ladies who dress provocatively are requesting to be assaulted (Lonsway and Fitzgerald, 1995). Studies examnining rape myth acceptance have administered an instrument called the Rape Myth Acceptance Scale (RMAS; Burt 1980).

Belief in Traditional Gender Roles

Studies have additionally analyzed a connection between convictions in conventional sex jobs (that ladies and men should cling to their individual customary jobs and characteristics) and rape execution. A few investigations have discovered a connection between men in the all inclusive community who confess to having submitted rape and the support of conventional sexual orientation jobs (Carr and Van Deusen 2004 and White 2008). In another examination, confidence in conventional sex jobs was the main critical indicator of sexual animosity when seen token obstruction (or revealing past sexual encounters in which the accomplice at first said he or she would not like to take part in sexual movement however in the end did) was incorporated into the models (Loh 2005). In this model, saw token opposition and faith in conventional sex jobs clarified around 9 percent of the change in whether somebody occupied with sexually forceful conduct or not.

Hypermasculanity

Other research has investigated the connection among hypermasculinity and rape execution. Hypermasculine men have been conceptualized as having hard states of mind toward sex, encountering fervor notwithstanding risk, and trusting that outflow of brutality is masculine (Mosher and Sirkin 1984). These qualities at that point incline hypermasculine men to apply power and strength over ladies, including displays of sexual animosity. Various examinations have discovered a relationship among hypermasculinity and rape execution (e.g. Gold 1992; Mosher and Anderson 1986; Parrot and Zeichner 2003).[131]

Research has distinguished various diverse sex related discernments and demeanors that are related with rape execution. A few states of mind toward ladies, for example, the confidence in customary sex jobs and threatening vibe toward ladies, have been connected to rape execution. Likewise, outrageous dispositions and insights about manliness have been observed to be prescient of rape execution. At long last, while a few examinations have discovered that the

[130] Ibid
[131] Ibid

support of assault fantasies is identified with the commission of rape, a few specialists have contended that positive connections in these investigations are driven by proportions of antagonistic and sexist states of mind toward ladies that are incorporated into the exploration. While it could be contended that huge numbers of the sex related perceptions analyzed so far incorporate some cover, in general, the examination seems to show that states of mind and comprehensions about sex assume some job in rape execution. More research is expected to prod separated the impacts of every sexual orientation related factor. What's more, studies should keep on exploring the way in which sex related states of mind collaborate with different indicators, for example, peer mentalities, liquor, and sexual conduct.

PERCEPTIONS OF PEER ATTRIBUTES

Since sexual wrongdoers have been theorized to be especially affected by the dispositions and practices of their companions, (Abbey 2006) various investigations have investigated the job of peer impacts on rape execution, particularly the impact of people's recognitions about their associates' states of mind toward and consolation of sexual viciousness and their impression of whether their companions take part in rape. Since sexual wrongdoers have been theorized to be especially affected by the dispositions and practices of their companions , various investigations have investigated the job of peer impacts on rape execution, particularly the impact of people's recognitions about their associates' states of mind toward and consolation of sexual viciousness and their impression of whether their companions take part in rape (Christopher, Madura, and Weaver 1998; Dekerserdy and Kelly 1995). Different investigations have analyzed whether impression of companions' states of mind toward rape are related with the probability of having submitted rape. A few examinations have discovered that people who see their companions as endorsing of rape will probably submit rape themselves (Abbey 2007; Capaldi 2001; Franklin, Bouffard and Pratt 2012; Humphrey and Kahn, 2000).[132]

Research on the impacts of associate effects on rape execution appears to demonstrate that a person's impression of his companions' states of mind and practices about sex and sexual animosity are identified with rape execution. Various examinations have discovered that view of associate endorsement of constrained sex is identified with rape execution. Fewer investigations have likewise recognized a connection between rape execution and associate strain to take part in sexual action, and in addition saw companions' commitment in sexual animosity.

SUBSTANCE ABUSE

Liquor utilization has been found to co-happen with rape execution at a genuinely high rate. Crosswise over examinations, explore gauges that in around 50 percent of rapes, the casualty, the culprit, or the two people expended liquor before the attack (Abbey 2001).

[132] Ibid

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Alcohol Use

Liquor utilization has been found to co-happen with rape execution at a genuinely high rate. Crosswise over examinations, explore gauges that in around 50 percent of rapes, the casualty, the culprit, or the two people expended liquor before the attack (Abbey 2001). Pharmacological systems of liquor utilization allude to a diminish in subjective working because of liquor utilization and to a reduction in restraints. Subsequent to expending liquor, people dismiss distal signals, for example, sympathy for the casualty and the long haul results of their activities, and spotlight rather on more quick prompts, for example, sexual excitement, outrage, and disappointment. This impact has been hypothesized to be more probable in men who are inclined to sexual animosity (Abbey 2002). Mental systems of liquor utilization allude to the connection between culprits' convictions about the impacts of liquor all alone conduct and the pharmacological impacts of liquor. In this regard, liquor can influence how inebriated people decipher conduct around them to fit in with what they need to occur. For instance, if an individual is hoping to participate in sex, they may translate a lady's readiness to move as a challenge to have intercourse (Abbey 2011).[133]

Drug Use

Contrasted and research on liquor, we know significantly less about the job of culprit medicate use in rape execution. One of only a handful couple of concentrates to look at the connection between tranquilize utilize furthermore, rape execution in the United States reviewed an example of 851 school men five times over a four-year term about their recurrence of drinking, marijuana utilize, other illegal medication utilizes, and their investment in sexually forceful conduct. (Swartout and White, 2010). It was found that alcohol use and drug use immediately before sexual activity over time increases the predicted severity of sexual aggression. However, there is not enough research to completely validate these factors. [134]

The high rate at which liquor utilization happens related to rape execution has prompted various investigations analysing the connection among liquor and rape execution. These examinations appear to demonstrate that liquor utilization can assume a job in rape execution. A few investigations demonstrate that liquor utilization expands men's misperceptions of ladies' sexual intrigue. Research on the relationship between tranquilize utilize and rape execution is inadequate, and additionally examine is expected to all the more completely comprehend the impact of different types of medication use on rape execution.

COMBATTING SEXUAL VIOLENCE

Sexual violence can be combated on individual, administrative, legal and social levels. The function of law becomes most important in combating sexual violence. Some programs for

[133] Ibid
[134] Ibid

perpetrators that the Indian government can adopt to help in prevention of sexual assault perpetration could be as follows:

There are few projects outside of the criminal equity framework which are focusing on culprits of sexual brutality, by and large went for men indicted male-on-female rape, who shape a noteworthy bit of criminal instances of sexual viciousness. A typical reaction of men who submit sexual brutality is to deny both that they are capable and that what they are doing is fierce.[135] These projects, discovered chiefly in Industrialized countries, work with male culprits to influence them to concede obligation and be openly observed as in charge of their activities.[136] One way to achieve this is for programmes which targets male perpetrators of sexual violence to associate and collaborate with support services for victims and campaigns against sexual violence.

EDUCATIONAL PROGRAMMES

As of late, a few projects for sexual and regenerative wellbeing advancement, especially those advancing HIV counteractive action, have started to acquaint sex issues and with address the issue of sexual and physical savagery. Two remarkable models created for Africa yet utilized in numerous parts of the creating scene incorporate "Stepping Stones"[137] and "Men As Partners."[138] These projects have been intended for use in peer gatherings of people and are conveyed more than a few workshop sessions utilizing participatory learning approaches. Their far reaching approach helps men, who may some way or another be hesitant to go to programs exclusively worried about brutality against ladies, take an interest and examine a scope of issues concerning savagery. Besides, regardless of whether men are now and again the culprits of sexual savagery, the projects are mindful so as to abstain from marking them in that capacity.

An audit of the impact of the Stepping Stones program in Africa and Asia found that the workshops helped the men taking an interest assume more noteworthy liability for their activities, relate better to other people, have more prominent regard for ladies and convey all the more adequately. Because of the program, decreases in viciousness against ladies have been accounted for in networks in Cambodia, the Gambia, South Africa, Uganda, Fiji, the United Republic of Tanzania and somewhere else. The assessments to date, however, have by and large utilized subjective strategies and further research is expected to enough test the adequacy of this program.[139]

Research has focused on the significance of empowering supporting, with better and more sex adjusted child rearing[140], to anticipate sexual brutality[141].

[135] Kelly L, Radford J, Sexual violence against women and girls: an approach to an international overview. In: Dobash E, Dobash R, eds. Rethinking violence against women. London, Sage, 1998.

[136]Kaufman, Building a Movement of Men Workington to End Violence Against Women, Development:2001

[137] Welbourn A. Stepping Stones. Oxford, Strategies for Hope, 1995.

[138] Men as partners. New York, NY, AVSC International, 1998.

[139] Gordon G & Welbourn A, Stepping Stones and Men, Interagency Gender Working Group, 2001

[140] Malamuth, Neil M. (August 1988). "A multidimensional approach to sexual aggression: combining measures of past behaviour and present likelihood". Annals of the New York Academy of Sciences. 528: 123–132.

In the meantime, Schwartz has built up a counteractive action demonstrate that receives a formative methodology, with mediations before birth, amid youth and in youthfulness and youthful adulthood. In this model, the pre-birth component would incorporate talks of child rearing aptitudes, the stereotyping of sex jobs, stress, strife and viciousness. In the early long stretches of adolescence, wellbeing suppliers would seek after these issues and present kid sexual mishandle and presentation to viciousness in the media to the rundown of talk themes, and also advancing the utilization of non-sexist instructive materials. In later adolescence, wellbeing advancement would incorporate displaying practices and mentalities that abstain from stereotyping, urging youngsters to recognize great and terrible contacting, and improving their capacity and certainty to take command over their own bodies. This mediation would permit space for discussing sexual animosity. Amid immaturity and youthful adulthood, exchanges would cover fantasies about assault, how to define limits for sexual movement, and breaking the connections between sex, savagery and pressure. While Schwartz's model was intended for use in industrialized nations, a portion of the standards included could be appropriate to creating nations.[142]

COMMUNITY BASED EFFORTS

A few research based assault anticipation programs have been tried and checked through logical examinations. The assault counteractive action programs that have the most grounded exact information in the examination writing incorporate the following:

The Men's Program. The Men's Program, otherwise called the One out of Four program, was composed by John Foubert. Its attention is on expanding compassion toward assault survivors and rousing men to mediate as observers in rape circumstances. Distributed information demonstrate that high hazard men who saw The Men's Program dedicated 40% less demonstrations of sexually coercive conduct than the individuals who didn't. These treated men likewise dedicated demonstrations of sexual compulsion that were 8 times less serious than a control gathering[143]. Additionally explore likewise demonstrates that men who saw The Men's Program revealed more viability in mediating and more noteworthy eagerness to help as an observer subsequent to seeing the program.[144]

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[141] Malamuth, Neil M.; Addison, Tamara; Koss, Mary (2000). "Pornography and sexual aggression: are there reliable effects and how can we understand them?". Annual Review of Sex Research. Taylor and Francis. 11 (1): 26–91.

[142] Schwartz, Ivy L. (November–December 1991). "Sexual violence against women: prevalence, consequences, societal factors and prevention". American Journal of Preventive Medicine. PubMed. 7 (6): 363–373.

[143] Foubert, John; Newberry, J. T.; Tatum, J (2007). "Behavior differences seven months later: Effects of a rape prevention program on first-year men who join fraternities". NASPA Journal. 44: 728–749.

[144] Langhinrichsen-Rohling, J; Foubert, J.; Brasfield, H.; Hill, B.; Shelley-Tremblay, S. (2011). "The Men's Program: Does it impact college men's bystander efficacy and willingness to intervene?". Violence Against Women. 17 (6): 743–759.

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CONCLUSION

Globalization and progression have changed the presence of person as it were. All circles of our lives are influenced. The ferocious rivalry in the time of globalization has popularized each part of our life including our esteem framework and legacy. Therefore, in this globalized time we discover assault is regularly utilized as a corporate procedure with one of a kind level of complexity. Such cases unquestionably require extraordinary and new methodologies for characterizing the issue and discovering battle techniques. These strategies must begin at home itself, at the nurturing stage of the human itself. The law must work towards educating all persons towards sexual assault perpetration and initiate policies and programmes to effectively prevent sexual assault perpetration, rather than using itself as a deterrence form.

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CORPORATE SOCIAL RESPONSIBILITY: AN ENLIGHTENED CONCEPT

- *Nibedita Mukhopadhyay*[145]

ABSTRACT

The paper ahead aims at giving an overview of Corporate Social Responsibility , its meaning and evolution. It includes the statutory provisions related to CSR in India along with a comparative study on whether CSR is a compulsion or free will. Reference has been made to the several eminent personalities of India who thought about promoting and propagating the concept of CSR and the present scenario of measuring the performance of companies on the basis of their CSR activities.

RESEARCH QUESTIONS

1. What is CSR?

2. What are the statutory provisions of CSR in India?

3. Whether CSR is a compulsion or free will?

INRODUCTION

CSR (Corporate Social Responsibility), also referred to as Corporate responsibility, corporate citizenship, Responsible business, sustainable responsible business or corporate social performance is a self -regulating mechanism through which businesses monitor and ensure their adherence to law, ethical standards and international norms. Through CSR businesses embrace the responsibilities for their harmful and stressful impact on the society(including all sectors of stakeholders). It approaches towards the promotion of public interest by encouraging community growth and development. It is based on the quid –pro-quo relationship of businesses with the society in the form of social –contract theory[146].

[145] KIIT SCHOOL OF LAW

[146] . Social contract theory-"morality consists in the set of rules governing behaviour, that rational people would accept, on the condition that others accept them as well."- Rachels, p. 145

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WHAT IS CSR?

MEANING

Corporate Social Responsibility is the way by which a company maintains a balance of economic , social and environmental imperatives. Its idea is far beyond charity, sponsorship and philanthropy. It evolves from doing well to all and maintaining the responsibility and duties towards the society as a body corporate is also a part of the society and getting sumptuous benefits from it to remain a going concern. Here society is comprised of all the stakeholders from whom the corporation gets benefitted to run its day to day activities.

Corporate social Responsibility, the term itself is self -explanatory when broken. It refers to what a company (or corporation) does for the society, its people and their welfare. For further analysis it refers to the commitment of business enterprise to its stakeholders for conducting business in an economically, socially and environmentally sustainable manner which is both transparent as well as ethical.

EVOLUTION

The evolution of the regime of CSR can be dated back to the Mauryan period when Vishnugupta Kautilya in his Arthashatra[147] had emphasized on the maintenance of ethical practices and principles while conducting business. During the Muslim era there was the practice of Zakat through which the persons who earned more(mostly the businessmen) shared their earnings with the poor and deprived. In early 1900 the business –houses of India like Tatas, Birlas, Modis, Godrejs, Singhania s and Bajajs began to establish charitable foundations , educational and healthcare centers and trusts for community development . M.K.Gandhi urged the wealthy businessmen to share their wealth with the under-privileged lot under his theory of trusteeship[148]. Then post -independence CSR was influenced by the public sector undertakings for ensuring proper distribution of wealth.

In 1953, Howard Bowen had published his book, "*Social Responsibilities of the Businessman"*, [149]and he is largely credited for coining the phrase 'corporate social responsibility'. He is referred to as the Father of CSR. Peter . F. Drucker in 1984 had referred and further elaborated the term in the California Management Review[150] while referring to the various social problems hidden behind business opportunities.

From 1980 onwards Indian companies began to focus on sustainable business strategies while doing CSR. Post the LPG[151] Era of 1991 corporations began to have greater economic growth as

[147] Arthashashtra- by Chankaya
[148] Gandhian Theory of Trusteeship
[149] Howard Bowen- Social Responsibilities of the Businessman, 1953
[150] Peter . F. Drucker. – California Management Review
[151] Liberalisation , Privatisation and Globalisation Era of India, 1991

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a result of which companies began to contribute more towards social responsibility (thinking it as a duty and responsibility rather than mere charity).

Section 135 of the Indian Companies Act, 2013[152] deals with the provisions for CSR ,and it mandates every company having a net worth of Rs. 500 crores, or turnover of Rs. 1000 crores or net profit of Rs. 5 crore or more to constitute a CSR committee with BOD (one independent director compulsorily) in order to spend atleast 2% of its net average profits made during last three immediately preceding financial years on CSR activities. Previously CSR was included in the Companies Bill of 2009[153] and Companies Amended Act of 2012[154].

WHY CSR?

The business environment is no longer shareholder oriented , it has drastically transformed itself into the stakeholders model. Business's in modern days aim to be welfare houses just what Gandhiji had tried to refer through his model of trusteeship[155]. This can be better referred to as the shift of corporates from corporate consumerism towards the , 'Green' and 'Ethical' consumerism that has made the corporates to be green and ethical for consumer acceptance.

The legislations play a huge role behind CSR , as CSR includes Health & Safety , Environmental Protections , Sustainability surety (including the Consumer Protection Act[156], Environmental Protection Act[157], Pollution Control Act[158], Companies Act [159]and the like) The corporates are expected to follow such codes and while adhering to the provisions of these codes they are automatically doing CSR Activities.

ADVANTAGES OF PRACTICING CSR

1. It promotes Brand Differentiation in the competitive market.
2. It helps in building ethical brand equity for the investors.
3. It helps in building brand names and brand loyalty.
4. It helps in increasing the goodwill and reputation of the company through brand attractiveness.
5. It helps in business development.
6. It helps in finding new markets and expanding in newer products and services.
7. It helps in better management and conservation of strategic assets.

[152] Section . 135 , Indian Companies Act, 2013
[153] Companies Bill of 2009
[154] Companies Amendment Act, 2012
[155] Gandhian Theory of Trusteeship
[156] Consumer ProtectionAct,,1986
[157] Environmental Protection Act, 1986
[158] Pollution Control Act
[159] Companies Act , 2013

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STATUTORY PROVISIONS

With respect to the statutory requirements of CSR , one can find the following provisions-

1. Section 135 of the Companies Act, 2013[160] mandates every company having a net worth of Rs. 500 crores, or turnover of Rs. 1000 crores or net profit of Rs. 5 crore or more to constitute a CSR committee with BOD (one independent director compulsorily out of the three board of directors appointed in such committee) in order to spend atleast 2% of its net average profits made during last three immediately preceding financial years on CSR activities.
2. Section 135 further mandates that board of directors have to disclose the composition of such committee. And they have to prepare CSR policies as per Schedule 7[161] of the Companies Act ,2013- including the following
   a. Eradicating extreme hunger and poverty
   b. Promotion of education
   c. Promotion of gender equality and empowering women
   d. Reducing child mortality and improving maternal health
   e. Enhancing child morality and helping the society for child education
   f. Ensuring environmental sustainability
   g. Activities for social and inclusive development and enhancing the employment opportunities
   h. Activities for worker's rights and welfare
   i. Activities for health issues
   j. Contribution to the prime minister's National Relief Fund or any other fund as set up by the central or state government for socio- economic development.
   The above list is not exhaustive
3. Companies CSR Policies Amendment Rules[162]
4. ICAI Mandates[163] Like CSR expenses to be treated as non- cost items.

CSR: A COMPULSION OR FREE WILL?

No man can be compelled to do good without his consent. Here dharma comes to play the role. Corporates are artificial legal personalities and so they are eminent persons of the society without whom the society is incomplete . They also benefit from the society. And here grows their duty and responsibility to do good for the society and consider its welfare. But doing dharma or adharma is completely resting on ones own motive and will. No one can compel. The statutory

[160] Section 135 of Companies Act, 2013
[161] Schedulel vii of Companies Act, 2013
[162] Companies CSR Policies Amendment Rules, 2016
[163] ICAI Mandates

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mandates of CSR have their own flaws. A hearty will to do CSR can only come from those business enterprises who are ethical , others merely adhere to the rules and find its flaws to avoid practicing CSR either legally by twisting their income or illegally. Dharma and adharama lies on the doer of acts. Good Influences at times change the hearts of persons and even they begin to walk in the path of dharma. And sanction (the fear of punishment and penalty) also forces the persons to practice Dharma. Similar instance is now taking place in India.

The companies that used to practice CSR previously are also now getting bad influence from the just for mandatory clauses and doing CSR for name sake. Swami Vivekananda did not spread wealth to the human race but spread the means to it. The young sanyassin went on with man making for the upliftment of the society. He had encouraged Jamshedji to build a steel plant in India and that is how, Tata Steel Ltd, was set up at Jamshedpur.[164] He felt that industrial advancement would require the development of indigenous technology. Behind it lies Swamiji's inner motive for CSR through which the whole of India would get benefitted. He had aroused the concept of entrepreneurship to strengthen the economy and urged to the entrepreneurs not to forget to repay the society for their achievements through contributions by them for welfare of the society.

Mahatma Gandhi had urged to the powerful industrialists and businessmen of India to share their wealth for the benefit of underprivileged and poor sections of the society. He gave the concept of trusteeship which helped in the socio-economic growth of India. Gandhi regarded the Indian companies and industries as "Temples of Modern India" who are the trustees of the Indian society and responsible for its welfare. [165]He had influenced the industrialists and business houses to build trusts for colleges, research and training institutes that would enhance social reforms like rural development, women empowerment and education.

The former President of India, Dr. A.P.J . Abdul Kalam had asked all corporate leaders and industrial houses to ensure that the fruits of development and modernisation reached to those living in rural hinterland . While addressing to the Business-world-FICCI-SEDF Corporate Social Responsibility awards function, Dr. Kalam had said that the corporate and industrial houses could make an important contribution by adopting the schools, particularly in rural areas in their region, and providing infrastructure for the schools in the form of clean drinking water, toilet and transportation facilities, building sport complexes and providing computing facilities.[166]

The concept of social auditing has been introduced by the companies around the globe including India, to demonstrate their commitment to social responsibilities.

[164] Vision of Swami Vivekananda on participation of corporates on social growth and CSR-C.SS. Saibal .C.Patel
[165] Gandhian Theory of Trusteeship
[166] MAY 08, 2007 00:00 IST-The Hindu

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CONCLUSION

Companies world-wide are now beginning to assess their social performance and report results of those assessments a means of demonstrating their commitment to show off their sense of social responsibility. The concept of social auditing has developed to provide a means to the companies to demonstrate it.[167] CSR aims at all-round development of the society by making the companies a means to achieve it. It focuses on welfare issues like human rights, labour practices, sustainable development, pollution control, ethics, environment, consumer issues and community development. It does not restrict itself to the strategic management and governance of the company only but extends towards people and planet.

[167] Social Audit- Importance of CSR

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FEMINISTS OR GENDER EXTREMISTS

- Kaviya Singh[168]

INTRODUCTION

Gone are the times when women and slaves were treated alike. As the slaves were considered helpless and lived on the mercy of their masters so was the case of women too who lived under the protection of their father or husband. However times have changed now and women have proved the notion of them being the weaker sex as wrong. The independent women of our era are taking their own decisions, though being protected; they are free to act on their own will. The patriarchal society has been overpowered by the movement of feminism which emphasizes on the recognition of rights of women as being human beings. This would have done magic if both would have come to the same stage and men and women in the society were being treated alike but in a society like ours that is difficult to achieve. Despite several public campaigns and social media 'uprisings' our society continues to be more extremist than rational. It either favors the men turning a deaf ear towards women as in case of rural 'panchayats' of Bundelkhand region and 'khap panchayats' or else they will believe the female like in our urban system which is in such a haste to protect the women's rights that they inevitably hinder a man's human rights. Our legal system too has been facing a similar flaw that laws which were created to protect women are now being misused by some of them. Being an active member of legal fraternity often I am posed with the question: Who is the victim now? Recently a video for raising the concern for a victim named Saravjeet[169] rose in the social media when he was accused of a false claim by some delhite who flew out of the country after getting appreciations and support from the government and country. No one cared to look what the issue was; it was apparently a case of mutual fight where the girl misused her rights of being the protected class. This is one case which the world has seen; we often come across these but are helpless under the laws.

A case of male rape was brought to my knowledge and I couldn't attract many sections because of the stringent laws and confined interpretations. And the list goes on. There are more than fifty laws which are women favoring and need immediate attention of the lawmakers and the law interpreters'.

All penal laws are devised to treat males and females alike and to make them serve the offenses equally until otherwise specified by the law. But the laws running in India raised eyebrows when after the feminist movements the government started creating laws which were being used against their spirit. Running schemes and campaigns was an effective effort because it was meant to mold the thinking patterns of the individuals at large. Non-enforceable and non-effective laws

[168] B.A.LL.B. (Hon's), LLM, PGDHRM

[169] "Jasleen Kaur case: What you know and what you don't", India Today, New Delhi, Aug 30, 2015.

have worsened the situation. They have not been able to deter the situation; according to a survey conducted the amendments made in 2015 in criminal law which were meant to reduce the crime rate have otherwise increased it. Crime rates have increased ever since. The fact cannot be denied that humans should be protected from their own race but a division between women, men, and other gender is not appreciated and should not be promoted. A unanimous stand was there to bring in the awareness of uplifting the downtrodden classes, which have been given protection and up-liftment as was required. India stands on its own feet and needs to serve the country as one without being biased in its opinion and laws towards a section of society.

Indian Penal Code (read as IPC onwards) enacted in the year 1860 has been amended 76 times by various laws brought in the country. But it lacks in addressing the issue of gender unbiased crimes and after has been titled in protecting the weaker and the marginalized classes. Recently the Code was brought in question for section[170] 377, 302, 309 and 497 into the apex court of the country. After the numbered amendments made in the Code, it still lacks in addressing the issue of gender un-biased provisions in totality or say provisions for the protection of men in particular. It is perceived that men being the stronger sex will be able to protect themselves. Otherwise too men related crimes do not get reported very often in our country. To understand, males below the age of 18 are covered under the Juvenile Justice Act 2005 and thus are a protected class, but males above that age are helpless.

There are only certain major crimes to address to:

Rape and Gang Rape: We do not understand the term of rape for men; it is a solely associated crime for women. Merriam Webster[171] dictionary defines rape as *"any unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception"*, this will widely include men violating physical activity. IPC under section 375[172] and 376D[173]

[170] Section 377: Unnatural offences; section 302: Punishment for murder; Section 309. Attempt to commit suicide; Section 497: Adultery.

[171] https://www.merriam-webster.com/dictionary/rape

[172] 375. Rape.—A man is said to commit "rape" if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly.—Without her consent. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent. Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora. Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any

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amended and added by amendment act of 2013 only focuses on women being raped and gang-raped. Recently a writ was filed before the court to introduce a gender neutral rape law in the country[174].

a) Sections related to 376 B[175] and C[176]: Public servants' acting in violation in authority under section 376C punishes only the male public servants acting in the fiduciary relationship and being the manager of a women or children institution and managing the hospital. This section will not punish the female acting in violation or in contravention. Any sexual demand by any male official is a punishable offense but what if a female official demands one? It goes unmentioned in the society like ours.
b) **The Immoral Traffic (Prevention) Act, 1956**: Females who are offenders of carrying or practicing prostitution under section 7[177] and seducing someone under section 8[178] go to

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form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.—A medical procedure or intervention shall not constitute rape. Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

[173] 376D. Gang rape.—Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.

[174] https://www.republicindia.org/pil-filed-delhi-high-court-make-rape-laws-gender-neutral-protect-enforce-fundamental-rights-male-children-turning-18-yrs/25-09-2018.

[175] 376B. Sexual intercourse by husband upon his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

[176] 376C. Sexual intercourse by a person in authority.—Whoever, being— (a) in a position of authority or in a fiduciary relationship; or (b) a public servant; or (c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or (d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine. Explanation 1.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375. Explanation 2.—For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

[177] 7. Prostitution in or in the vicinity of public places.—(1) Any [person], who carries on prostitution and the person with whom such prostitution is carried on, in any premises,— (a) which are within the area or areas, notified under sub-section (3), or (b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months.] [(1A) Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.] (2) Any person who— (a) being the keeper of any public place knowingly permits prostitutes for purposes of their trade to

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correctional homes for two years at-least but they are not harshly punished. But on the other hand, a man who seduces a woman under section 366[179] and shows pornographic material or eve-teases under Section 354A[180] respectively faces a punishment of three years and it is a cognizable and on bailable offence.

c) Offences like disrobing a woman (354B)[181], voyeurism (354C)[182], Stalking (354D)[183] have been defined only in respect to women. They should be gender neutral and should

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resort to or remain in such place; or (b) being the tenant, lessee, occupier or person in charge of any premises referred to in sub-section (1) knowingly permits the same or any part thereof to be used for prostitution; or (c) being the owner, lessor or landlord, of any premises referred to in sub-section (1), or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof may be used for prostitution, or is wilfully a party to such use, shall be punishable on first conviction with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both, and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and also with fine 2 [which may extend to two hundred rupees, and if the public place or premises happen to be a hotel, the licence for carrying on the business of such hotel under any law for the time being in force shall also be liable to be suspended for a period of not less than three months but which may extend to one year: Provided that if an offence committed under this sub-section is in respect of a child or minor in a hotel, such licence shall also be liable to be cancelled.

[178] 8. Seducing or soliciting for purpose of prostitution.—Whoever, in any public place or within sight of, and in such manner as to be seen or heard from any public place, whether from within any building or house or not— (a) by words, gestures, wilful exposure of her person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavours to tempt, or attracts or endeavours to attract the attention of, any person for the purpose of prostitution; or (b) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency, for the purpose of prostitution, shall be punishable on first conviction with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year, and also with fine which may extend to five hundred rupees: [Provided that where an offence under this section is committed by a man, he shall be punishable with imprisonment for a period of not less than seven days but which may extend to three months.]

[179] 366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1 [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

[180] 354A. Sexual harassment and punishment for sexual harassment.—(1) A man committing any of the following acts— (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favors; or (iii) showing pornography against the will of a woman; or (iv) making sexually colored remarks, shall be guilty of the offence of sexual harassment. (2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both. (3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[181] 354B. Assault or use of criminal force to woman with intent to disrobe.—Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

[182] 354C. Voyeurism.—Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by

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also save males from all the crimes which might occur in the future or others which are being committed but are not being reported. It's a strange practice in India that crime rate is evaluated on the basis of the number of crimes reported i.e. FIR filed and as we are aware of that is not a usual practice. Generally, a complaint is filed or many a time a personal action is taken by the police but as far as possible least number of FIRs is filed to show the area crime free.

d) If a man outrages the modesty of a woman under the section 354[184] of the IPC then he will be punished by a punishment of one year which may extend to five years. In the case of *Raju Pandurang Mahale vs. State of Maharashtra*[185], the court held that there is no fixed definition of estimating the acts which may account for outraging a female's modesty. The essence of a woman's modesty is her sex and any assault committed in furtherance of the same will be considered under the section. Nowhere has ever considered that a man's modesty can also be hurt by doing such acts. IPC is a wide code and does not only considers assault when committed literally, any duress created will be considered in the same and thus such acts can be committed to outrage the modesty of a man too.

e) Cohabitation of a woman and man as a lawfully married couple where man deceits the woman of the same, for such a man gets punished for 10 years and gets registered for an non-bailable offence under section 493[186] of the IPC. Such a practice can be committed by women too but no particular section exists for them in particular thus this section should be made gender neutral.

f) Section 497[187] which is under scrutiny before the Supreme Court these days reads and exempts the women in general from being adulteress. Adultery is considered an act of

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any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

[183] 354D. Stalking.—(1) Any man who— (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or (ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking Provided that such conduct shall not amount to stalking if the man who pursued it proves that— (i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or (iii) in the particular circumstances such conduct was reasonable and justified.

[184] 354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, 1 [shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine

[185] AIR2004SC1677

[186] 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[187] supra, 2.

seduction which can only be practiced by men because "man is a seductive being". Thus women are considered to be as a victim before the law rather than a contributor or criminal. Seduction is an art which has no gender disparity and can be practiced by anybody, thus adultery should not be made men-centric and should be gender neutral.

g) Rural and tribal areas of Bihar, Jharkhand, and Chhattisgarh are famous for kidnapping the well groomed grooms and getting them married to any local girl who is not his choice[188]. A crime of section 498[189] is committed against a man but it will not be covered under this section for it mentions any enticing, taking away or detaining with criminal intent to a married woman and is woman-centric.

h) Cruelty under section 498A[190] is covered under chapter 20A named as "Of cruelty by Husband or relatives of Husband". This chapter's interpretation was widened by the learned court when it included mental torture into the definition of cruelty in the judgment of ***Shobha Rani v. Madhukar Reddi***[191]. Such is an inclusive definition and includes only women. Mental cruelty can also be committed on men and thus should include men in ambit. But such section being women-centric will not get attracted. Recently, in the case heard by the Supreme Court of Rajesh Sharma vs. State of UP[192] the misuse of section 498A and Dowry Prohibition Act was brought before the court by the women protection NGOs and imperative to men organization was given to produce their arguments on the same.

i) Section 497 along with other provisions of divorce under different acts namely:
   i) Sec 13(1)(i) of Hindu Marriage Act,
   ii) Section 27(1)a of Special Marriage Act,
   iii) Section 32D of Parsi Marriage and Divorce Act 1936,
   iv) Section 10 of Indian Divorce Act, allows men to attract divorce on the ground of adultery. But such contention has to be proved by the husband. Adultery unlike other offences can only be challenged by the husband in court and the burden of proof shall lie on the husband to prove the same against the wife. If adulterous act

[188] "Marriage by abduction soars in Bihar, over 3,000 grooms tied knot at gunpoint in 2016", Indian Today article, New Delhi, June 4 2017.

[189] 498. Enticing or taking away or detaining with criminal intent a married woman.—Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

[190] 498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purposes of this section, "cruelty" means— (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand

[191] 1988 SCR(1) 1010

[192] Cr. Appeal 1265/2017. Supreme Court (https://indiankanoon.org/doc/182220573/)

is proved without husbands consent then the ground for divorce shall be accepted otherwise it will not be a ground at all.

A wife's adulterous relations if result into a child then the burden of proof shall again be on the husband of the wife. Strong evidences are required to prove the same ion the court. In case of paternity, a DNA test can be ordered and considered as evidence under section 112[193] of Indian Evidence Act but otherwise it is remediless. This provision needs a strong interpretation since it gives a way to woman's misconduct.

CONCLUSION

Women protection and awareness has been the prime prerogative of the country and the country has been very progressive in attaining the same. These programs were brought in to educate people with a theme of understanding and once its work was done it was to be withdrawn. India as a country has not understood the practice of withdrawing at a particular time. Strategically, once the message is made the words should be withdrawn or else they will lead to opposite action. Other developing countries are running programs for gender equality but we still are protecting one sex from the other by social campaigns. Our country has seen a history of hypocrisy and is still running on the same. How can one promote gender equality when you are saving and favoring one particular gender over other? This does not mean that crimes committed against women are not real and should not be deterred but this is to understand that now real action is needed and law needs to be strong enough to deal with it.

Various sensitive questions are asked whenever such a debate is done such as who can rape men. How does a man suffer domestic violence? Why can't they defend themselves? Such questions have attracted the emergence of various men right foundations which are successfully running campaigns to stop the misuse of provisions which were created to withhold the dignity of women in large. Judiciary has been active in serving the same interest; the apex court has also invited arguments to understand the point view of men in the Rajesh Sharma's case[194]. The data collected by the National Crime Records Bureau and other NGOs have been revaluated to assess the legal position of men.

To conclude, it can be said that we are in a need of nation where gender neutrality is preferred over gender equality; because a country as vast as ours' will never cope up in providing the latter. Men are as essential a part of our country as women; they need the same stretch of protection as others. In the phase of development, investment of resources in determining the differences will be a waste and it will take us back to where we started.

[193] 112. Birth during marriage, conclusive proof of legitimacy. — The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

[194] Supra, 24.

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ANALYSIS OF THE SCHEDULE CASTE & THE SCHEDULE TRIBE (PREVENTION OF ATROCITIES) ACT, 1989 IN THE LIGHT OF CONTEMPORARY CASE LAWS

- *Vindhya V.*[195]

ABSTRACT

The liberty of individuals in the eyes of the law should hold equal weightage which makes it vital to define the limits of the exercise of positive discrimination and affirmative action; the lack of which will inevitably give rise to exercising of arbitrariness. This paper sheds light on the negative effects of the usage of stigmatised labels, on the different sections of the society before critically analysing the Rawls's Theory of Justice in light of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989. This paper seeks to bring forth the existence of the inherent injustice in the provisions of the aforementioned Act and throws light on the jurisprudential miscalculations that have the potential to pose a threat to constitutionalism.

INTRODUCTION

John Locke brings forth in his work, the vitality to recognise and enforce the inalienable rights of life, liberty and private property i.e. pursuit of happiness as it is given by God to every human being without an exception. "These three gifts from God precede all human legislations and are superior to it." (Bastiat 1850. p 20-21) These three inalienable rights protects man's existence and gives him an opportunity to seek for the purpose of his life and secures the individual's autonomy. These rights are universal and are indifferent to the consent of those who are entitled to these rights. Locke, while propounding and advocating the Social Contract Theory, analysed that the need for a state arises for the protection of private property of human beings and only that. With the evolution of time, the state has taken upon itself to regulate multiple facets of an individual's life. The public-private divide is grossly blurred and the law has seeped into the private lives of its citizens thereby being in a position to regulate every single action of an individual. It has come to a point where either something is prohibited or compulsory.

The state associates extravagant importance to the protecting and shielding of the moral standards that it sets for the society even though it comes at the cost of infringing the natural rights of an individual. Locke saw the individual and his rights as being the most important part

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of the community. "The individual is prior to society, which comes into existence only through the voluntary contract of individuals trying to maximize their own self interests."[196] The individuals form the basic units of the society and to ignore the rights of certain individuals, to further moral agendas or provide protection to the rights of other individuals is in itself a gross violation of the equality that is promised to all by nature.

Plato in his work brought out the role that reason plays in a man's life. He deduced that all things can be unraveled and explained by applying pure reason and rationality to the matter at hand. He brought out the importance of merit based decisions in his book, *Republic*. The provision for society specific laws i.e. positive discrimination brings out without any ambiguity, the evidence of emotion superseding rational in the making of crucial decisions that impact the society.

The Preamble of the Indian Constitution enunciates the importance of equality, liberty and fraternity among other ideals. These golden ideals that were propagated by the French Revolution is in fact necessary and imperative to maintain the peace and harmony of the state as it facilitates economic growth and also fosters brotherhood and friendship. Article 14 of the Indian Constitution provides for equality before the law i.e. equal protection of the law to every citizen without discrimination based on race, caste, gender, sex, place of birth, etc. According to Locke, "Nothing more evident than the Creatures of the same species and rank promiscuously born to the same advantages of Nature, and use the same faculties, should also be equal one amongst the other, without Subordination or Subjection."[197]

The Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 (hereby mentioned as The Act) is a piece of legislation that caters to protect the rights and interests of the members of the Schedule Caste and Schedule Tribes with respect to atrocities that are committed against them by non - members of the community. Article 21 of the Constitution guarantees the right to life and liberty of all citizens and the right to live with dignity. The Act lays down several offences that is grave, obscene and cruel under Chapter II and prescribes punishments for everyone who propagate and/or effectuate these offences against the members of the Schedule Caste and Tribes community for the sole reason of the caste that they belong to. The premise that aided in the conception of this Act was the years of neglect and oppression that was rendered to the members of these communities which invariably infringed upon the negative liberty that they were entitled to by the command of Nature. There is no denying the inhuman conditions that the members of this community were subjected to; which included the practice of untouchability, the seclusion of the members from the integral part of the society thereby robbing them of satisfaction from life and the liberty to express themselves to the fullest extent, preventing them from getting educated and subjecting them to a restricted list of jobs that provided no space for any kind of growth and/or development. However, with the inception of the Constitution, there

[196] Portillo, Javier, and Walter E. Block. "Anti-Discrimination Laws: Undermining Our Rights." Journal of Business Ethics 109, no. 2 (2012): 209-17. http://www.jstor.org/stable/23259312.
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has been a variety of legislations and statues that protect and keep the rights of this community by way of affirmative action and positive discrimination. The abolition of the caste system, the reservations in the field of education, in the workplace, in elections to the Houses of the Parliament, etc. aided in bringing them out of the cycle of diminishment that they were in and in certain arenas, still are.

The "privileged" section of the society has empathised and sympathised with the plight of the Schedule Caste and Tribes and to a certain level, feel responsible and harbour guilt for the latter's plight. The moral dictation of rectification of past wrongs allows the justification, to a certain extent, of positive discrimination rendered to the Schedule Castes and Tribes at the expense of the opportunities that is available to the "privileged" class. With the passage of time, the Schedule Caste and Tribes, aided by these positive reinforcements, have landed on their feet and there has also been a marked increase in the misuse of these legislations to the disadvantage of the "privileged" class. Now, the misuse of these legislations are not victimless as it robs the falsely accused of his rights and interests that have been guaranteed to him by the same constitution that grants extra layers of protection to the Schedule Caste and Tribes.

NEGATIVITIES ASSOCIATED WITH STIGMATISED LABELS

The law provides for positive discrimination and affirmative actions to the neglected sections of the society to repair their conditions and establish status quo among all the citizens irrespective of their beliefs, faith, race, caste, gender, sex, etc. The members of the Schedule Castes and Tribes were ill-treated and subjected to cruelty due to the implications of the caste system. With the abolishment of the caste system on the grounds of acute lack of sound rational to support its existence, the law brought in several legislations to rectify past wrongs, of which, the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 is one. The members of this community have now risen to a respectable level and their presence is pervasive in all the arenas that society. They have been given multiplicities of opportunities over the last seven decades, and rightly so. While it is important to uphold the ideals of the welfare state, there needs to be a gross change in the way it is upheld.

The members of the Schedule Castes and Tribes are often described using adjectives like helpless, neglected, oppressed, powerless, voiceless, etc. The aforementioned stigmatic labels negatively intensifies the experience that the members of this community go through. The fundamental postulate of the strain of labelling theory under discussion is the assumption that the re- action of the "societal other" has a reinforcing effect on subject's behaviour.[198] The law's reaction to the subject, intensifies the subject's behaviour. The throwing of a perpetual pity party for the members of this community will prevent them from tapping their potential and pursuing high end goals. The labelling will negatively impact their head space and their self- worth. On

[198] Hagan, John. "Labelling and Deviance: A Case Study in the "Sociology of the Interesting"." Social Problems 20, no. 4 (1973): 447-58. doi:10.2307/799707.

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the other hand, the labelling of the "privileged" section of the society as oppressive, regressive, etc. and the presumption of their guilt in the absence of credible proof to prove it, will further drive them to the commission of the very atrocities that the law seeks to prevent. It furthers the gap between the communities and threatens the peace and harmony in the society. Therefore, it is imperative that the state recognises the improved situation of the Schedule Castes and Tribes and provide for it accordingly instead of blindly sympathising with the ghosts of their past. The stigmatised labels aid in increasing the animosity and the friction between the communities.

IMPLICATIONS OF END THEORY OF JUSTICE

John Rawls brought out an End Theory of Justice wherein, all the facets of an ideal society and government have already been laid out i.e. the end result has already been decided before choosing the means through which these ends are to be achieved. The End Theory of Justice works on the assumption that the ends justify the means and no matter the cost, the pre-decided end is to be achieved. Robert Nozick criticized this theory of justice and propounded the Historical Theory of Justice. Nozick believed that the when the means are justified, the ends will automatically be justified as well. If the justification of means, with respect to any parameter, is compromised on, then the liberty of the individual in question will be gravely compromised as well. Rawls's theory of Justice does not provide for the establishing of justified means and therefore gives rise to arbitrariness.

There are several legislations like the Indian Evidence Act, 1872, Code of Civil Procedure, 1908, Code of Criminal Procedure, 1973, etc. that lay down procedures based on pure reason and logic to adjudge the credibility of the evidence and/or the facts brought in front of the Court of Law. These laws and the objectives they entail, uphold the importance of justifying the ends by the justification of the means. The Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 was passed to protect the rights and interests of the less fortunate which in turn secured a welfare state – an epitome of morality. The blanket protection given to the members of the Schedule Castes and Tribes under the provision of this act is justified by the ends that are achieved by this act and not just in itself. Section 18 of the Act completely curtails the liberty of the accused as it prevents him/her from seeking anticipatory bail; the justification of which stems from the presumption of guilt as opposed to the universal maxim: innocent until proven guilty.

UNEQUAL PROTECTION BEFORE THE LAW

The atrocities mentioned under Chapter II of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 are all indeed, cruel and inhumane. It can be said that they are all crimes against humanity. Human beings resorting to torture and cruelty to assert power over another human being is a tale as old as time. Dostoyevsky said, "Human beings are capable of artistic and picturesque cruelty; one that puts bestial cruelty to shame." The above mentioned Act operates on the assumption that only the members of the "privileged" sections of the society are capable of exercising acts of cruelty against the members of the Schedule Castes and Tribes.

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The Act does not in its entirety, prescribe a punishment for atrocities committed by members of the Schedule Castes and Tribes against each other. While this author is not ignorant about the rationale behind the absence of punitive sanctions for atrocities committed by the members of Schedule Castes and Tribes against other members of the same community under the Act, this author does not agree with the rationale for, it is, yet again, faulty. The right of life and liberty of the members of the Schedule Castes and Tribes is protected under the Indian Penal Code, 1860 as well as the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989. When there is an active and operating general law to impose appropriate penal sanctions for any act that constitutes as a hate crime, the drafting of a separate legislation for the same under the guise of special law seems utterly absurd. Sections 153 A and 153 B of the Indian Penal Code, 1860 cover the issue of anti-racial/hate crimes. These provisions can be read into and harmonised with the fundamental rights that is guaranteed to every citizen of the country and several international instruments that are in place for the prevention and the reduction of hate crimes.

Furthermore, Section 3(2)va of the Prevention of Atrocities Act, 1989 provides:

Whoever, not being a member of Schedule Caste or a Schedule Tribe, -
Commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Schedule Caste or Schedule Tribe or such property belongs to such member shall be punishable with such punishment as specified under the Indian Penal Code, 1860 for such offences and shall also be liable for fine.

The Schedule that is elaborated at the end of the Act reiterates 33 crimes and their punishments that are already provided for under the Indian Penal Code, 1860. The definition of crime against nature and morality cannot differ with the person against whom it is committed as a subjective definition is highly unlikely to render justice.

In the case of Maneka Gandi v. Union of India[199], the Supreme Court, in its judgement brought out the importance of reading the Articles 14, 19 and 21 in harmony with each other and not distinct of each other. The view that Articles 19 and 21 constitute watertight compartments has been rightly over-ruled. The doctrine that Articles 19 and 21 protect or regulate flows in different channels, was laid down in A. K. Gopalan's[200] case in a context which was very different from that in which that approach was displaced by the counter view that the constitution must be read as an integral whole, with possible overlapping of the subject matter, of what is sought to be protected by its various provisions, particularly by articles relating to fundamental rights. [201] The Schedule Caste and Tribes (Prevention of Atrocities) Act, 1989 was set in motion to ensure the social, economic and political justice of the down trodden sections of the society. Section 18 of

[199] 1978 AIR 597, 1978 SCR (2) 621
[200] 1950 AIR 27, 1950 SCR 88
[201] Indian Railways Government, Maneka Gandhi v. Union of India (Jan 25, 1978) http://www.iritm.indianrailways.gov.in/instt/uploads/files/1436779312324-Maneka%20Gandhi%20v.%20Union%20of%20India.pdf

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the Act provides a blanket protection to the members of the community without any provision to protect innocent individuals against a vengeful accusation from the members of this community. The undefined scope of the section renders it ambiguous. Article 21 provides for the Right of life and liberty of every individual which can be curtailed by a procedure established by law after completely analysing the facts at hand and meticulously applying the law at hand. Therefore, the need arises for the clear definitions of the limits of the law to prevent the exercising of arbitrariness. The fulfilment of the ideals of social, economic and political justice at the expense of the life and liberty of another individual cannot be justified given that our Constitution upholds the ideals of liberty, freedom and equality. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.

The year of 2016 showed a marked increase in the commission of hate crimes against the citizens of the North Eastern states of India. The Centre, proposed the drafting of a special legislation for the protection of the aforementioned citizens from the crimes of hate committed against them. The Supreme Court of the country, disagreed with the Centre on the issue and believed that the provisions in the Indian Penal Code, 1860 will suffice.

CASE ANALYSIS

In the case of Dr. Subhash Kashinath Mahajan v. State of Maharashtra and Anr., the Supreme Court issued a set of directions and laid down guidelines to minimize the misuse of the Act in question. Before the inception of the aforementioned case, the scope of section 18 of the Act read with section 438 of the Indian Penal Code provides for a specific bar on the grant of anticipatory bail post the arrest of an individual for the alleged commission of any atrocities that is mentioned under the Act. This section essentially brings out the unjust facets of positive discrimination that cannot be justified, either morally or jurisprudentially. The curbing of an individual's liberty without a substantiated reason solely because of the caste he belongs to does not align with the ideals that are protected under Article 14 and Article 15 of the Constitution. Section 18 of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 associates more importance and weightage to the liberty of the members of the Schedule Caste and Tribes in comparison to the liberty of the "privileged" class. The roots of the section 18 are found in the furtherance of moral right by the state, which they have no duty to protect, as opposed to the protection of political right, which is the sole reason for its existence. Mr. Tarkunde argued that Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail.

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A Bench of two judges of the Supreme Court has enriched this confluence of Section 438 of CrPC and personal liberty in Siddharam Satlingappa Mhetre v. State of Maharashtra[202], to state that the restriction on the provision of anticipatory bail under Section 438 limits the personal liberty of the accused granted under Article 21 of the Constitution of India.

A blanket exclusion of anticipatory bail under the SC/ST (Prevention of Atrocities) Act is in violation of Article 21 of the Constitution. The issue has been agitated before the Supreme Court on two separate occasions without any success due to a myopic and incorrect understanding of the decision in Gurbaksh Singh Sibbia (supra). In State of MP v. Ram Kishan Balothia[203].

In the case of Ramesh Prasad Bhanja And Ors. vs State Of Orissa[204], the High Court of Orissa interpreted the ambit of Section 18 of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989.

The expression "accusation of having committed an offence under this Act" does not mean that mere registration of the case under the Act would ipso facto attract the prohibition contained in Section 18. The opinion of the police regarding the nature of alleged offence is neither final nor conclusive.

Merely because a case is mechanically registered under the Act, the provision of Section 438 of the Code cannot be said to be inapplicable in each and every case. If the allegations make out a prima facie case under Section 3 or for that matter Sections 4 and 5of the Act, the jurisdiction to entertain an application under Section 438 is definitely ousted. Where however, the allegations do not make out any prima facie case punishable under any of the provisions of the Act, the bar under Section 18 is inapplicable and the provision of Section 438 of the Code can be availed of.

CONCLUSION

The need for a just society has its origins in the morals that are instilled in us by nature and in the rules given to us by the state to that aids in the maintenance of peace and stability of the society. Law is normative i.e. it is derived from the customs, etiquettes, morals, traditions, etc. of the society. Justice Oliver Wendell Holmes stated that laws are for the society and therefore, judges should have on hand on the pulse of the society. It becomes vital to change with the dynamism that is exhibited by our society. The rigorous hold on archaic laws in the face of adverse change is non sensical to say the least. The judges, lawyers and the law makers should provide for laws that help and aid in the furtherance of prosperity of the state. This is possible only when the laws are made and interpreted in a manner that coincides with the mannerisms of the society.

[202] (2011) 1 SCC, 694
[203] (1995) 3 SCC 221
[204] 1996 Cri LJ 2743

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In the early days, when the members of the Schedule Caste and Schedule Tribes were on the receiving end of cruel offences and derogatory treatment, the state, with the monopoly on power, made legislations to protect the down trodden community who were helpless against the manifestations of the social stigmas in the minds of other sections of the society. These manifestations were more often than not cruel and distasteful. The Preamble guarantees, Justice; Social, Economic and Political to all its citizens and Article 14 proves for equal protection of the law i.e. treat equals equally and unequal, unequally. As the sands of time have slipped away, the methods of positive discrimination and affirmative action in favour of the lower sections of the society, they have, now a grasp, stronger than before, on the society. These communities on more than one occasion, used unjustly the blanket protection that has been provided to them by the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989. This blanket protection might have been justified in the earlier days but at present, the grave abuse of the provisions of this Act by the members of the Schedule Caste and Tribes to fulfil their own agendas and at the cost of the lives and liberties of innocent citizens, no less. The pulse of the society at present dictates the need for defining the limitations of positive discrimination and affirmative action in order to protect both the members of the Schedule Caste and Tribe from those individuals who use their privilege against the former and to prevent the mis-utilization of legislations that are in place to protect those individuals who are genuinely affected by the societal stigma by individuals who seek, through their selfish needs to profit from the circumstances of their birth.

The provisions of the Act in question is too absolute i.e. it renders absolute empathy to the members of Schedule Caste and Tribes and robs the benefit of the doubt from the supposed perpetrators of the act. Besides, the interpretation of the piece of legislation is literal and narrow without the enumeration of the perspective of the current society into its provisions. The end result that is achieved by the current interpretation of the legislation is not one that coincides with the definition of Justice, Freedom and Equality. A state infused with these three ideals in its truest sense is more suitable to foster fraternity and facilitate growth and development of the nation than one that is not.

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LEGALIZATION OF PERFORMANCE ENHANCING DRUGS IN SPORTS

- *Arjun Hasija*

ABSTRACT

Athletes face enormous pressure to excel in competition. They also know that winning can reap them more than a gold medal. A star athlete can earn a lot of money and a lot of fame, and athletes only have a short time to do their best work. Athletes know that training is the best path to victory, but they also get the message that some drugs and other practices can boost their efforts and give them a shortcut, even as they risk their health and their athletic careers.[205] Performance enhancing drugs are drugs that are consumed by athletes to excel in a competition. Consumption of a performance enhancing drug is called Doping. Doping refers to the use of a substance (such as an anabolic steroid or erythropoietin) or technique (such as blood doping) to illegally improve athletic performance.[206]

In 1998, a large number of prohibited drugs were found by the police authorities in a raid during the Tour-de-France. This scandal highlighted the need for an independent international agency which would set unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities. The International Olympic Committee took the initiative and convened the First World Conference on Doping in Sport in February 1999, concluding in the establishment of the World Anti-Doping Agency (the "**WADA**") on 10th November, 1999.[207]

LITERATURE REVIEW

1. The use of performance-enhancing substances (doping) by athletes in Saudi Arabia [208]

This article talks about the usage of performance enhancers by athletes. This study confirmed that doping is a common problem in Saudi Arabia and an improvement should be made in anti-doping screening and education to ensure a safe and fair sporting environment for Saudi Arabian athletes.

[205] https://entertainment.howstuffworks.com/athletic-drug-test1.htm
[206] https://www.merriam-webster.com/dictionary/doping
[207] http://www.mondaq.com/india/x/623940/Sport/AntiDoping+regulations+in+India
[208] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5596627/

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2. Performance-enhancing drugs: Know the risks[209]

Some athletes take a form of steroids — known as anabolic-androgen steroids or just anabolic steroids, to increase their muscle mass and strength. The long-term effects of performance-enhancing drugs haven't been rigorously studied. And short-term benefits are tempered by many risks. Not to mention that doping is prohibited by most sports organizations. No matter how you look at it, using performance-enhancing drugs is risky business.

3. Sport as a Common Property Resource- A solution to the dilemmas of doping[210]

In this article, they argue that the current rules against the use of performance- enhancing drugs do confront athletes with incentives counter to virtuous behavior, therefore we urge sports administrators to consider different rules. The use drugs, also called "doping," has a long history. Drug use is a dilemma of collective self-damage. Each athlete has the incentive to use drugs no matter what others a world in which all athletes use drugs is bad for the athletes and everyone situation cries out for a regulatory response.

4. The Coercive Power of Drugs in Sports[211]

This article basically talks about whether the use of performance enhancers are unethical or can it be taken as an expression of liberty. In particular, should liberty give way when other important values are threatened, and when no one's good is advanced? Olympic and professional sport, as a social institution, is an intensely competitive endeavor, and there is tremendous pressure to seek a competitive advantage. If some athletes are believed to have found something that gives them an edge, other athletes will feel pressed to do the same, or leave the competition. Unquestionably, coerciveness operates in the case of performance-enhancing drugs and sport. Where improved performance can be measured in fractions of inches, pounds, or seconds, and that fraction is the difference between winning and losing, it is very difficult for athletes to forego using something that they believe improves their competitors' performance.

5. Banning Drugs in Sports: A Skeptical view[212]

Nearly everyone condemns the use of drugs--amphetamines, cocaine, steroids, and narcotics-in sports. But other drugs-antibiotics, insulin, vitamins, and aspirin are quite acceptable. The basis for these distinctions is not obvious, nor is it self-evident why there should be any restrictions on the use of drugs in sports. Distress about drugs in sports may reflect a deeper displeasure about

[209] https://www.mayoclinic.org/healthy-lifestyle/fitness/in-depth/performance-enhancing-drugs/art-20046134

[210] Edward J. Bird and Gert G. Wagner, Sage Publications, Inc, The Journal of Conflict Resolution, Vol. 41, No. 6 (Dec., 1997), pp. 749-766

[211] Thomas H. Murray, The Hastings Center Report, Vol. 13, No. 4 (Aug., 1983), pp. 24-30

[212] Norman Fost, The Hastings Center Report, Vol. 16, No. 4 (Aug., 1986), pp. 5-10, The Hastings Center

the loss of innocence in sports. The notion of the amateur-the person who competes for pure love of the sport-probably began eroding whenever awards were first given to winners. Wanting to win is not evil, but it is one step removed from the sport itself. Once winning becomes a valid goal throughout society, athletes will inevitably test the limits of the rules, use psychological ploys to gain an edge, and explore a variety of natural and unnatural techniques to enhance the prospects of winning.

6. In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping[213]

In Sandel's view, the use of drugs athletic performance represents "a Promethean aspiration nature, including human nature, to serve our purposes desires." It is not, however, the "drive to mastery" troubles him but the effect of that drive in obliterating "the gifted character of human powers and achievements" recognition that "not everything in the world is open may desire or devise".

7. All Doped Up—and Going for the Gold[214]

The use of performance-enhancing drugs has long been one of the darkest aspects of sport, but the shadow has grown longer in recent years as evidence accrues that athletes are increasingly turning to two drugs relatively new on the doping scene: erythropoietin and human growth hormone. Like hundreds of other substances that are formally banned by the International Olympic Committee (IOC), these two are effective and fairly easy to get.

8. Banning athletes who take drugs is unjustifiable[215]

Sports training is hard, and for the supreme competition of the Olympics the effort has to be supreme; but why is help from drugs "cheating", an unfair advantage from outside help rather than personal effort, when we allow specialized training equipment, sports psychologists, physiologists applying optimizing monitors, electronic positioning of cyclists in relation to pedals and handlebars, and dieticians using foods and additives as drugs? What makes a covert team of sports specialists fair, and taking a pill cheating? Why is training in a low oxygen chamber acceptable but not erythropoietin?

Cheating, for example, tripping a competing runner is confused with fairness; but in competitive sport you aim to win regardless, whether by personal application, help from others, or genetic good fortune.

RESEARCH QUESTIONS

[213] Richard A. Posner, Duke Law Journal, Vol. 57, No. 6 (Apr., 2008), pp. 1725-1741, Duke University School of Law

[214] Glenn Zorpette, Scientific American, Vol. 282, No. 5 (MAY 2000), p. 20, 22 , Scientific American, a division of Nature America, Inc.

[215] Sam Shuster, BMJ: British Medical Journal, Vol. 344, No. 7858 (26 May 2012), p. 33, BMJ

- Why performance enhancing drugs should be allowed in professional sport?
- Whether Athletes are a Nation's property?
- Whether WADA amendment shows progress or decrease in sports law?

RESEARCH METHODOLOGY

The author has used the Doctrinal method of research as there was enough information available in books and articles that empirical type of research was not needed. The empirical research methodology would create awareness among people and the author could get a statistics about how much the people know on the topic but due to paucity of time, it was not possible and so the doctrinal method was followed. The author has put in efforts and has done the best in writing the paper using the doctrinal method of research.

RESEARCH FINDINGS

Performance-enhancing substances, also known as performance-enhancing drugs (PED), are substances that are used to improve any form of activity performance in humans. A well-known example involves doping in sport, where banned physical performance–enhancing drugs are used by athletes and bodybuilders. Athletic performance-enhancing substances are sometimes referred to as ergogenic aids. Cognitive performance-enhancing drugs, commonly called nootropics are sometimes used by students to improve academic performance. Performance-enhancing substances are also used by military personnel to enhance combat performance. The use of performance-enhancing drugs spans the categories of legitimate use and substance abuse.

The Athletes face enormous pressure to excel in competition. They also know that winning can reap them more than a gold medal. A star athlete can earn a lot of money and a lot of fame, and athletes only have a short time to do their best work. Athletes know that training is the best path to victory, but they also get the message that some drugs and other practices can boost their efforts and give them a shortcut, even as they risk their health and their athletic careers. So why not legalize consumption of these drugs when they actually help the athletes excel? There are various kinds of drugs that are consumed. For example, Anabolic drugs build up muscle; examples include steroids hormones, most notably human growth hormone, Stimulants improve focus and alertness, Ergogenic aids, or athletic performance-enhancing substances, include a number of drugs with various effects on physical performance. Drugs such as amphetamine and methylphenidate increase power output at constant levels of perceived exertion and delay the onset of fatigue, Sedatives and anxiolytics are sometimes used in sports like archery which require steady hands and accurate aim, and also to overcome excessive nervousness or discomfort. Diazepam and propranolol are common examples; ethanol and cannabis are also used occasionally.

As far back as ancient Greece, athletes have often been willing to take any preparation that would improve their performance. But it appears that drug use increased in the 1960s. The

precise reason for the increase is uncertain, but we do know that anabolic-androgenic steroids were made available for sale during this period and the East German government began giving drugs to its athletes in an attempt to excel on an international level. Athletes may also misuse drugs to relax, cope with stress or boost their own confidence.[216]

In March, 2003, all major sports federations and nearly 80 governments participating at the Copenhagen World Conference on Doping in Sport adopted the World Anti-Doping Code ("the Code") as the basis for the fight against doping in sport throughout the world". The participants noted that the Code was adopted after "broad consultation throughout the world' For the first time in sports history, a broad range of stakeholders was consulted and could provide comments on the draft Code. During this consultation process, many raised concerns about athletes' fundamental rights. This comes as no surprise as athletes' fundamental rights in doping disputes is presently one of the most debated issues among sports lawyers.[217]

The terms "fundamental rights" and "human rights" are used in a Wide variety of different ways and contexts. For example, the Olympic Charter sets out as a "fundamental principle" that "the practice of sport is a human right". The various different and sometimes inconsistent uses of the terms "fundamental rights" and "human rights" can lead to confusion both on the part of athletes and those charged with adjudicating doping disputes. For this reason, it is essential to clarify the concept of "fundamental rights". [218]

According to the introduction to the Code, the "fundamental rationale for the World Anti-Doping Code" is meant to be to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as the 'spirit of sport', it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind. The Code then lists a series of values characterizing the spirit of sport, namely ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage, community and solidarity. The drafters of the Code felt it was preferable to set forth only a brief list of values in order to "avoid requests for expansion and clarifications", notably as to whether "sport should also be considered entertainment and business". The protection of the athlete's health is the most traditional policy rationale for anti-doping regulation. Although legal commentators increasingly criticize the legitimacy of this rationale the Code explicitly

[216] https://entertainment.howstuffworks.com/athletic-drug-test1.htm

[217] https://lk-k.com/wp-content/uploads/Doping-and-fundamental-rights-of-athletes-Comments-in-the-wake-of-the-adoption-of-the-World-Anti-Doping-Code.pdf

[218] For a quite puzzling approach see AAA No.30-190-00814-02 USADA v Kyoko Ina, Award of September 25, 2002, Christopher L. Campbell, dissenting: para.A.1: "The right to compete in national and international competition is a human right. Olympic Charter, Fundamental Principles, No. 8, p.9. It is a substantial right protected by [US] federal, state and international law. 22 U.S.C §220509(a); United States Olympic Committee Constitution, Art.IX; California State University v National Collegiate Athletic Association (1975) Cal. App.3d 533, 121 al Rprtr. (56; Olympic Charter, Rule 2, Section 10 and Bylaw to Rule 45"

implements it. Indeed, "actual or potential health risk to the athlete" is one of the three criteria set out in Art.4.3 for including a substance on the list of prohibited substances.

In 1998, a large number of prohibited medical substances were found by police in a raid during the Tour-de-France. This scandal highlighted the need for an independent international agency which would set unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities. The International Olympic Committee took the initiative and convened the First World Conference on Doping in Sport in February 1999, concluding in the establishment of the World Anti-Doping Agency (the "WADA") on 10th November, 1999. Its key activities include scientific research, education, development of anti-doping capacities and monitoring of the World Anti-Doping Agency Code (the "WADC"), which is the document harmonizing anti-doping policies in all sports and all countries of the world.[219] India is a signatory to the Copenhagen Declaration on Anti-Doping and the UNESCO International Convention against Doping. The Government of India set up the National Anti-Doping Agency of India (the "NADA") as a registered society on 24th November, 2005. NADA accepted a revised version of the WADC on 7th March, 2008 and framed the Anti-Doping Rules of NADA in conformity with the WADC.

Unfortunately, these Anti-Doping Rules were adopted by NADA in verbatim without taking into consideration the realities on the ground in India. The Anti-Doping Rules place a strict responsibility on athletes to be aware of what substances enter their body. However, in India, most athletes are not educated to the same level as in foreign countries and lack adequate access to resources which would enable them to identify the ingredients of what they consume. When athletes attend and reside at training camps for several months in a year, the camps are responsible for their food and supplements and the athletes cannot be expected to monitor or refuse the food being provided to them in these camps or by their coaches.

CASE LAWS

In a recent case, six Indian athletes who were gold medalists in the Commonwealth Games were tested positive for the presence of anabolic steroids in their urine samples taken both in and out of competition. The case became a battle between the athletes and the NADA and the National Dope Testing Laboratory in New Delhi ("NDTL") was given a special sanction to test all the supplements consumed by the athletes. The NDTL confirmed that Ginseng pills consumed by the athletes contained prohibited substances. It was not disputed that their coach provided these pills to them. It was the responsibility of the Sports Authority of India to provide for all supplements but since this was not done in spite of repeated requests, the coach purchased bottles of these supplements. The Anti-Doping Disciplinary Panel ("ADDP") held that the athletes bore "no significant fault or negligence" and issued a reprimand and suspension for a period of one year from the date of the positive test. The NADA and the WADA filed an appeal against the first

[219] http://www.mondaq.com/india/x/623940/Sport/AntiDoping+regulations+in+India

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instance decision of the ADDP and the athletes also filed cross-appeals against the first instance decision of the ADDP praying for a complete reprieve. In appeal, the ADDP upheld its first instance decision.[220]

CONCLUSION

WADA's effort might be seen by some as the latest attempt of the sports world to immunize sports from state control. The situation is more complex, however. The adoption of a Code, which complies with the fundamental rights of athletes, was only made possible thanks to a broad consultation of all stakeholders. Indeed, as a result of such consultation, the concerns about fundamental rights were duly taken into account in the course of the drafting process. This represents a major step forward as opposed to an approach that ignores fundamental rights requirements and, thus, leaves the enforcement of such rights to the courts.

The NADA Anti-Doping Rules specifically state that it is the fault of the athlete if the supplements consumed are contaminated. An athlete is expected to conduct research before consuming any supplement. However, there is a lack of laboratories in India that carry out such specific tests on supplements and if an athlete finds such a laboratory, the cost of carrying out the tests are high.

It should be the decision of an athlete to consume a drug or not. Every person has their fundamental rights which cannot be taken away. India needs a specific number of laboratories to carry out such specific tests on supplements and notify the athlete as to what exactly is he consuming and whether its going to help him.

[220] http://www.mondaq.com/india/x/623940/Sport/AntiDoping+regulations+in+India

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THE MISFIRE OF THE CURRENT INDIAN GUN LAW POLICY

- *Aditya Singh*[221]

ABSTRACT

This research paper tries to establish the fact how the India's current gun law policy is not sufficient enough, in order to prevent and control the massive trade of illegal arms and ammunition across the nation and how the criminals with political ties are able to bend the law for their own comfort. However, the limitation of this document would be whether there is a need for a reasonable and lenient gun law policy for the benefit of the common man in a justifiable need for arms and ammunition. The topic of the research holds a lot of importance as it connotes to the reality of India with respect to the huge trade and the practice of illicit craft of manufacture of firearms across the nation. This becomes a gateway for various illegal gangs to operate in various local towns across the nation and also attracts terrorist organizations, which seize control over some regions of the country and create their own safe haven. Apart from that, the misuse of law by the politically tied people with power who have most of the legal ownership of guns without having any reasonable reason for such an ownership is another issue. The police force also feels that they lack in numbers as this illegal trade network is very vast and steadily growing illegal market, which operates in small towns and areas having very narrow and shady streets which makes it very difficult for the police to track down such criminals. India has one of the most stringent gun law policies across the globe but it seems inadequate for controlling tackling down this illegal manufacture and trade of arms and ammunition. The policy of licensing and registration has made the situation very inconvenient for the common man who has no power to obtain any kinds of weapons, even in a reasonable need but the politically tied parties and criminals are benefitting because of such policy and the existence of such a wide trade network.

FACTS

Considering the India's current social, economical and political condition, it deems really important to tackle the issue of illicit practice of manufacture and trade of illegal firearms across India. Hence the topic for the research now, there are plenty of reasons for why such research is been done and why is it so important for our developing society. First of all, the current law has misfired with respect to such a problem because there is no specific and certain law in the nation

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which exclusively deal with the problem of manufacturing and trading if illegal firearms. How so ever the arms act of 1959 provides with a seven years of imprisonment in section ---- for the illegal position or manufacture of such arms. More over the new amendment places emphasis on the licensing and registration of pellet guns, blank firing round, air guns, fake guns used in movie cinema etcetera which does not even move close to solving such issues but provides with one of the most stringent laws with respect to owning a registered, licensed gun with the bourgeoisie. While the main problem focuses on the prevention of such illegally made and illegally traded weapons. Apart from that people with political ties along with various gang members which are present in Rajasthan, Bihar and UP, terrorist organizations and contract killers have a upper hand in obtaining weapons both through legal and illegal means; but the ones who are in dire need for the protection of their farms and family are going from post to pole to no avail. Speaking about the licensed and registered guns in India which the people with political dice are easily able to acquire for which no substantial record for licensing is enforced by the authorities, adding to such issue the illegal firearms are even more easier to obtain by such people which can be said to be so easy to obtain that even anyone with Rupees 5000 pocket can obtain it. The national crime record beauro in its 2014 notification stated that there were 17,448 weapons related crime occurred between 2010 and 2014 out of which 85% were committed with illegal weapons. Now, there's a vast difference between legal and illegal firearms; first of all, illegal bullets/shells are hard to trace as they do not have any licensing and registration number. Secondly these weapons are easily available in black markets situated in towns and small cities spread across the nation. Last but not the least, the type of ammunition places a 50% more risk of death because these bullets are made up of local, cheap and dense RDX placed inside a weak iron or metal projectile. Thus, one can say that the condition of India with respect to gun law policies and firearms laws are inadequate or deficient to prevent such practice of elicit craft of manufacture and trade of illegal firearms. Currently the aim of upcoming legal provisions should be based on preventing, controlling and regulating such issues and not making the current license policy even more stringent. India has a lot of various local towns and cities which have become major hubs for the trade and manufacture of such illegal firearms, out of which Munger (A town in Bihar), Furrukhabad (small city in Uttar Pradesh) and Delhi would be a part of this research.

Another aspect of such an issue also covers the issue of smuggling of illegal arms and ammunition through porous borders in the nation. These weapons are smuggled through the docks which amount to estimated 50% of the weapons held by terrorist organization and gangs situated in many parts of the country. Thus in the famous lines of Vladimir Ilyich Lenin, it can be said "a system of licensing and registration is the perfect device to deny gun ownership to the bourgeoisie". Therefore, one can say that present gun laws in India are not adequate or sufficient enough to prevent and control the illegal manufacturing and trading of illegal firearms across the nation while present laws can have said to be one of the most stringent gun laws policies in the world. 'Imposing license on air guns and blank rounds are like imposing licensing on toy guns

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which does not even provide for the solution, however the illegal gun manufacturers and traders have been benefiting since 1857 where the mutiny by started by the Indians in the British India. At that point of time, the mutiny by the Indians for the first time was supported by arms manufactured by the local people which the colonizers to enact the Arms act of 1818. The policy then, also aimed at preventing the acquisition and ownership of guns by the people, so one can say that such policy is originally adopted from the English and does not adhere to the social Indian standards. However, the Indians who were considered to be the loyal subjects of the colonizers were entitled to possess a gun. Had the Indians been armed when the East India Company changed its function from a trader to a judiciary, executive and legislature; there would've been more bloodshed but it would've provided the Indians, a better chance to prevent the suppression of their whole nation.

Currently, News reports along with the records of the National crimes records beauro state that a small town in Bihar, Munger is the biggest hub for the manufacture of illegal weapons in the country where owning an illegal weapon is a part of the local culture. Its claimed that craft of manufacturing arms have been very prevalent in this region since its very establishment in the colonial era which is why the local people who are involved in such practices are pretty skilled at the job. Also people skilled at such jobs employed at the government factories often lose or leave their job due to the less operation and work in the factories, which is why the wages of such people are very less with respect to the kind and the nature of the job. Such people often seek jobs in these illegal manufacturing units across the country irrespective of the risk factor involved and also due to very high payments received from such trade. Munger's supply of weapons ranges from a locally made "katta" to a "Kalashnikov", and the local police claims that the quality of these illegal copies of these weapons are so sophisticated, that even ranked officers are not able to distinguish between the two. Another town located in UP by the name of "Furrukhabad" was the one violent city in India till 2011 in relation to crimes associated with arms because of the easy availability and open black trading of such weapons. The biggest advantage these criminals have is that the guns cannot be traced from any kinds of ammunition and can be disposed off very easily (due to cheap pricing), which makes it ever more difficult for the police force to track such cases. The claims of the National crime records beauro clearly indicate that nearly seventy-five percentage of gun related crimes are committed by illegal weapons. There is a dire need for a special branch of police which would specifically check and account for preventing such an illegal trade network to exist. One would not believe but even the capital of the country has become a major hub for the trading of these illegal firearms, where in 2012 was first seize of illegal weapons by the Delhi police which was reported in one of their 2012 notification. Almost 90 percentages of the guns traded in Delhi come from Munger. These weapons also come from all over the nation wherever they are manufactured along with the internationally smuggled weapons which provides for the demands of such a black market. Most of these arms are transported through roadways as there are thousands of entry and exit points to

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Delhi. It becomes impossible for the police to track down every route in order to tackle such a trade; without precise intel and information, there is not much one can do to prevent such large scale illegal trade operations. Most of the demand for such arms arises from the various illegal gangs which operate in Bihar, Rajasthan, UP, MP etc. which is why this huge network stays away from the eyes of the common man. The demands of the terrorist organizations are mostly catered by the smuggling of the weapons made in foreign countries, bought in through the porous borders in the Northern India. However, the local manufacturers often find out ways in order to contract with these terrorists for the trade of such weapons. This is how the capital of India, has been becoming a major hub of such illegal trade of weapons while the police force still seems to fade away against the vast industry of arms and ammunition. One can easily see how the law has misfired by making a policy of licensing and registration very strict while not providing for the various classifications of illegal weapons and its craft of manufacturing such arms. The crux of the problem lies in the prevention and control of this vastly growing illegal market of illegal arms and not in the creation of the grave hindrance for the common man in acquiring and possessing an arm for a reasonable cause. On the other hand, the people who should not have guns and ammunition (criminals, gang members, politically tied groups and terrorists) have a very easy access to such illegal firearms through the local traders and manufacturers of illegal firearms.

The United nation's stance on gun law policy also falls on a very stringent level as it seeks to gain control of the tracking down of legally sold weapons across the globe. While currently they seek to impose gun control in the United States of America as well as in the rest of the world. It's after the America's second amendment of the constitution which grants people the rights to acquire, possess, produce and use guns in various conditions. On December 2000, the general assembly of the UN adopted a treaty against trans-national organized crime. One of the protocols which could not be implemented was against the illicit manufacture and trafficking of arms and ammunition all over the world.

ISSUES INVOLVED

I. The first issue which arises from the current Indian situation with respect to production and trade of illegal weapons, lies in deciding, whether or not the the new amendment in the gun law policy or the new legislation, which aims at making the law even more stringent, is helpful or not, in preventing the possession of illegal weapons ?

Crux of this research lies upon the factor of the prevention of the illegal trade and production of firearms, which would, in the normal course action, would require the law to be made more stricter but however, making the law even more stringent would not play a major role if such amendment is made with respect to possession of a legal firearm.

II. Another issue arising from such facts is whether or not, the current gun law policy is inadequate to tackle the current problem?
The current gun law policy can easily be seen by one, as a complete full proof formula to track and tackle the issue of illegal weapons in the country as it does provide for a seven years' imprisonment, life imprisonment and also death for the sanction for such an issue. However, it fails to establish the classification of a wide range of weapons along with the machinery required to produce such guns which can broaden the scope for enforcing proper investigation.

III. Whether or not, there is a need for a new legislation or further amendment of the current gun law policy for tracking down and tackling the issue of illegal production and trade of arms and ammunition in the whole country ?
Where the issue cannot be tackled by serious investigation and operation of the police force due to the lack in numbers in comparison to the vast network of this illegal black market, the nation would require a backup by a new law or any amendment which can in turn, provide such backup to the police force.

These issues have to be dealt with keeping in regard, the skilled laborers who are not just criminals but have the required and efficient skill in crafting and manufacturing firearms. Many of them enter this trade due to low economic status and others because their families have been traditionally involved in such business from many years. Apart from the, the insufficiency of the police force is another issue, which makes it impossible for such a small force with little backup in order to track and prevent such massive trade of illegal weapons across the nation.

LAWS INVOLVED

There is only one central legislation in India, which deals with the current issues i.e. The arms act which was initially enacted under the colonial rule by the Britishers in order to prevent the possession of guns by the local Indians. This legislation was adopted by the parliament of the republic of India again in 1959, for which one might say that such a law does not adhere to the community and traditional standards of the country where originally, activities like poaching and hunting are considered a part of one's heritage in many communities across the nation. Basically, the current act has only six to seven provisions concerning the ban of guns without providing any specific and precise definition of gun, various gun parts and tools, machines and the local craft of

manufacturing guns. Sections 3, 4, 5, 7, 27, 28 and 29 of this legislation provides for the ban of guns.

First clause of section 3 of arms act of 1959, requires one to have a legal registration and license for obtaining/acquiring/possessing a legal weapon whereas the second clause of this section states that any person having more than three firearm has to submit any one of such firearm to the licensing authority within a specified period of ninety days. This section also provides for an exception for the owner of any gun range or a shooting club to hold a registered licensed .22 bore rifle or an air gun for recreational shooting or sporting activities. Its seems rather ironical how there is no availability of legal weapons for those who actually need it for a reasonable reason and on the other hand such a provision is promoting shooting, but only for those who own a shooting club.

Section 4 of such legislation along with the arms rules provides for the exception whereby any person can hold a legally registered firearm in his or possession in the following three circumstances: -

1. Where a person is in a very grave danger of his or her life and the reason of which can be logically established in the interview with the gun issuing authority. An example- A person may require a firearm for his or her own protection from a stranger who has been giving him/her threats of battery or death from an unknown source.
2. Where a person has a reasonable need for acquiring and possessing a firearm with respect to the protection of his or her property which is in a grave danger of being destroyed or damaged. For example- a person requiring a rifle for the protection of his 3 acre farmland which is usually damaged by the various local wild animals of the region.
3. Where the government feels that the region is such, that the social atmosphere creates a dire need for the possession of firearms by the general public for the protection of themselves and their family, it can, by a gazette notification allow such a scenario.

Along with that, Section 5 of the arms act establishes that only the government will have monopoly for the legal manufacture, sale and trade of firearms in the country. Along with that it also states that if a person needs to transfer the ownership of his/her legal firearm, he/she will have to inform the nearest magistrate or the officer in charge of such transfer 45 days before commencing such transfer. Also, such a notice has to include all the necessary details of the

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transferee including the name and current address. Section 7 lays down that no person shall acquire, transfer, sell or manufacture any illegal arm or ammunition.

The punishment for contravening the provisions of section 5 is laid down in section 27 of the arms act, 1959 which states that a person could be imprisoned for up to his/her lifetime, or could be hanged until death and also provides for fine depending on the gravity of the offence and the judgment of the court.

Section 29 provides the punishment for the purchase, which is mentioned in the first clause and delivering, which is mentioned in the second clause, of any illegal arm or ammunition. It states that the punishment for such an offence can be imprisonment up to a period of 3 years or fine or both depending from case to case basis.

Along with that, section 30 of the act states the punishment to the owner of a legally registered weapon, having obtained the license by contravening any of the condition or provision of such legislation or by false pretenses.

ANALYSIS

First of all, for such a desperate situation which requires change, various aspects have to be taken into consideration like:

1. The history of the nation with respect to gun law policy
2. the social status of the country,
3. The amount of crimes relating to illegal weapons
4. The existence of the vast illegal trade network of weapons
5. Need for a better force in tackling the issue
6. The current gun law policy- a strict procedural law
7. The misuse of law by criminals and people with political influence and power
8. The major hubs for trade and manufacture of such weapons

One of the major reasons for the constant rise in the illegal business of manufacturing and trading weapons is the rise of such skilled laborers in small cities and towns across the nation. Such towns like Munger and Furrukhabad have a lot of people who are in a very lower economic state and many of such people decide in to risk with the law in order to have a better and a sustainable life. Along with that, such trade is so vast and efficient that it has established one of its biggest networks in the capital of the country. There is also a lot of supply of weapons from the smuggling taking place in the porous northern borders through the ocean. Also, there is backing up the supply of these illegal weapons by the demand created by the various terrorist

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organizations, Maoist groups and the rise of the local gangs in Maharashtra, Uttar Pradesh, Madhya Pradesh, Harayana, Rajasthan etc. These parties, not only provide the black money to its traders and cater to its supply, but also lead to a rise in such gun related crimes across the nation.

Another major role is played by the police in tracking down such trade and which has constantly failed in preventing any massive trade of weapons. The police seem to lack the tools and mechanism needed for tracking down such a vast illegal trade network. I think it deems fit for this situation to enforce the defense forces to create a special force in collaboration with local police forces of such regions affected by the illegal manufacture and trade of firearms. This is because the police force is very small in numbers with respect to such a wide trade network and it is practically impossible for them to tackle such an issue. Thus, this special force would be responsible for tackling the issue which will have powers to check any commercial vehicles, individuals, storages etc. The shortage of the police force will be met by the defense personnel, both in numbers and in providing weaponry. Plus, only specially trained offices shall constitute in such a collaboration. This force also must create and enforce plans of creation of various surprise check posts and points on a daily basis, in the areas mostly affected by the illegal gun trade, in order to prevent such trade to some extent. Along with that a major plan of checking the whole sea ways of the porous northern borders, through which guns are smuggled into the country, needs to be comprehended. The situation is very crucial as this trade is main provider of illegal weapons to the terrorists, Maoists and the various local gangs of small cities and towns.

As we can observe, the current law is not holding up in controlling and preventing this massive gun trade. Even the latest amendment to the arms act, 2018 brings in about more stringent rules, but not with respect to the trade of illegal weapons but with respect to the licensing and registration of legally owned guns and ammunition. It brings in about change by making it mandatory for the public to issue license for pellet shooting guns, blank rounds, air rifles and even the replicas used in the cinematography business. This seems so absurd, that the ones representing the public are making such rules. One might also ban toy guns, but it would have no repercussions in the prevention of such illegal trade. Moreover, the concept of this licensing and registration, only prevents only the common from obtaining a weapon, even if he or she reasonably needs it. On the other hand, the criminals, gangsters and people with political influence are easily able to get legal weapons from the issuing authority. It feels like as if the government is trying to mock the common man by imposing such a strict policy for obtaining firearm whereas, all such dangerous people who should not get a hold of such weapons are flourishing from this trade. The social status of the country does not adhere to such strict standards which has a culture and history of possessing weapons and indulging in practices like poaching and hunting. The law originally came into force as the colonizer did not want the public to hold arms and ammunition. But the rate of crimes in some parts of India are huge as

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accounted by the NCRB (National Crimes Records bureau) indicates that there were 14,788 gun related crimes between 2010-14, out of which 85 percent were committed by illegal weapons.

CONCLUSION

In the end, one can say that there is a need for a new amendment to arms act, 1959 or a new legislation aiming at reducing the strictness of obtaining a legally registered weapon along with increasing the strictness of law with respect to illegal manufacture and trade. This situation is not caused only by an improper implementation, but majorly because the legislation provides a way for the common man in need to stay away from weapons and opens up ways for the these bad, corrupt and malice minded people to get hold of these weapons and also to benefit from its illegal trade. It can be said that nonetheless, there may be a further major amendment in the current arms and ammunition act of 1959 or a requirement of a new legislation which would relate to the classification of of such crimes in detail, including the local parts and traditional arrangements made by the traders and manufacturers of such illegal weapons. Also, providing for reasonable and proportional sanction for such offences which not only have been harming the society for decades, but create a lot of power and potential for harming the society in a very heinous manner.

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EVOLUTION OF SEXUAL HARASSMENT PREVENTION LAWS AND THEIR EFFICACY IN WORKPLACE

-Akshey Kumar[222] & Harshita Goel[223]

ABSTRACT

Women constitute half the humanity. Men and Women both should enjoy equal status in this society. Unfortunately, this balance has not been maintained in human society. Women have suffered and are still suffering with discrimination in silence as everywhere women have been subjected to inequities, indignities and discrimination. It is good for a society or country that, there is increase in numbers of women at different workplace over the last 3 decades, what has also increased is their vulnerability to unwanted attention at the workplace.

Today, the problem of sexual harassment in workplace is acknowledged as a serious issue. It violates the human right, creates discrimination on sex and also effect safety and health regarding issue. Sexual harassment is a form of sex discrimination as it violates the laws against sex discrimination in the workplace. It is a growing problem to which our government and legislature trying their best to combat this problem by adopting new policies and measures.

Doctrinal method has been adopted to collect and also to provide multi-faceted insight on the developments in the field of sexual harassment at workplace and the loop holes keeping in view the current scenario. In conclusion, the essay would take a firm stand for providing suggestions for the same.

INTRODUCTION

Men and Women have diverse physical and temperamental qualities; together they form a complete race that is why they are complementary to each other to make the world exist. There exists equality between both of them by nature but not by society. In the era of Vedic civilization (1500BC-600BC) the society was so advanced in nature that boys and girls were not so discriminated on the basis of sex but nowadays discrimination is prevailing everywhere. There was no such law for discrimination at that time but now the Constitution deals with problems arising from any type of discrimination in the society.

The Indian Constitution guarantees to protect fundamental right to all of its citizens and provide equality of status and opportunity to all citizens of India. Even the Constitution does not want

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any type of discrimination among the citizens of India on the basis of caste, religion, sex, race, place of birth, descent, residence. Equal opportunity should be provided to all in matters of public employment[224].

Besides the law made by the legislature to avoid discrimination of public employment, the discrimination still prevails. There are several crimes prevailing in the society bringing discrimination in the society amongst which the offence of sexual harassment at the workplace has grown over a period of time. Though the act of sexual harassment at the workplace has serious results but still all the women may not be willing to file the case with the fear of reprisal from the harasser, losing the livelihood, being stigmatized, or losing professional standing or may because of the personal reputation. Today at the global level the act of sexual harassment is considered to be violative of the right of the women to work and form a shape of violence against them.

Sexual harassment is a type of behaviour, which involves a range of behaviour, and victim finds it difficult to explain what they suffered. The word harassment according to *Merriam Webster dictionary* it comes from an old French word harasser, *harer* means for being pursued by dogs. Sexual harassment of women at workplace (Prevention, Prohibition and Redressal) Act, 2013 has adopted the definition of 'sexual harassment' from the *Vishaka Guidelines*[225]. According to Section 2 sub-clause (n)[226], "Sexual harassment" is a type of behaviour towards the women and any type of unwelcome/uninvited acts whether directly or by indirectly, makes any; physical contact, demand or request, showing pornography, sexually coloured remarks, or any other unwelcome physical, verbal or non-verbal conduct of sexual nature towards women and this offence is cognizable and bailable.

The definition of sexual harassment includes a key word 'Unwelcome/Uninvited'. This word means 'not wanted' and all such conduct/act is totally prohibited where there is mere absentia of consent. Sexual or romantic interaction with consent between the parties at workplace may be offensive to observes or may also led to the violation of workplace's policy, but it is not sexual harassment.

According to Section 2 sub-clause (o)[227] , "A 'workplace' is a place where people work which includes any Central/State Government office, factory, NGO, private organization, school, university or any place of education, government company, co-operative society, local body, hospital or nursing home, household, sport complex or place where sports is played, [unorganized sector][228] and any place where the employ has to visit for work purposes."

[224] INDIA CONST. art 16.
[225] Vishaka and Others Vs. State of Rajasthan and Others (JT 1997 (7) SC 384).
[226] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
[227] Ibid.
[228] Section 2 sub-clause (p), Supra note 3.

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PRE 1997 SCENARIO

During the period close to nineteenth century *Helen Campbell* in year 1887 published a report on Women Wage-Workers, invoking the common understanding that how household service become the worst degradation that comes to woman, also he described some detail form of sexual extortion practiced upon women working in factories and the garment industry[229]. Incidents of sexual harassment way back to the era of chattel slavery. African-American women and those involved in any type of domestic service from sexual coercion. Upton Sinclair in year 1905[230] showed the predicament of women in meat packing industry by comparing the forms of sexual coercion practiced in "wage slavery" and "chattel slavery"[231].

The case of *Vishaka and others v. State of Rajasthan* in year 1997 played an important role in establishing law against sexual harassment at workplace, made it illegal in India. Before these guidelines came into force and amendment bought to section 354 of IPC, the provisions of section 354 provided with assault or criminal force against women and intention to outrage her modesty or knowledge that her modesty would be outraged. In other words, it provided with the act or force done or committed to outrage the modesty of women and the intention to do so.

In the case of *Ram Das vs. State of West Bengal*[232] , a person had ladies in his compartment of a train and at night, he removed his pants in front of those ladies, before he was going to sleep and the women in the compartment held the act to be violative of their modesty but it was held in the following case that the ingredient of section 354, the intention to commit such an act that would outrage the modesty of the women was lacking.

On December 18, 1979, UN adopted a Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which was ratified by India, often described as an international bill of rights for women. It called for the equality of women and men in terms of human rights and fundamental freedoms in the political, economic, social, cultural and civil spheres and it also underlined the discrimination and attacks on women's dignity violating the principle of equality of rights. This UN Convention set a stage for the decision in the landmark judgment of *Vishakha and others vs. State of Rajasthan*[233].

POST 1997 SCENARIO

The case of *Vishaka and others v. State of Rajasthan*[234] in year 1997 played an important role in establishing law against sexual harassment at workplace, making it illegal in India. It took almost 16 years for the Indian Parliament to enact The Sexual Harassment of Women at Workplace

[229] Reva B. Siegel, A short history of sexual harassment, Directions in Sexual harassment law, Forthcoming Yale press 2003 at 3.
[230] Upton Sinclair, The Jungle (1960) (1905).
[231] Siegel, Supra note 7.
[232] AIR 1954 SC 711.
[233] AIR 1997 SC 3011.
[234] IbId

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(Prevention, Prohibition and Redressal) Act and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules in 2013.

The facts of this case are that, in year 1992 a lady named Bhanwari Devi, a social worker who was engaged in by the state of Rajasthan to work towards the prevention of child and multiple marriages in villages. She had prevented many child marriages in villages. During the course of her work as her work was met with resentment, in September 1992 she was brutally gang-raped in front of her husband. She had not been medically examined in the primary health centre due to lack of female doctor, as there was only male doctor who refused to do examine her. Then the doctor of Jaipur only confirmed her age without making any reference to rape in his medical report. Based on these facts feminism power came together to provide justice to Bhanwari Devi. As a part of this PIL was filed by Vishaka and other women groups against the state of Rajasthan and Union of India before the Supreme Court of India. The Supreme Court laid down guidelines to prevent sexual harassment of women at the workplace.

Following are the observations taken by the supreme court on 13th August, 1997 authored by Chief Justice of India of that time named J.S. Verma, Sujata Manohar and B.N. Kirpal. The Supreme Court observed that:

- Sexual harassment of women at workplace is a violation of fundamental rights under Article 14, 15, 16(2), 19(1)(g) and 21of the Indian Constitution.
- It is the fundamental right of every citizen to carry on any occupation, trade or profession depends on the availability of safe working environment. Thus, sexual harassment is also a violation of rights to live with human dignity[235].
- Article 42 in Directive Principles of State Policy come up with liability on State to secure just and humane conditions of work.

These all observations were kept in mind before giving the landmark Judgment. The Supreme Court of India had come up with few legally binding Guidelines based upon the rights and principles provided by the Constitution as well as The UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

These guidelines provided with the employer or any other responsible person of the workplace to prevent the commission of harassing acts in the firm; shifting accountability from individuals to institutions, i.e. to provide the employers power to ensure hostile environment at the workplace and avoid harassment of the women employees; to create a complaint mechanism to redress the complaint of the victim; in the conduct rules, proper penalties should be mentioned to punish the offenders, in case of private employers, Prohibition of sexual harassment in the standing orders under the Industrial Employment (Standing Orders) Act, 1946, to be included and also the victim

[235] Pallavi Kapila, Evolution of the Indian Law on workplace Sexual Harassment, Volume 6 Issue 9, International Journal of Humanities and Social Invention, pp 46-52, (Sept. 22, 2018 20:30AM).

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who have faced harassment should be given an option to seek transfer of either the offender or their own self.

These guidelines were followed by all kinds of employment, from paid to voluntary, across the public and private sector also to all women whether students who are working either part time, full time, or on the contract or even voluntarily. Guidelines was most welcomed by many states and territories of India, but many others didn't. There were several institutions who failed to provide complaint committee as envisaged in the Supreme Court Guidelines. These guidelines brought the working women in to the limelight and intensified the feminist movement in India. There were some of the cases that were dealt through these guidelines such cases are *Apparel Export Promotion Council vs. A.K. Chopra*[236] , *Rupan Deol Bajaj vs. Kanwar Pal Singh Gill*[237] , etc., these all cases clearly marked that sexual harassment of millions of working women is going on across the country, everywhere, everyday irrespective of their locations

After ten years of Vishaka Guidelines legislative had drafted a bill named Protection of women against Sexual Harassment at workplace Bill, 2007, it was later approved by the Union Cabinet[238] . In 2010 The Bill was introduced in the Lok Sabha but not passed, later on 3rd September, 2012, the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was amended and re-introduced in Lok Sabha and passed. On 26th February, 2013 this bill was passed by Rajya Sabha also. On 23rd April, 2013 the bill received the President assent and was published in the Gazette of India as Act No. 14 of 2013. Finally, on 09th December, 2013 The Indian Ministry of Women and Child Development notified this date as an effective date of the Prevention of Workplace Sexual Harassment Act, 2013 and the Prevention of Workplace Sexual Harassment Rules.

Media play a vital role in doing survey which made all the eyes of the wings and layers of the government- legislative, executive, judiciary at central, state and local levels to decide their best and come up with a particular act on this issue as it has been observed that guidelines and norms are not sufficient to deal with the incidents of sexual harassment of women at workplaces. Therefore, the legislation has enacted Sexual Harassment of Women at Workplace Act, 2013. A survey conducted by the Indian National Bar Association (INBA) in year 2016-2017 that 38% women/girls still faced sexual harassment at workplace[239], 65.2% women said their company didn't follow the process laid under the Act, 46.7% surveyors said that the members of internal

[236] AIR 1999 SC 625, [In this case it was held by the Hon'ble Supreme Court that everyone no matter what their position at workplace they all are bind under these guidelines. Even any unwelcome act of superior officer towards his junior woman would amount to sexual harassment.]
[237] AIR 1996 SC 309.
[238] Nishith Desai Associates, India's Law on Prevention of Sexual Harassment at Workplace, NDA Legal and Tax Counselling Worldwide, (Sept. 26, 2018 15:00 PM).
[239] Rashmi Rajput, 38% woman say they faced sexual harassment at workplace: Survey, The Indian Express,(Sept. 23, 2018 09:17AM), http://indianexpress.com/article/india/38-per-cent-women-say-they-faced-sexual-harassment-at-workplace-survey-4459402/.

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committee were not aware of the sections and the legal provisions available under the Act, 70% women said they did not report sexual harassment by superiors because they feared the repercussions, according to a survey conducted by the Indian National Bar Association in 2017 of 6,047 respondents.[240]

Through the rising cases and the situation of crime at workplace against female employees, the *Sexual Harassment of Women at Workplace Act, 2013 had bought several changes to the law of sexual harassment*. The following changes may include:

• *Section 2(a)* tumefied the term *'aggrieved woman'* as according to it, any women of any age, whether employed or not, in relation to workplace, can be putative for sexual harassment.

• The scope of the term sexual harassment also widened under *section 2(n)* which defines *'sexual harassment'* as defined earlier.

• It even *section 2(o)* which defined 'workplace', is not limited to the offices as defined in ancient times as workplace, refers to all the organisations across different sectors and all the other places where the employees are usually found employed.

• *Section 4 clause (1)* provides genesis of the *'Internal Complaint Committee (ICC)'* to be instituted mandatorily in all the institutions. In addition to it, not only all the organisations but according to the proviso of section 4, all the levels and the units of a single organisation are also required to have devised an Internal Complaint Committee (ICC). *Section 26 clause (1) sub clause (c)* provides that, while scrutinizing the aspect of the criminal law if it is observed that the employer of the organisation has to initiate an Internal Complaint Committee (ICC) in the organisation and if not implemented or instituted, the employer may be punished with the fine of Rs.50000.

• *Section 19* provides with different *'Duties of the employer'* which provides that the employers of the different organisations should organise different seminars, programs, etc., to provide education to the other about the act and the implications of any wrong if done in the organisation, provide safe working environment and even to provide necessary facilities to the ICC of the organisation.

• *Section 26(2)* provides the punishment to the employer in case of any crime as mentioned in the act is being committed by him, which may even get twice the penalty amount in case the offence has been committed even earlier. Besides, that in case any serious punishment has been given earlier to the offender, it is on the discretion of the court to decide the level of punishment in case

[240] Manisha Chachra, 70% women don't report workplace sexual harassment, employers show poor compliance, Hindustan Times, (Sept. 20, 2018 17:08PM), https://www.hindustantimes.com/india-news/70-women-don-t-report-workplace-sexual-harassment-employers-show-poor-compliance/story-40pcb35iu328VSLjjjpotL.html.

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the offence is committed again and also the license, application of registration or any approval by such employer would get cancelled by the government or any other authority.

CIVIL REMEDY

Further the act of 2013, provides the civil remedy of harassment which may be of criminal nature to be filed with the police under the following provisions of law:

Under *section 354* of Indian Penal code (IPC), there came an amendment, 'The Criminal Law Amendment Act, 2013' which was being commenced on the 3 April 2013. The amendment defined *section 354(A)* which elucidated the term sexual harassment either by physical contact, demand or offer of sexual favours or showing pornography against the will of the woman, to be penalised by providing vengeance of 3 years imprisonment which may either include fine or not. It even defines the act of sexual harassment as making sexually coloured remarks which is held to be offence, providing vengeance of a period 1 year which may either include fine or may not include the fine.

OCCURRENCE

The act of sexual harassment at workplace may occur in two ways:

• ***Quid pro Quo*** means this for that. The following act occurs when any employer or any authority figure offers or mere insinuate that he may give the employee some kind of benefit, usually in the form of promotion, income, any type of expensive gift etc., in return for the employer or any such authority's sexual demands fulfilment. In the country like India, such act can be very well observed at the workplace. In the countries like Belgium, Canada, France, New Zealand, and Spain this act is considered to be explicitly prohibited. In fact, in Belgium the employer is responsible for the protection of employees against sexual harassment at workplace. In Canada all the employees are entitled of sexual harassment free employment. While in the country like New Zealand, the law defines sexual harassment as an act of discussing personal grievances with the employer[241].

• ***Hostile work environment*** is a kind of sexual demeanour which vexatious interferes with the staging of the individual's job or create an intimidating or an offensive workplace to work. It can be read with section 3 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, which states the prevention of sexual harassment by creating such circumstances which beneficiary of the proper performance of the individual at the workplace are. The act also implied or explicitly expressed the sexual favours in the form of verbal, visual, physical and psychological with sexual undertones.

[241] Kumar, E. Vijaya, Sexual Harassment of Women at Workplace A socio legal study, Handle (Sept. 20, 2018, 14:20 PM), http://hdl.handle.net/10603/63204.

This act bought a great change in the surveys when conducted of the reported cases of sexual harassment at the workplace. It provided that in past four years till December 12, 2017 as many as 1,971 cases of sexual harassment at workplace were registered, or it can be said that one case every day took place. Each year cases of sexual harassment at workplaces increasing like as in 2017 45% from 371 in 2014 to 539 in 2017. Sometimes women may not know where to go to report harassment or it could be that the cases may not have been dealt with sincerely. In such a case, often women go to committees believing them to be independent, and find that they are actually puppets in the hands of their superiors[242]. The government has set-up an online complaint management system ***Sexual Harassment electronic- Box (She-Box)*** under the ministry of women and child development for registering sexual harassment complaints at workplace.[243]

CONCLUSION

Sexual harassment is such an act which cannot be properly defined. This abhorrent act has been reportedly increased in the last few years against women at the workplace, outside workplace, public places etc. When it comes to resolving the problem of sexual harassment, there two ways it can be solved. The first method is at the organisational level and the second method is the governmental method. When the first criteria come into picture it can be said that at the organisational the employer should take up proper methods to ensure that no case of sexual harassment occurs in the organisation.

The internal complaint committee (ICC) as defined under the law should be there in the organisation which could work to deal with such cases. Moreover, at this level the employer can avoid the happening of such incidents by installing CCTV cameras all around the workplace and also to have a monthly meeting wherein all the grievances of the employees could be dealt with and solutions to the same can be inbuilt. Besides the effort of the employer, it is the duty of the female employee that before joining the workplace, she should inspect whether the workplace is safe or not for them.

The second method is resolving the issue at the governmental level. At the following level it is the steps taken by the government to reconcile the issue. The government has taken initiative steps to control this detestable act by making laws to ensure justice to the victim and serious punishments to the accused. The Sexual Harassment Act and the other laws containing provisions dealing with the issue of sexual harassment are made to corroborate justice.

But not only the government it is the people also who have to work and put in efforts so that the laws made are not limited to the books but are implemented in the society. Hence, it can be concluded that it is not only laws and efforts of the employers who can initiate a step to stop the

[242] Chaitanya Mallapur, 45% Rise in sexual harassment cases at workplace over 3 years, Fact Checker, (Sept 24, 2018 11:10AM), http://factchecker.in/45-rise-in-sexual-harassment-cases-at-workplace-over-3-years/.
[243] Supra Note 20.

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crimes against women but females also who have to make effort and fight for their justice as in survey it was found 70% women victims didn't make complain regarding harassment she faced at workplace.

When the ancient period is compared with the modern period a difference can be drawn between the two. The ancient scripts, admired and respected by the modern people, talks about the equal status of both males and females and making no incongruity between them. But in the modern society, such rules are being made that in all the fields the females are being discriminated from males. It is the youth of the country who has to initiate the new bright light of change to ensure equal status to both males and females and redevelop the lost respect and integrity of the country.

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COPYRIGHT LAW IN INDIA: AN OVERVIEW

- *Siddharth Saxena*[244]

INTRODUCTION

Nature bestowed man with a wonderful ability to create, invent or make new things out of the blues. The man has the ability to think, to create things out of its own consciousness using things that have been pre-existent in nature. A man with this ability created many things. These things could be used by anyone anywhere in the world without any permission. No one would realize the importance of an idea or an invention. No one did consider their ideas to be exclusive or what their creation is to be exclusive to them. However, after the Renaissance in Medieval Europe, Commercial importance or value of these creations was realized. As such, rights of the owner over the creations were recognized and were termed as intellectual property rights. These rights can be further classified into various subcategories namely – Patents, Copyrights, Trademarks, etc.

Copyright is one of the most important rights of all Intellectual Property Rights. Copyright simply refers to the exclusive right of ownership of the creation to its owner which may include – Publication, distribution etc. However, it should also be kept into consideration that this exclusive right is for a certain period of time. This right is exhaustible. It isn't time immemorial or inexhaustive.

Copyright doesn't protect the creation or the product. It also doesn't protect the idea itself but its expression or fixation. Copyright laws vary from country to country. Some countries have quite strict laws in comparison to others. They also vary in the public or private domain. They do not, however, change the very nature of what copyright is but simply diversify its expression. Variance in various copyright laws can be attributed to the limitations and exceptions which might be fair usage. Some countries have their statutes allowing them to let the owner transfer their license or permanently transfer their exclusive copyright rights to other which includes distribution, fixation, and adaption of the original work.

Intellectual Property Rights have evolved quite variably throughout the years from its emergence to the present time with different countries adding their own view to their own statutes to make them relevant in the public domain. Countries take into consideration various factors like public peace, equity etc. to provide exclusive rights of adaptation and fixation of the work.

[244] School of Law, UPES Dehradun

Copyright is mostly limited to the creation of literary and artistic works. The owner gets exclusive rights to the distribution of his own creation. Artistic work may include – musical, dramatic and cinematographic works. It may also include acoustic works too.[245]

Various instances of copyright infringement over the years have helped to evolve copyright laws. Copyright law isn't limited to the first world countries or the developed countries, its scope has widened to the third world countries and developing countries as well.

BACKGROUND

The earliest instance of a copyright case can be traced back to Ireland where there arose a dispute over the ownership of a manuscript known as *Cathach*. King Diarmait Mac Cerbhaill gave the judgment that every book belonged to its copy. Hence, the first case of copyright infringement was resolved.

Copyright law was born in the wake of a technological revolution-the invention of print in Europe-which enabled the mass dissemination of information.[246]

The need for copyright laws can be traced back to the aftermath of the Industrial Revolution. The invention of the printing press by Gutenberg accelerated the need for copyright laws. Although, Europe had a system of extensive control over the ownership and control over the original work yet the need for licensing was felt.

In England, in 1518, Richard Pynson, the King's Printer, issued the first book *cum privilegio*; the title page declaring that no one else should print or import in England any other copies for two years; and in I530 a privilege for seven years was granted to John Palsgrave " in the consideration of the value of his work and the time spent on it; this being the first recognition of the nature of copyright as furnishing a reward to the author for his labor."[247]. He was given a monopoly of two years. These privileges were termed as monopolies.

The first copyright statute was the Copyright Act of 1709 also popularly known as the Statute of Anne. The act was enacted in 1710.

The United States didn't have a coded copyright law. In 1787, the proposition was submitted at the Philipedia Convention to give Congress to authorize copyright law, and it was at last in1790, first government Copyright Act was sanctioned.

From that point, came the worldwide assertions like the Paris Convention and the Berne Convention which are the guidelines for the copyright law authorized by each nation including India. Copyright law in India can be understood through the means of three enactments over the

[245] Manish Arora, Universal's Guide to Patents Law (English) 4th Edition (4th ed. 2007).
[246] Lyman Ray Patterson, Copyright in historical perspective, (1968).
[247] T E Scruton, Laws of Copyright.p.72

period of three phases. The first phase started in 1847 when British Raj brought with it the concept of copyright.

The second Phase was in 1914 when the Legislature enacted the Copyright Act of 1914 based on the United Kingdom Copyright Act of 1911. The third phase was the enactment of the Copyright Act,1957 after the Independence which was later amended in 2012 and governs the copyright aspect to date.

RELEVANCE

Creativity is beneficial to the society. Creativity helps society to progress. It uses man's own ability to create and develop things for a better future.

If anyone could copy freely anything that is an output of your creative work, then how would a writer make living writing books or a musician make a living producing music?

The relevance of copyright can be summarised under three sub-categories: -

Control- Copyright laws enable the creator or the original author to control their product or creation. Copyright ensures that the creators and the ones who get the permission from the creator can copy, perform or change the original work. This encourages or provides an incentive to people of all kinds of cultural disciplines to create work that in turn create a better public life.

Income- Copyright ensures that creator generates income from the exclusive right bestowed upon the creator for his original work. The permission to copy and distribute original works leads to the generation of income. The artists can sell, rent or license their creations to others and generate income.

Fair Use- Copyright also paves way for criticism and research. Original work can be used for teaching and commentary. It is although not for commercial use and doesn't substantially affect the creation.

The aim of providing the authors with copyright is to promote science, culture, and arts. Copyright rewards the authors by granting them economic and moral rights. The economic rights are related to the financial interests and the moral rights are related to the personal interests of the creators[248]. The authors get royalties against the licenses they provide for the use of their works, i.e. economic rights. On the other hand, they get recognition for their creation, i.e. moral rights.

These rights can be simplified as: -

- The incentive to authors to create new things
- Recognition of the work

[248] Nanita Kalia Bindu Sharma, Dictionary on Indian Patent Law (English) (1st ed. 2012).

- Generation of income through work
- Development and research work
- The growth of business and the individual as a whole.[249]

Copyright acts as an incentive to the creators to create new things who in turn dedicate their efforts and focus to the creation. It promotes creativity and leads to economic and social development.

COPYRIGHT LAW IN INDIA

Copyright law in India can be understood through the means of three enactments over the period of three phases. The first phase started in 1847 when British Raj brought with it the concept of copyright.

The second Phase was in 1914 when the Legislature enacted the Copyright Act of 1914 based on the United Kingdom Copyright Act of 1911.

The third phase was the enactment of the Copyright Act,1957 after the Independence which was later amended in 2012 and governs the copyright aspect to date.

Before 1958, The Indian Copyright Act, 1914 was applicable and the period of copyright for photographs was 50 years.

Section 13 of the Copyright Act, 1957 covers the copyright conferred on artistic works, dramatic works, musical works, and sound recordings.

Section 14 of the Act covers the bundle of exclusive rights that the creator has after getting the copyright. These rights include adaptation, reproduction, distribution of the work.

Section 17 of the Act states and makes the creator the first owner of the copyright. Although, the employer would be the first owner in case of creation during the course of employment.

The Copyright Act 1957 vests two kinds of rights in the creator of the work. It vests economic and moral rights in the creator which can be explained as below:

Section 14 vests economic rights in the author which include works mainly in the aspect of literary, dramatic, artistic and musical disciplines whereby author enjoys royalties in the rights of adaptation, distribution, reproduction, and fair use. When it comes to a computer program, the creator enjoys additional rights such as the right to sell or rent. When it comes to cinematography, the author has the right to sell or rent any photograph or copy of the film and communicate the same to the public. When it comes to sound recording, the author in addition to

[249] Nanita Kalia Bindu Sharma, Dictionary on Indian Patent Law (English) (1st ed. 2012).

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the above-mentioned rights also gets a share in the sale of a copy of the creation when the resale price is greater than Rs. 10,000.

Section 57 of the Act defines two basic moral rights of an author. The right of paternity and Right of integrity.

The right of paternity refers to a right of an author to assert authorship of labor and a right to stop all others from claiming authorship of his work. The right of integrity empowers the author to stop distortion, injury or alternative alterations of his work, or the other action in regard to the aforementioned work, which might be prejudicious to his honor or name. The provision to section 57(1) provides that the author shall not have any right to restrain or claim damages in respect of any adaptation of a malicious program to that section 52 (1) (a) applies (i.e. reverse engineering of the same). It should be noted that failure to show a piece or to show it to the satisfaction of the author shall not be deemed to be an infringement of the rights given by this section. The legal representatives of the author could exercise the rights given upon an author of a piece by section 57(1), apart from the correct to assert authorship of the work.

COPYRIGHT INFRINGEMENT IN INDIA

Copyright laws vest certain exclusive rights to the owner, such as distribution, adaptation, reproduction. When a creation is used without the permission of the owner it is called copyright infringement.

Copyright Infringement can be classified as below:

- Copying copyrighted work for sale
- Using copyrighted work at the performance of works
- Distributing work
- Public display
- Importing or exporting copyright works

The ownership of the copyrighted works is often believed to be of the copier unless the contrary is proved.

Section 51: Copyright in a work is deemed to be infringed-
(a) when any person without a license from the owner of the copyright, or the Registrar of Copyright, or in contravention of the conditions of a license granted or any conditions imposed by a competent authority under the Act:
(i) does anything, the exclusive right to do which is conferred upon the owner of the copyright, or
(ii) permits for profit any piece to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work unless he was not aware and had. no reasonable ground for believing that such communication to the public would

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be an infringement of copyright, or
(b) when any Person,
(i) makes for sale or hire, or sells or lets for hire or by way of trade displays or offers for sale or hire any infringing copies of the work, or
(ii) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, any infringing copies of the work, or
(iii) exhibits in public by way of trade any infringing copies of the work, or
(iv) imports into India any infringing copies of the work except one copy of any work, for the private and domestic use of the importer.

The reproduction of a literary dramatic, musical or artistic work in the form of a cinematograph film will be deemed to be an infringing copy.[250]

Copyright owners can institute a suit against any person which includes an artificial person too who uses their work without their prior permission. They can get civil remedies in a court whose has jurisdiction into the matter. The court can issue injunctions, damages, and accounts.

The copyright Act 1957 provides three kinds of remedies – administrative remedies, civil and criminal remedies.

Section 63 and 63A of the Act under Chapter XIII of the statute state the remedy against copyright infringement include imprisonment for up to 3 years and fine up to Rs. 2 Lakh.

Section 63 states,

The offense of infringement of copyright or other rights conferred by this Act. — Any person who knowingly infringes or abets the infringement of—

(a) the copyright in a work, or

(b) any other right conferred by this Act, 1[except the right conferred by section 53A] 1[except the right conferred by section 53A]" 2[shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that 3[where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of fewer than six months or a fine of fewer than fifty thousand rupees.]

[250] Section 51 of Indian Copyright Act, 1957

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Explanation. —Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offense under this section.[251]

JUDICIAL DECISIONS

Judicial Precedents related to Copyright. In *Eastern Book company v Navin J.Desai*[252], the question involved was whether there is any copyright in the reporting of the judgment of a court. Section 52(1)(q) of the Act states that the reproduction of a judgment of the court is an exception to the infringement of the Copyright. Since it is the work of the Government, no copyright exists therein and therefore no one can claim copyright in these judgments and orders of the court.

The question of jurisdiction when it comes to foreign copyright on several occasions. In *Exphar SA and Anr v Eupharma Laboratories Ltd & Anr*[253], The Court observed that "*Section 62(2) cannot be read as limiting the jurisdiction of the District Court only to cases where the person instituting the suit or other proceeding or where there are more than one such persons, any of them actually and voluntarily resides or carries on business or presently works for gain.*"

The question of cognizance often arises when it comes to copyright infringement. In *Shree Devendra Somabhai Naik v Accurate Transheet Pvt Ltd*[254], the Gujarat High Court explained conflicting nature between Article 137 of the Limitation Act, 1963 and section 50 of the Copyright Act, 1957. The Court observed that "*The order passed by the by the Copyright Board is an order whereby it is held that the provisions of Article 137 of the Limitation Act are not applicable and the board has also held that the Copyright Board is a Tribunal and quasi-judicial authority for all other purposes except for the purposes which are specifically provided in the Copyright Act.*"

In the case of *Indian Performing Rights Society Ltd. V Sanjay Dalia & Ors*[255], where there was a conflict between Section 62 of The Copyright Act 1957, Section 134 of Trademarks Act, 1999, Section 20 of The Civil Procedure Code.

The division bench of Justice Jagdish Singh Khehar and Justice Arun Mishra held that the Applicability of Section 20 of CPC isn't completely ousted hereby. The division bench also applied the Mischief Rule laid down in _ where the bench held that phrases like "Notwithstanding anything contained – being in force" do not necessarily exclude the applicability of other law.

[251] Section 63 & 63A of Indian Copyright Act, 1957
[252] (2001) 58 DRJ 103
[253] (2004) 3 SCC 688
[254] (2003) 1 GLR 589
[255] (2007) 3 MIPR 204

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EXCEPTIONS

Copyright Act, 1957 exempts certain acts from the scope of infringement. The Act lays down a hybrid approach with broad fair usage and certain specific activities. It explains Fair Usage under Section 52(1)(a) of the Act were, fair dealing with any copyrighted work for certain specifically mentioned purposes where certain specific activities are covered from Section 52(1)(aa) to (zc) of the Act.

The fair usage in the Indian context has its scope limited to private or personal use, including research and education, criticism or review etc.

CONCLUSION

Intellectual Property Rights are necessary in the ever-evolving world like ours. They pave way for creativity and constant evolution in terms of creativity and idea. They pave way for making new creations which ultimately enrich life. Copyright is also such a right out of all Intellectual Property rights that give royalty to the owner.

Indian Copyright Act is strong and effective enough to take care of the Copyright of the concerned person. It is continuously progressive in nature with a recent amendment in 2012. It has both traditional and modern aspects. With the help of the Information Technology Act, 2000 it also takes care of the online platform.

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RIGHTS OF THE DECEASED: ARTICLE 21

- *Nikitha Akkara*[256]

INTRODUCTION

The living persons are given several rights under various laws, statutes etc. Under Article 21 of the Indian Constitution, protection of life and personal liberty is given to the citizens, which includes right to travel abroad, right to privacy, right against solitary confinement, right to legal aid, right to speedy trial, right against hand cuffing, right against delayed execution, right against custodial violence, right to health etc and these rights are inherent in the persons guaranteed to by the Constitution of India and can't be denied except in accordance with the procedure established by law.

Right to life which is the most fundamental of the rights and is also the most difficult to define, thus it cannot be conferred to a guarantee against the taking away of life, it must have a wider application. This includes the expansion of this right to the dead people i.e. protecting the body of the dead and treating it with dignity, which it was accustomed to before the death.

The Supreme Court through various cases has held that the right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death and the word and expression 'person' in Article 21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed. This further imposes a duty on the State to ensure that the same is being adhered to.

RESEARCH QUESTION

This research paper raises the question as to whether the dead persons have any right(s) under any laws, statutes or covenants and whether he/she is a person within the normal or legal parlance. The Constitution of India, provides various rights to the living persons and under Article 21, Right to Life, this paper also considers the matter of whether this right can also be made available to the deceased.

RESEARCH

The living person, under various statutes, laws etc are given innumerable rights whereas the dead persons only have rights in macro sense in two main areas:

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i. Disposal of bodies
ii. Crimes against the corpses

Disposal of bodies includes proper burial facilities, to be buried with dignity and the right to not be dug from the grave for any reasons other than the ones mentioned under the law for any crime investigation or for the good of the society. The main crime against the corpses is necrophilia (sexual intercourse with or attraction towards corpses), which is a crime included under Section 377 (Unnatural Offences) of the Indian Penal Code i.e. voluntarily having carnal intercourse against the order of the nature.

From time immemorial, it is believed that corpses have the right to rest undisturbed and unmolested. This includes safeguarding the corpses from getting harmed or disrespected. Even in the tomb of the Christian community an inscription like RIP (Requiscat in Peace) which means Rest in Peace can be seen. In the book "Burial of the Dead" written by William Henry Francis Bsevi, it is clearly specified that "Across history, cultures with almost no other rituals in common treat their dead with reverence". The notion of respect is so rooted that people even agree to deal gently with the bodies of their enemies.

The Supreme Court of India has interpreted Article 21 of the Constitution of India, guaranteeing protection of life and personal liberty to include right to travel abroad, right to privacy, right against solitary confinement, right to legal aid, right to speedy trial, right against hand cuffing, right against delayed execution, right against custodial violence, right to health etc and these rights are inherent in the persons guaranteed to by the Constitution of India and cannot be denied except in accordance with the procedure established by law. Right to life is the most fundamental of the rights and is also the most difficult to define, thus it cannot be conferred to a guarantee against the taking away of life, it must have a wider application.[257]

In Parmanand Katara, Advocate v. Union of India & Anr.[258], the Supreme Court held that, "We agree with the petitioner that right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death. We thus find that the word and expression 'person' in Article 21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed. The State must respect a dead person by allowing the body of that dead person to be treated with dignity and unless it is required for the purposes of establishing a crime, to ascertain the cause of death and be subjected to post-mortem or for any scientific investigation, medical education or to save

[257] JIAFM,2007 29 (1) ISSN: 0971-0973 Dealing.with Unclaimed Dead Bodies: An Issue of Ethics, Law and Human Rights
[258] (1995) 3 SCC 248

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the life of another person in accordance with law, the preservation of the dead body and its disposal in accordance with human dignity."

In some cases, the bodies of the victims of the crimes and of those who are killed in action, or in accidents are paraded in open by their kith or kin, or those, who have its temporary possession, in retaliation or in protest to the nature of the incident in which they died. Many a times recently, it is reported and has happened, like the incident in the Allahabad High Court, where the dead body of Late Shri Srikant Awasthi, an Advocate was used by a section of the members of the Bar Association including its leaders, for ransom, i.e. the demand for compensation and rehabilitation of his family. The body was brought from the mortuary to be kept in the portico of the Bar Association in the building of the Allahabad High Court, with threats of carrying it through the corridors of the Court, demanding action against the jailer in whose custody the person was entrusted in a contempt case and for extracting political mileage. The society should not permit such disgrace to the dead body. The State, which allows the possession of the dead body to be taken by a person or group of persons for such purposes, fails in its duty to preserve and to dispose of the dead body with dignity. The State through its agencies must take immediate possession of such dead bodies used for illegal means, for its decent and dignified cremation or burial in accordance with the religion or sect the person may have professed. If Courts are required to fulfil the desires of the dead person by execution of his will, the same Courts are also obliged for giving appropriate directions for the preservation and disposal of the dead bodies and for that purpose, to give an extended meaning of the expression, 'person' under Article 21 of the Constitution to include dead bodies of the persons, who were human beings, in a restricted sense.

The State is obliged in law both under powers as a Welfare State and to protect the rights of dead person in its extended meaning under Article 21 of the Constitution of India, for the disposal of a dead body, for a decent and dignified cremation/burial in accordance with the religious beliefs the man kept or professed.

In a case[259], Field, J. spoke of the right to life in the following words: "By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed; the provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world". This statement, which has been repeatedly quoted with approval by the Supreme Court of India[260] has been further expanded in another case[261] by the statement, "that any act which damages or injures or interferes with the use of any limb or faculty of a person, either

[259] Munn v, Iliinois, (94 U.S. 111)
[260] Kharak Singh v. State of UP, AIR 1963 SC 1295; Sunil Batra v. Delhi Administration, (1978) 4 SEC 494; Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180
[261] Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746

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permanently or temporarily, would be within tile inhibition of Article 21", i.e. this right extends to the death and dignified disposal of the dead body also.

Though the definition clause in Article 366 of the Constitution of India does not define a person, Section 3(42) of the General Clauses Act, defines a person to include any company or association or body of individuals, whether incorporated or not and considers such a person as a legal entity that is recognized by law with its own rights and duties.

The Indian Penal Code defines a person in Section 11 to include any company or association of body of persons whether incorporated or not. A person is defined in Tomlins Law Dictionary as man or woman, also the state or condition, whereby one man differs from another.

A person in Law may be either natural or artificial. Natural persons are those that are formed by the God of nature i.e. living human beings including men, women or children as individuals of human race and an artificial person like those that are created for the purpose of society and government, also known as corporations or body politic. The expression 'person', however, cannot be detached from its context, which raises the question of whether it includes a person who has died, having his body in the physical form to be protected by the kith or kin, friends, society or the state, if no one else can be found?

The Indian Penal Code, clearly prohibits irreverence to dead bodies. Section 297, " Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both." This Section deals more specifically with trespasses on places of sculptures and places set apart for the performance of funeral rights and depositories for the remains of the dead. The essence of this Section is an intention or knowledge of likelihood to wound feelings of any person or any religion and who with that intention or knowledge, trespasses on places of sculpture, or causes indignity to a corpse or disturbance to persons assembled for funeral ceremony.

In Jamuna Das Paras Ram v. State of M.P[262].,with reference to Section 392 of IPC and in the matters of crime the High Court had found that the word person cannot be so naturally construed has to exclude the body of human being, i.e. the human body must be given the right, irrespective of being alive or dead.

[262] AIR 1963 MP 106

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The law has not so far defined a person to include a dead person. It, however, has some rights, which cannot be detached from it, even if the body is denuded of the life, which together forms a human being. The Indian Succession Act, 1923, provides for the execution of the will of a person after he has died. A person also has a right to protection of his dead body, to be mutilated, wasted or its organs to be taken out, by the consent of that person, when he/she was alive or on the consent of his/her kith and kin or the State, if the body is unclaimed, under the Transplantation of Human Organs Act 1994.

With the privatization of medical education leading to mushrooming of medical and dental colleges in India, there have been violations of many laws, as the laws are not able to keep pace with the development and the changing scenario. Many types of crimes are reported by the media, one of which is related to the illegal human dead body organ trading, which is in violation of Article 21 of the Indian Constitution, the Transplantation of Human Organ Act,1994 etc. These crimes happen mainly because dissection of human body is required by the MBBS Students in their first year of medical education, to facilitate elaborate teaching of human anatomy and for the same dead bodies are required by the Anatomy department.

With the number of crimes against the corpses increasing, it is essential that a law be made for the protection of the same i.e. safeguard the human body, not only when the person is alive, but also when the person is dead. Every person has a right to safety, this includes the safety of his/her body from any harm that may be caused to him/her by a third party and this right being essential, cannot be taken away once a person dies only on the basis that the person is no longer alive and thus is not considered as a person. The right to safety and dignity that is given to a person under Article 21 of the Constitution is mainly for the safety and dignity of the body of that person and to prevent any crime or harm that may be caused against it. Similarly the body of the dead too must be respected and assured safety and dignity because irrespective of a person being alive or dead, a third person does not have the right to cause harm to the body of another.[263]

[263] ISSN: 2249-7196, IJMRR, May 2015, Volume 5, Issue 5, Article No-2/296-301, A. Nasim et. al., International Journal of Management Research & Review

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DESIGNER BABIES: THE PARENTS' RIGHT TO CHOOSE

- *Charuta Nair*[264]

INTRODUCTION

Designer babies are babies whose genes have been chosen by its parents and doctors so that it has particular characteristics.[265] To put it in other terms, designer babies are babies whose characteristics or traits have been altered before they are born mainly to change their genetic set up while being in their embryonic stage. Such babies are supposed to have longer life spans and better health when compared to regular babies.

Even today, the idea of replacing genes and adding new genes is new to all of us. Even though genetic modification has been tried in a lot of places around the world, the days of swapping and inserting DNA seemed very far off. However the technology of CRISPR (Clustered Regularly Interspaced Short Palindrome Repeats) has brought new insights into this field. CRISPRs are nothing but DNA sequences from different viruses which alter the main setup of the embryo's genes when added to them. This technology has brought about a lot of changes in the field of genetic modification and embryo alteration.

However the emergence of the concept of designer babies is considered very controversial and is regarded to have many social, legal and ethical issues. Though some have welcomed the advent of this technology, others are skeptical, even fearful of the consequences.[266] What we have to understand is that most of these fears are unjustified and are even attached to the rights of the parents. This paper focuses mainly on the technologies in modification of embryos and the parents' right to choose, arguing that the right to access these technologies falls squarely within the existing array of reproductive and parental rights established by law in other countries.[267] This right is not new and is established even through the Constitution. *No person shall be deprived of his life or personal liberty except according to a procedure established by law*[268] *is what is even said by the law in our very own Constitution. Therefore the parents of a child can have the right to choose to modify their baby according to their will with respect to this provision of the law in our country. Moreover the babies born with the help of such methods are believed to have health benefits, which is indeed a very good thing. Thus this paper focuses on*

[264] School of Law, Christ University, Bangalore
[265] "Designer baby", Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/designer-baby.
[266] Tandice Ossareh, WOULD YOU LIKE BLUE EYES WITH THAT? A FUNDAMENTAL RIGHT TO GENETIC MODIFICATION OF EMBRYOS, 117 Colum. L. Rev. 729, 730 (2017).
[267] John A. Robertson, Genetic Selection of Offspring Characteristics, 76 B.U. L. Rev. 42
[268] INDIA CONST. art. 21.

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bringing out the issues regarding the legality of designer babies and the current scenario in our country with respect to moral, legal and even ethical issues.

REPRODUCTIVE TECHNOLOGY AND THE PARENTS' RIGHT TO CHOOSE

Technology has become so powerful in our world right now that the chances and methods of reproduction are vast and vary from each other. The same technological advancement of science has led to greater hopes and expectations among people with regard to their off springs. However even though rights regarding parenting and procreation have traditionally been protected, the exact scopes of these rights remain vague.[269]

Reproductive technology has become so advanced that there is access to a lot of In vitro fertilization methods and even pre implantation genetic diagnosis. In India, though a lot of these methods are practiced they are used mostly when the parents cannot conceive naturally.

In many countries, there are laws regulating the modification of embryos while in other countries there are no guidelines as such, but are prohibited strictly. Germany has banned the use of Pre implantation Genetic Diagnosis altogether. Germany's Embryo Protection Law of 1991 mandates a five- year prison sentence for any use of germ-line manipulations.[270] Austria and Italy have also banned the use of Pre implantation Genetic Diagnosis.[271] While countries such as Hungary, Costa Rica, and Ecuador have deemed that embryos have a right to life[272], which limits the rights of the parents to interfere with the unborn child rights. Other countries have allowed Pre implantation Genetic Diagnosis under narrowly defined circumstances. The United Kingdom, for example, established the Human Fertilization and Embryology Authority (HFEA) to supervise the use of such methods.[273] Further as mentioned above the other countries do not have any regulations as such on the modification of embryos or Pre implantation Genetic Diagnosis but take examples from such countries ad remain silent on it.

Our country has not yet formulated any particular guidelines or provisions regarding the genetic modification of embryos or pre implantation genetic diagnosis but is not accepted. The main issue that comes up when genetic modification of embryos is not accepted is the Parents' right to choose. Article 21 of the Constitution of India which provides for our right to life and personal liberty does indeed include our right to choose. Across India, high courts are interpreting Article 21 of the Constitution to give depth and detail to the "inner" aspects of the right to life, namely, the right to privacy and to make one's own choices.[274] So it is not wrong to

[269] Andrew B. Coan, Is There a Constitutional Right to Select the Genes of One's Offspring?, 63 Hastings L.J. 233, 238 (2011).
[270] 5. Nicole Baffi, Comment, The Good, the Bad, and the Healthy: How Spindle- Chromosomal Complex Transfer Can Improve the Future, 74 Alb. L. Rev. 361, 479 (2010).
[271] 6. Michael Gortakowski, A Parent's Choice v. Governmental Regulations: A Bioethical Analysis in an Era of Preimplantation Genetic Diagnosis.
[272] Ossareh, supra note 2, 736.
[273] Ossareh, supra note 2, 736.
[274] Alok Prassana Kumar, "Right to choose" as a fundamental right, 51 Econ Polit Wkly(2016).

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say that right to choose is accepted in India as a fundamental right under the same. So with this regard the right to choose the traits and modification of embryo can be accepted in our country. But it also raises a lot of ethical and moral issues.

Generally in the Indian society, parents being the guardians of their off springs until their age of eighteen, always make the decisions with regard to their lives. Be it school, friend choices, career options or even other things parents always make the choices for their children. Even though the Constitution of India gives every individual the right to practice, propagate and profess any religion[275] of their choice, the religious beliefs of children are the same beliefs of their parents. So the question that comes here is, if parents have the right to choose all aspects of their children's lives and upbringing, why can't they have the right to choose their traits. In the case Pierce v. Society of Sisters[276] the court shut down a statute saying that all parents should send their kids to public schools instead of private schools until the age of sixteen. This statute was found to be violating the liberty of the parents with regard to the upbringing of their kids. Therefore the same idea can be used in this scenario where the parents if given all the liberty to make all the right choices for their kids, should also be given the liberty to choose their children's traits because after all they would be doing so only for the benefit of their kids and themselves.

HEALTH AND WELL BEING OF THE BABY

One of the most common reasons for the use of genetic modification or pre implantation genetic diagnosis is health benefits. Looking into the aspects of health benefits, it has been observed that designer babies have longer life spans than regular babies. Usage of genetic modification in babies could increase the baby's life expectancy by almost 30 years.[277] When people are born they are born with healthy and unhealthy genes. But when parents opt for designer babies, they will take out all the defective genes and only keep the healthy genes thus making the baby free of unhealthy genes. As a result, such babies are healthier and live for more years than regular babies who have a mix of both defective and healthy genes.

Another known health benefit of designer babies is that these babies when born after genetic modification will help reduce chances of various genetic health disorders.

Alzheimer's disease a genetic condition that affects your brain and causes memory issues and problems in the functioning of the brain's thinking pattern caused due to tangles or growths in the brain can be easily removed by pre implantation genetic diagnosis. Down Syndrome the most common genetic disorder caused due to the abnormality in chromosomes can be easily tackled by removing the defective chromosomes from the genes of the baby. Huntington's Disease, a

[275] INDIA CONST. art. 25.
[276] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35(1925).
[277] Debolina Raja, How are designer babies made and what are its pros and cons? (January,2018), https://www.momjunction.com/articles/designer-babies_00395977/#gref.

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disease caused due to the breakdown of nerve cells in the brain is also one of the main genetic disorders that can be removed from the baby due to the various processes of genetic modification. Moreover it will also reduce the chances of the baby contacting other inherited diseases too like obesity, cancer, diabetes etc.

Genetic modification of embryos does indeed have positive effects on the baby with regard to the aspect of health. However this is not a complete error free process. This is because even though technology is far advanced, scientists are still new to the whole concept of designer babies and is still in its experimental phase. The processes involved in these techniques are risky too and any small error or mistake can end up constituting a miscarriage.

Moreover it should be understood that genetics is not always 100% error free and there are possibilities for some error or the other to come up later on during their lives. Removing certain genes from the embryo can indeed reduce risks of diseases. However we should realize that the genes which are being removed must have been there for a reason even though it seemed like it wasn't required. To understand this better we can take the help of an illustration. Suppose you choose to keep a certain gene from your baby that controls your baby's anger issues and intelligence level. Keeping this gene in the baby will therefore mean that the baby can have good intelligence and a really short temper too. So even though having this short temper may not be seen as a trait, the very same gene provides for the baby's intelligence too. This is what is meant by the scientists when they say that genes are there for a reason even though it may seem like it's not necessary.

Another argument against the modification of genes is that such pre implantation genetic diagnosis or genetic modification of the embryo being a little risky, might lead to the deterioration of the baby's health. Even though such techniques are mostly done for the health benefits that follow, it may sometimes end up causing harm to the baby. The scariest part is that such techniques if gone wrong can even lead to the development of any new diseases that even scientists aren't aware of. Therefore these techniques are considered dangerous too.

PERSONAL BENEFITS

Designer babies as the name suggests are clearly "designed" according to the parents' will. However sometimes parents choose to alter their babies for their personal benefits rather than any health benefits for their child. If you look at it from this aspect, designer babies should be termed as "customized babies" rather than "designer babies".[278] *The technology used to make designer babies can be used like choosing the toppings of you pizza and customizing it which is really difficult to take in looking at its moral and ethical aspects.*

Parents are seen choosing certain traits like the colour of the baby's eyes, hair, editing the gene pool thus deciding the size of the baby, that is whether the baby should be lean or curved and so

[278] Raja, supra 13.

on. Therefore parents choosing their babies traits for mere 'fashionable gains" is really looked down upon by our society and our country's norms. But what should be understood here is that all individuals have the right to choose and thus the parents by exercising this right can choose what to do and what not to do regarding their children.

However is it morally justifiable to use genetic technology to bring about a deformity in child? For instance, deaf people are often seen wanting to have deaf children. Is it morally permissible to allow deaf parents to bear deaf children? Even though it may seem counterintuitive to hearing people, deaf people often desire to have deaf children. Reasons for this vary, but often include a deep longing to have a child who can fully participate in the parents' linguistic and cultural community. Many view using genetic technology to ensure or create a child with a disability as harmful and a dereliction of parental duty.[279] However according to the parents, they are not wrong. They can connect and understand their kids better if they are deaf. However because of this, the child is being disabled and is losing the right to an open future. So here the rights of a unborn child will come up. Unborn children indeed have certain rights in our country. Therefore causing disability to the baby for the parents' personal benefits cannot be justified completely.

RIGHTS OF AN UNBORN CHILD IN INDIA

The legal understanding of the concept of 'person' or 'personality' revolves around possession of rights and capacity to discharge legal duties. Legal personality of natural persons begins at birth and extinguishes with death with the result that pre-birth, post death stages are devoid of any legal persona.[280] However in our country unborn children do have certain rights with regard to property and life under certain particular situations. However the rights of an unborn child is a topic that has always been well debated on in our country and is even today a little ambiguous.

In India, there are a few provisions protecting the rights of unborn children especially in the Medical Termination of Pregnancy Act, 1971, Indian Penal Code,1860 and the Pre Conception and Pre Natal Diagnostic Techniques(Prevention of Sex Selection) Act,1994. Other than this, under certain circumstances unborn children are given property rights too. But that is not very common.

In our county, we have laws criminalizing the actions of any person trying to cause miscarriage or hurt to the unborn child. Causing miscarriage[281], causing miscarriage without the woman's consent[282] or preventing a child from being born alive or causing death immediately after birth[283] are all considered as crimes in India.

[279] Teresa Blankmeyer Burke, quest for a deaf child: ethics and genetics,University of New Mexico,2011.
[280]Sunanda Bharti, Legal Personality of Unborn: Jurisprudential Analysis, 2013.
[281] Indian Penal Code, Sec. 312.
[282] India Penal Code, Sec. 313.
[283] Indian Penal Code, Sec. 315.

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According to Section 4 of the Pre Natal Diagnostic Techniques(Regulation and Prevention of Misuse) Act, 1994 is it said that no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely, chromosomal abnormalities, genetic metabolic diseases, haemoglobinopathies, sex-linked genetic diseases; congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board. So it can be said that it is indeed "illegal" in our country to do any other genetic modification in embryos.

However when it comes to designer babies, even if the parents have the right to choose, the children once they are born will have their right to life and personal liberty. So putting restrictions on the child's life and completely changing it can be considered unethical and immoral.

In the case Hemraj and Anr v. Ram Dhan and Ors.[284]it was held that an unborn child cannot be considered as a person or property . If we keep this in mind and do not give unborn children this validity, then it is okay to have designer babies without considering the baby's rights.

ORDER OF NATURE

One of the most important ethical issues regarding the emergence of designer babies is that it goes against the order of nature. The natural selection theory is very deep and important. Tampering with the order of nature is very dangerous. It is believed that is our society reaches a point where many people decide to have designer babies, it can create a gap in the society, leading to classes.[285] As mentioned before, designer babies have marked differences from regular babies and can cause a big divide in the society. If more and more people opt this, our world will come to a state where there will be a divide between designer humans and non-designer humans thus giving a superiority complex to people born with genetic modification techniques. It can cause hostility among people, eventually causing a very hostile environment to come up in our society.

CONCLUSION

As we have now seen, designer babies are indeed very controversial in our country. Though the Constitution of India provides for the right to choose, it is not very easy to simply exercise that right. The parents' right to choose goes against the unborn child's human rights. The idea of health benefits of a baby born with the help of pre implantation genetic diagnosis or genetic modification of embryo is contradicted by the various genetic deformities even unknown to scientists that can arise due to the making of such babies.

Even though it is understood that designer babies can be made as it is an exercise of the parents' right to choose, it still has many ethical and moral issues. It can even be said that nobody has the

[284] (1993) IILLJ 167 Raj/ 1992 (1) WLC 622.
[285] Raja, supra 13.

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right to modify another human being and it is going against the order of nature. Moreover it can even be said that parents if given the right to choose the traits and characteristics of their babies, it would be like allowing human beings to play God. According to the order of nature, one human being cannot be given the right to choose the traits of another. However in this scenario it can also be seen as a mere exercise of the parents' right to choose. Thus designer babies should be allowed with regard to the situations of the parents and should be seen from other aspects too.

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INTERNATIONAL E-COMMERCE TAXATION- PERSISTENT PROBLEMS & DEVELOPMENTS

- *Nidhi Mehra*[286]

INTRODUCTION

The relationships between taxation and technological developments have always been dynamic, interactive and complex. The current debate over the taxation of e-commerce has, to some extent, been a little more than a rehash of a similar debate over the mail-order sales in the 1980s. However, in the case of e-commerce, the question of reconciling national fiscal boundaries with the borderless world of internet arises. A government's authority to tax had always been on territory and jurisdiction. Although the underlying principles of international taxation have always been flawed, these flaws have become much more apparent with the advent of e-commerce.[287] Ecommerce has created an apparent lasting gap between technology and law making. Ecommerce makes the concepts of Permanent establishment, income classification, point of sale, product classification, etc., difficult to apply obliterating any footprints leading to the parties of the transaction, in turn making government's lose millions in tax revenue in their jurisdiction.

The definition of tax is far from straight forward, even if only conventional taxes are considered. Different countries have different, sometimes even arbitrary and irregular taxes imposed by the taxing authorities. In most countries, conventionally defined legal taxes and levies constitute a significant proportion of GDP, and finance a major part of the government expenditure. There is an urgent need for the taxation of Ecommerce, as it has revolutionized the way business operates. Creation of wealth through cyber space constitutes an elaborate and often untraceable form of tax avoidance. This is not only a threat to national sovereignty but also overrides traditional principles of taxation- a transgression of traditional notion of political and monetary autonomy.

IS E-COMMERCE TAXABLE?

Issue of Classification

The problem of classifying digital products has been a subject of attention for decades, and has been more relevant with the arrival o Ecommerce. It is necessary to classify a transaction or the

[286] School of Law, Christ University, Bangalore
[287] Basu, Subhajit (2007), Global Perspectives on E-Commerce Taxation Law, Ashgate

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object of transaction for the purpose of taxation. Transactions for example, are conventionally classified as under income from employment or property, objects of transactions as products or services. In all these cases, the information product is an object that exists and can be observed in the physical world. The classification problems connected to Ecommerce are primarily related to the principle of neutrality. According to existing tax law regime, the same information product will be taxed differently based on its mode of delivery. It is hard to find a way to classify Ecommerce transaction information delivery within the framework of current tax law, which at the same time satisfies fundamental taxation principles and considers the characteristics of the information. Information simply doesn't fit into tax law, because tax law is rooted in the production and distribution of physical products, and not services, still less information.

Issue of Jurisdiction

Jurisdiction describes the legal authority of the state. The application of any state law requires that a territorial connection can be made between the legal question and thus physical or conceptual state place. The connection is an imperative of international law and is necessary to distinguish the applicability of one state's law from another. There are two aspects that disconnect between geographic jurisdiction and Internet.[288] First, enforcement of law or regulation based on territorial jurisdiction may become problematic in the e-commerce environment. As Dryden (2000) notes, internet is not a lawless frontier; the issue is not the absence of law and regulation, but rather problems of enforcement through territorial jurisdiction. Second, and perhaps more important, there are serious questions about whether territorial jurisdiction provides a legitimate conceptual basis for the governance of internet.[289] Tax jurisdictions are very much dependent on the territorial nexus principle and the status of a tax payer. It is therefore necessary to attribute a transaction to a certain geographic location. The aim is always that the creation of value should be taxed where the value is actually created, this connection can either be formal (where the organisation is registered) or informal (place of effective control). Conceptually, there are two distinct issues. The first is the issue of when it is appropriate for a state to subject persons outside its borders to the economic burden (as opposed to the administrative burden) of a particular tax because of contacts with that state, which are in whole or part electronic in nature. The second significant issue is to determine when a state can legitimately ask that a foreign person be asked to assist in the collection of a tax on others, where those others are within the state's legitimate taxing jurisdiction. The distinction made here, between jurisdiction to impose the burden of a tax and jurisdiction to impose a duty to help collect a tax, is not one that is reflected in the actual law of jurisdiction that has developed, but in a more global and technologically sophisticated economy it may become increasingly important

[288] Kobrin, Stephen J (2001), 'Territoriality and Governance of Cyberspace', Journal of International Business Studies, 32 (4), pp 687-704
[289] Kobrin, Stephen J (2000), 'Taxing Internet Transactions', U. PA Journal of International Econ. L. 21

to make this distinction.[290] However, governmental entities should be cautious about imposing jurisdictional oversight and protections that will have extra jurisdictional implications.

When an online purchase is made, either directly or through the intervention of an electronic agent, programmed with the background, assets, and preferences of its human principal/buyer, has the buyer stepped into a new place or simply used a different means of communication, much like a phone, fax or satellite link, to affect that purchase? More specifically, if I order a book online from my home in Belfast from a seller physically located in California, is it as if the bookseller boarded a plane and delivered the book to me in Belfast, or is it as if I flew to California to purchase the book off his shelf? Does the „push" and „pull" of technology make a difference in how the law should be applied?[291]

The Internet penetrates deeply into domestic economic, political and cultural structures; tax issues go to the heart of a wide range of social issues from beliefs about social spending and the role of government to the distribution of income and wealth. Tax codes are used to discourage activities deemed undesirable by society. They are the basis of attempts to redistribute wealth and income through a graduated income tax or inheritance taxes. What is seen as an appropriate rate of taxation reflects social views about the role of government and collective versus individual solutions to social problems[292]. Although the principle of formal sovereignty, in theory, remains the underpinning of international taxation, developments such as economic integration and global ecommerce challenge the state's ability to adhere to or invoke this principle. It is beyond any argument that e-commerce particularly digital e-commerce has impaired the State's ability to tax the income generated by confusing traditional source rules thus making it more difficult to characterize income. If a state cannot characterize income according to traditional source rules, it cannot effectively determine whether it has a right to tax that income. This could result either in double taxation or nontaxation, thus inhibiting the growth of e-commerce or allowing these transactions to go completely untaxed.[293]

Transactions made through the internet provide a sort of anonymity and autonomy and prevent any legitimate chance of effective self control. The virtual identity of a person in most cases has no relation to their actual identity. Jurisdiction is the area of law that deals most directly with the contact between the two worlds. "It is more important that the applicable rule of law be settled than that it be settled right". The question is then how to settle this point of law with the bounds of the traditional legal framework. It is my submission that incremental and conservative change in jurisdiction law is right because it is the best choice. This means that the defined parameters of

[290] Hellerstein, Walter (2003) Jurisdiction to Tax income and Consumption in the New Economy: A Theoretical and Comparative Perspective, Georgia Law Review, 38, pp 1-70

[291] Basu, Subhajit and Jones, Richard P (2008), 'Regulating Cyberstalking' in Crimes of the Internet, Eds. Frank Schmalleger and Michael Pittaro(Prentice Hall)

[292] Kobrin, Stephen J (2001), 'Territoriality and Governance of Cyberspace', Journal of International Business Studies, 32 (4), pp 697

[293] Basu, Subhajit (2003), 'Relevance of E-Commerce for Taxation: an Overview', Global Jurist Topics: Vol. 3: No. 3, Article 2, http://www.bepress.com/gj/topics/vol3/iss3/art2

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the law should be applied to the new factual situations. Governments should take steps to align "enforcement jurisdiction" with "substantive jurisdiction" to ensure that technological developments do not undermine sound tax policy.[294]

SHOULD E-COMMERCE BE TAXED?

The conclusion has been that it is possible to tax e-commerce. However, just because it is possible to tax (part of) ecommerce it is not obvious that it is socially desirable to do so. However, two related concerns have focused the international response (1) that a transaction with a cross-border aspect may be taxed more lightly than a similar purely domestic transaction, stimulating tax evasion and tax competition between governments; (2) and, that reallocation of resources in response to tax conditions rather than market conditions will create economic distortions that diminish productivity.[295] International tax regimes are „sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors" expectations converge in a given area of international relations'.[296] A general theme in tax research is how the necessary tax revenue to support the public services can be raised in the most efficient and equitable way.

The debate relating to Ecommerce divides into two primary groups- The first, pro-taxation group believes that Ecommerce should be taxed just like normal taxation of commerce these arguments are based on equity, economic, neutrality, revenue and the simplicity of compliance and administration. believers of anti-taxation argue that Internet has created many jobs by moving retailing to the net. Among these jobs, they count trucking and package-delivery sectors. They also argue that by lowering the cost of products for the consumer, e-commerce allows the consumer to buy more things, thus benefiting a wider number of manufacturers. In addition, taxing the e-commerce the same way as conventional businesses brings about other concerns and complications, because first, due to the Internet, many small businesses are now able to serve consumers outside of their area. Imposing taxes on e-commerce will force these businesses curtail their presence on the internet.

Taxation raises a number of fundamental issues, which illustrate the more general regulatory problems involving international e-commerce. The digital revolution may lead to a shift in the tax burden to assets and individuals who are "nailed down," the more immobile elements of society. While some shifts in tax assessment and collection are unavoidable, revisions to the tax code should be made because of a deliberate societal process that considers revenue needs, equity, efficiency and effectiveness, rather than by default. Although arguments both for and

[294] Hellerstein, Walter (2003), 'Jurisdiction to Tax income and Consumption in the New Economy: A Theoretical and Comparative Perspective', Georgia Law Review, 38, pp 1-70
[295] Salter, Sarah W (2002), 'E-Commerce and International Taxation', New Eng. Journal of Int'l & Comp Law, 8 (1) pp 6-17
[296]Paris, Roland (2001), Global Taxation and the Transformation of the State, Department of Political Science, University of Colorado at Boulder, Paper presented at the 2001 Annual Convention of the American Political science association, San Francisco, August 30-September-2, 2001 , p3

against taxation exist, the important thing is for authorities to understand the Internet and its unique nature as well as its potential and weak points before a decision is made. Especially, understanding the border-spanning and global nature of the Internet is very important before a global tax agreement is reached. The future lies in developing a system suitable for the digital world of e-commerce, which is simplified in terms of compliance and administration.[297]

TAX EVASION

There are two critical problems in taxation: the first being identifying the tax base and then the enforcement of this tax. These problems are only aggravated when it comes to Ecommerce. In the backdrop of internet transaction, there are numerous possibilities of hiding transactions, and the opportunities for tax evasion seem endless[298]. There have always been certain businesses that choose to locate their corporate headquarters or to conduct their business activities from states that offer low or no tax regulation. The cost of conducting offshore activities, however, can often outweigh the benefits of tax relief. For this reason, tax avoidance and evasion opportunities of this nature have generally been exploited by only a small number of businesses, as the majority are unable to support such schemes. Traditionally businesses have also been deterred from locating in tax haven countries by other problems inherent in these countries. Although they can offer appealing tax rates, businesses must also consider other characteristics that may not be conducive to maintaining a globally competitive business. Such characteristics include a climate or geography that is not suitable to the particular business, high labour costs, low education levels, poor infrastructure, political instability or a small consumer base. A business operated through a commercial website, however, is not subject to the same physical constraints as a "bricks and mortar" business. For example, a small or medium sized business in UK can easily post its Web site with a host who operates from a tax haven country. Here it will still be able to access profitable consumer bases while having its financial information hidden by the privacy protection that tax haven countries often provide. The fact that an e-commerce business requires no physical presence other than a server also makes the problems identified above irrelevant. It is now not only affordable for virtually any e-commerce business to locate in a tax haven, but all of the incentives for doing so remain while the disincentives are gradually disappearing. Therefore, when business is conducted on the Internet the problem of tax competition reaches a new level of complexity. For some business, many of the physical constraints on tax evasion or avoidance remain. However, now a category of digital goods and services can be transacted entirely over the Internet. With respect to these transactions, states cannot rely on physical controls to prevent or deter tax avoidance and evasion.

[297] Ibid 9
[298] Bird, Richard (2003), Taxing Electronic Commerce: A Revolution in the Making, C.D. Howe Institute Commentary, No. 187

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IMPLICATIONS OF TAX BASE

All taxes, direct and indirect, under whatever jurisdiction, must operate within global economy. Where e-commerce presents its challenge to the established order is in the fact that it exists in borderless virtual world whereas conventional wisdom regulates commerce and taxation through international treaties, which rely heavily on the establishment of the location of each of the transacting parties. The most fundamental threat to the international tax system posed by e-commerce is the erosion of worldwide tax base and in consequence the damage to economic balances, economic efficiency, and competitive fairness among vendors. Tax rules have historically emphasized the taxation of transactions that involve tangible goods or the taxation of income derived from the economic activity associated with these tangible goods (e.g., royalties from the sale of traditional books). [299]The base of a tax means the thing, transaction, or amount on which the tax is raised. Identifying the correct tax base is the most important step in structuring a tax. The concept of a tax base refers to the specific measure to which a tax is applied. For direct taxes, which are levied on persons rather than commodities or transactions, the three main types of tax base are income, consumption, and wealth. Among those who have considered the subject, each of these taxes has been suggested as a proxy for the benefits received from civil society (Duff, 2005). Each tax will have a limited tax base, the limits being of two kinds: the general limits on that kind of tax, and specific exceptions. Clearly, the wider the tax base of a tax, the more revenue it will collect. Hobbes (1651) suggested that the benefits that individuals enjoy under a commonwealth are best measured by what they consume. In more recent times, consumption taxation has also been favoured on the basis that it is neutral between saving and spending and therefore affects individual choices less than most other kinds of tax. On this basis, some have argued that consumption taxation is most compatible with libertarian principles (Duff,

op. cit.). Notwithstanding these arguments for consumption and wealth taxes, others regard income as the best measure of the benefits received from civil society.[300] According to Adam Smith (1776), for example, "the subjects of every state ought to contribute towards the support of the government … in proportion to the revenue which they respectively enjoy under the protection of the state". Graeme Cooper makes a similar argument, reasoning that "the creation, maintenance and protection of a society within whose markets individuals can pursue and accumulate income and wealth, is a benefit derived from government," that this benefit "manifests itself in the income derived by individuals," and therefore that "income is an appropriate measure of the benefit"[301]. Although libertarians may question the extent to which the state is responsible for the creation and maintenance of income and wealth, many appear to accept these arguments in favour of personal income taxation. Epstein, for example, endorses the

[299]Cockfield, Arthur J (2002), The Law and Economics of Digital Taxation: Challenges to Traditional Tax Laws and Principles, Bulletin for International Fiscal Documentation, 5 , p.606

[300] Duff, David G (2005), 'Private Property and Tax Policy in a Libertarian World: A Critical Review', The Canadian Journal of Law & Jurisprudence, 18

[301]Cooper, Graeme S (1994), 'The Benefit Theory of Taxation', Aus. Tax Forum, , p.493

idea of a broad-based or comprehensive income tax on the basis that "everything of value protected by government is subject to taxation". [302]A narrow definition of a tax base creates problems for desired neutral tax treatment between traditional economic activity and activity involving ecommerce in intangibles. The risk of tax base erosion in connection with ecommerce is seen in two different situations, one of which focuses on the changed pattern of doing international business and the other one relates to the ease of offshore establishment[303]. Business functions could be moved to low-tax jurisdictions and bank accounts and other financial assets could be held offshore. There are numerous examples of avoidance reducing tax revenues and, in some cases, tax rates have had to be reduced in order to stem the revenue losses. Empirical research also supports the view that taxation influences international investment flows, although some studies find little effect[304]. The inability to tax e-commerce, on the one hand, and non zero tariffs on physical cross-border trade, on the other, may hasten the pace of substitution of the mode of transactions to virtual commerce as it gets technically feasible to do so. This in turn will further erode the tax base on tradable goods.

However Westberg argues that dynamic effects of ecommerce have been forgotten when it comes to taxation. Instead of worrying only about lost tax bases, we must also look for opportunities for new source of revenue. E-commerce generated new businesses, new products being created and new markets are being opened. Traders who generate new business will increase the tax base for income tax purposes. The value of their supply of goods or services will be the basis for the taxation of consumption. If e-commerce is used for cross-border transactions, the tax base will be increased in the country where the business activity takes place as well as in the country of consumption. In the first country this will increase the base for income tax purposes and in the other the base for consumption taxation. For a given country this may result in a change from one form of taxation to another. From a global point of view, it means a further step in the direction of more consumption taxes and possibly fewer income taxes[305].

OPTIONAL WAY

The issue of taxation of e-commerce is not about the desirability but it is more about the possibility. It would be unjustified if e-commerce is held responsible for all the fallacies of international taxation, particularly revenue loss. With very few exceptions, e-commerce raises no new conceptual issues for tax administrators. A significant portion of potential tax revenue is not collected because of poor tax administration. The complexity of the tax structure and tax administration by itself has been unable to fulfill the revenue objectives implied by the tax structure. It is widely recognized that tax policy and tax administration is intrinsically linked. In

[302]Epstein, Richard A (1985), Takings: Private Property and the Power of Eminent Domain (Cambridge, MA: Harvard University Press, 1985) , p.60
[303]Westberg, Bjorn (2002), Cross-border Taxation of E-Commerce, IBFD , p.234
[304] Leibfritz, W J Thornton and Bibbee, A (1997), 'Taxation and Economic Performance', OECD Economics Department Working Papers, No. 176
[305] Ibid 16, pp. 225-226

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this interrelationship, however, tax policy formulation is generally seen to precede tax administration. This is because only when a tax structure is legislated does tax administration come to play its role in the implementation of the law. However, for the purpose of taxation of ecommerce the direction of the link may not be quite so apparent. Indeed, it is can be said that in case of e-commerce tax administration is tax policy. Effective tax administration must include the power and means to enforce the substantive tax rules, the ability to obtain information and to protect tax base from businesses which locate in tax havens and to collect taxes generally is essential. It is a fine balancing act to legislate on thebasis of an intellectual and equitable framework on the one hand and to take proper consideration of enforcement barriers and administrative practicalities on the other. Inaction on the part of taxation authorities in today's e-commerce environment is simply not an option. It is not possible to advocate for one solution, there are number of potential reform alternatives for income generated by e-commerce transactions. A detail discussion of each and every potential reform is beyond the scope of this article, and some of the reforms may not be practical. Each option has some positive and some negative aspects embedded within. Given the complex structure and significant ramifications of our tax system today, the apparent need is for simplification. Kobrin argues that in discussions of e-commerce taxation issues, four assumptions should work. First, taxation should be economically neutral that is, it should not influence the location or form of economic activity. Second, there should not be double taxation neither taxation should be avoided. Third, there should be an equitable distribution of tax revenue. Fourthly, fiscal sovereignty based on geographically defined nation-states should be maintained[306]. As the question of permanent establishment (PE) indicates, however, it will be difficult to satisfy all four of these principles simultaneously. Indeed, given the non-geographic nature of e-commerce transaction[307], "it may be impossible to resolve jurisdictional issues, distribute revenue, or even collect sufficient revenues to sustain governmental activities while maintaining the practice or principle of mutually exclusive jurisdiction- political and economic control exercised through control over geography"[308]. Bird and Wilkie have argued that the most important issue is how to identify measure, assess and effectively tax income. From this

perspective, what seems most important is not so much about establishing the correct principles, but to determine what can be done and then, within the limits set by feasibility, to determine how it should be done, by whom and in what way.[309] The emphasis on rules rather than principle implies that a gradualist approach rather than a holistic approach should be adopted. It is in my view that more attention should be paid to the process by resolution to international (e-commerce) tax issues are reached and less to the alleged and often disputable normative

[306] Kobrin 2001
[307] Berman, Paul S (2002), 'The Globalisation of Jurisdiction', Uni. of Connecticut School of Law Working Paper Series, paper 13 p335
, p.335
[308] Kobrin 2001 pp. 666, 672
[309] Bird 2003

principles. No area of the law is closer to the subject of sovereignty than taxation. In legal theory, countries are totally able to determine their own internal tax policies; in reality these same internal policies have an impact far beyond a country's borders and are a legitimate concern of other sovereign nations. As the e-commerce process unfolds further with the introduction on m-commerce, it may be increasingly difficult to sustain the current methods of taxing e-commerce companies operating in different tax jurisdictions. In the absence of true international tax law in the sense of a multilateral tax convention or legislation of an international tax organisation, national tax sovereignty will result in divergent policies and principles governing the taxation of international income. However instead of taking each jurisdiction as a separate entity, consideration may need to be given to the adoption of the unitary or world-wide tax base for the corporate income tax, with an internationally agreed system of tax credits or allocation procedures to prevent double taxation and to maintain international competitiveness. In what circumstances should regulators seek more explicit control over technological developments? For the most part, it is accepted that law should only indirectly influence technological innovations by providing a legal framework for these developments to take place: capitalist democracies accept that law enables private property regimes under the values of liberalism or in an attempt to promote wealth creation by protecting the interests of innovators[310]. Markets in turn determine whether technologies persist or become obsolete. In certain circumstances, however, regulators should take more direct steps to mandate the use of technologies to protect interests and values. Tax authorities may need to promote the use of Internet technologies to perform functions that protect these objectives. For example, technological solutions could: (a) identify the location where the purchaser of information good resides; (b) automatically charge, assess and remit taxes on information good transactions to lower compliance costs; and (c) employ online extranets to enhance information exchange among sub-federal and federal tax authorities[311]. The more taxing authorities are driven to share information and to promote identification technology that reveals the jurisdiction of buyers and sellers, the more effective will become the taxation not just of e-commerce but of all international and inter-jurisdictional transactions.

CONCLUSION

There is nothing new about technology affecting taxation. What do these analyses imply for how e-commerce should be taxed? Digital fiscal pessimists contend that the digital revolution has overthrown the administrative and informational underpinnings of the present system of taxation. I submit that e-commerce can and will be taxed- the issue is that it should be taxed fairly and efficiently. It would not be acceptable for governments if, as expected, e-commerce continues to grow, to allow a gaping hole in their revenue base. However, there is no quick fix. "What may be a sound rule from a tax policy perspective may be totally unworkable in light of available

[310] Cockfield, Arthur J (2004a), 'Formulary Taxation Versus the Arm's Length Principle: The Battle Among Doubting Thomases, Purists', and Pragmatists, Canadian Tax Journal, 52,, 2004c, p.404
[311] ibid

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technology, for example, the ability to make anonymous, untraceable electronic cash payments or the ability to locate a server anywhere"[312]. However, in any future solution for taxation of e-commerce, the national governments should play a decisive function, since still taxation is a prerogative of the sovereign governments. Lawmaking can be slow and tedious, but technology often proceeds at break-neck speed. What are the implications of this apparent temporal gap between technological innovation and legal change? On the downside, the gap in time promotes legal uncertainty where affected parties cannot

fully understand their legal rights and obligations. "On the upside, the gap in time would seem to permit more analysis and sober thought prior to policy implementation. Moreover, the unpredictable nature of technological developments suggests that, in many circumstances, legal reform may not be suitable, at least not until the implications of the technological changes can be better understood" [313]Trade, whether conducted via the medium of the Internet or any other, is (very simply trade). Therefore, the taxation of it is a legal issue, not a technological one. While most would agree that the ability to effect transactions through electronic means has dramatically altered the way we conduct business, but not all would agree that such change necessitates a total re-evaluation and re-examination of current fundamental tax principles. However, if the technology makes it impossible to extract tax, society has a problem; it may become necessary for governments to seek greater control over the development and evolution of this technology that created e-commerce. In my view, technology has the capacity to provide a solution; one which is neither a patchwork of calibration, nor a reengineering that is too tightly structured, but has the flexibility necessary to accommodate the ever changing face of e-commerce.

[312]McLure, Charles E Jr. (1997), 'Taxation of Electronic Commerce: Economic Objectives, Technological Constraints and Tax Laws', Tax Law Review, 52 (3), pp 269–423
[313] Cockfield 2001

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ANALYSIS OF WATER (PREVENTION & CONTROL OF POLLUTION) ACT, 1974

- *Prakhar Jain*[314] *& Pramit Bhattacharya*[315]

ABSTRACT

The Indian constitution recognizes the basic fundamental right of its citizens; the right to a clean and healthy environment. Article 21 of the constitution insists that no person shall be deprived of his/her life or personal liberty except according to the procedure laid down by law. By this article, the Supreme Court of India in the case of Subhash v. State of Bihar held that the Right to Environment is a fundamental right of every citizen in India as included in the right to live.

Water is cradle of life. It is a basic human need and a finite life support system. To protect this precious resource, one needs a stringent enforcement system meant for its conservation, sanitation and supply. Environmental laws are meant to set standards for what people and institutions must do to control or prevent environmental pollution including water. After enactment it becomes the job of the central and state governments to make sure that those who are subject to these environmental protection laws know what they must do to comply. In this case, we have designated central and state institutions called the Central and State Pollution Control Boards respectively. Their primary role is the enforcement of the Environmental Protection Act (EPA) and its constituent statutory frameworks dating back to the Post Stockholm environmental laws such as the Water (Prevention and Control of Pollution) Act of 1974.

This research work endeavors to explore into the evolution and development of the legal aspects of water pollution and its environment-related laws. The second objective is to highlight the structural arrangements and functioning of the pollution control boards and the persistent challenges that they face in enforcing the laws of the land aimed at environmental protection.

Certain provision of The Water Cess Act 1977 have also been discussed as this act paves the way for the funding of the works of the pollution boards under The Water (Prevention and Control of Pollution) Act of 1974.

INTRODUCTION

Fresh water is one of our most vital resources, and when our water is polluted it is not only devastating to the environment, but also to human health. Water is a fundamental human need. Each person on Earth requires at least 20 to 50 liters of clean, safe water a day for drinking,

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cooking and simply keeping themselves clean. Much of that water comes from rivers, lakes and other surface water sources. Before it is delivered to our homes it is treated to remove chemicals, particulates (e.g., soot and silt) and bacteria. This clean, potable water is then used for cooking, drinking, cleaning, bathing, watering our lawns and so forth.

Those that are served by public sanitation systems rely on sewers to keep untreated wastewater from being released into the environment where it could potentially contaminate our drinking water sources and the natural environment, when the water goes down the drain or is flushed down the toilet, it usually enters a sewer system where it travels to a wastewater treatment plant. The plant treats the wastewater and removes solid waste and other contaminants before releasing the treated water it into the environment. Depending on the type of treatment the wastewater receives, water that is released could have different levels of quality from the water body which it is released. Water is obviously essential for hydration and for food production- but sanitation is an equally important, and complementary, use of water. A lack of proper sanitation services not only breeds disease, it can rob people of their basic human dignity.

The quality of our water is directly linked to the quality of our lives. By supporting clean water initiatives and similar measures that improve our water and wastewater treatment systems, we can each have a hand in ensuring clean, safe water for ourselves, our families and our communities.

FRAMEWORK OF THE WATER ACT

The Water (Prevention and Control of Pollution) Act of 1974 is a complex statute which has been in effect for over two decades. Many features of the Act have challenged in the courts. In this section we discuss the framework of the Water act and analyze major issues including the scope of judicial relief authorized by the constitutional challenges to the Act, liability of corporate officers, and funding of the administration of the Act.

The Water Act of 1974 represented one of India's first attempts to deal comprehensively with an environmental issue. Parliament adopted minor amendments to the Act in 1978 and revised the Act in 1988 to more closely conform to the provisions of the Environment (Protection) Act of 1986.

Water is a subject in the State List under the Constitution.[316] Consequently Water Act, a central law, was enacted under Article 252(1) of the Constitution, which empowers the Union Government to legislate in a field reserved for the states, when two or more State Legislatures consent to a central law. All the states have approved implementation of the Water Act as enacted in 1974.[317]

[316] Entry 17, List II, Seventh Schedule.
[317] However, the 1988 amendment has yet to be adopted by all the states.

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The Water Act establishes a Central and state pollution control boards. The Central board may advise the Central Government on water pollution issues, coordinate the activities of state pollution control boards, sponsor investigations and research relating to water pollution, and develop a comprehensive plan for the control and prevention of water pollution.[318]The Central Board also performs the functions of a state board for the union territories. In conflicts between a State board and the Central board prevails. Since 1982, the Central board has been attached to the Union Government's Department of Environment, Forests and Wildlife.

The Water Act is comprehensive in its coverage, applying to streams, inland waters, subterranean waters, and sea or tidal waters. Standards for the discharge of effluent or the quality of the receiving waters are not specified in the Act itself. Instead, the Act enables state boards to prescribe these standards.[319]

The Act provides for a permit system or 'consent' procedure to prevent and control water pollution. The Act generally prohibits disposal of polluting matter in streams, wells and sewers or on land in excess of the standards established by the state boards.[320] A person must obtain consent from the state board before taking steps to establish any industry, operation or process, any treatment and disposal system or any extension or addition to such a system which might result in the discharge of sewage or trade effluent into a stream, well or sewer or onto land.[321]The state board may condition its consent by orders that specify the location, construction and use of the outlet as well as the nature and composition of new discharges. The state board must maintain and make public a register containing the particulars of the consent orders. The Act empowers a state board, upon thirty days' notice to a polluter, to execute any work required under a consent order which has not been executed. The board may recover the expenses for such work from the polluters.

Other functions of the state boards specified by the Water Act include:

1. Planning a comprehensive program for prevention, control, and abatement of water pollution in the state
2. Encouraging, conducting, and participating in investigations and research of water pollution problems
3. Inspecting facilities for sewage and trade effluent treatment
4. Developing economical and reliable methods of treatment of sewage and trade effluents.[322]

[318] Section 16 of the Water Act, 1974.
[319] Section 17(g), The Environment (Protection) Act of 1986gives the Central Government similar authority to establish water quality and effluent standards throughout India.
[320] Section 24.
[321] Section 25. Section 26 requires that persons releasing water pollutants prior to the adoption of the Water Act must also meet the consent requirements of section 25.
[322] Section 17.

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The Act gives the state boards the power of entry and inspection to carry out their functions.[323] Moreover, a state board may take certain emergency measures if it determines that an accident or other unforeseen event has polluted a stream or well. These measures include removing the pollutants, mitigating the damage, and issuing orders to the polluter prohibiting effluent discharges.

The 1988 amendment introduced a new section 33A which empowers state boards to issue directions to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. Prior to the adoption of section 33A, a state board could issue direct orders to polluters under section 32 of the act. A state board, however, could only exercise this power if the pollution arose from any accident or other unforeseen act or event. Moreover, a state board's authority to issue orders under section 32 was limited to orders directed to the polluter, not to government officials or other parties. The state boards can also apply to courts for injunctions to prevent water pollution under section 33 of the Act. Under section 41, the penalty for failure to comply with a court order under section 33 or a direction from the board under section 33A is punishable by fines and imprisonment.

The amendments also increased the power of the Central board relative to the state boards. Under section 18 of the Act, the Central Government may determine that a state board has failed to comply with Central board directions and that because of this failure an emergency has arisen. The Central Government may then direct the Central board to perform the functions of the state board.

The 1988 amendments modified section 49 to allow citizens to bring actions under the Water Act. Now a state board must make relevant reports available to complaining citizens, unless the board determines that the disclosures would harm 'public interest'. Previously, the Act allowed courts to recognize only those actions brought by a board, or with a previous written sanction of a board.

SCOPE OF JUDICIAL RELIEF UNDER THE WATER ACT-

Judicial opinion concerning the scope of section 33 of the Water Act is divided. In the following excerpt from the Pondicherry Papers Ltd. Case, the doctrines invoked by the Madras High Court in its ruling that courts have broad powers to fashion orders under section 33.

1. **Pondicherry Papers Ltd Vs. Central Board for Prevention and Control of Water Pollution**[324]

[323] Section 23.
[324] Madras High Court Cri. M.P. No. 4662 and 4663 of 1978 March 21, 1980

The Central board, acting as a state board for Pondicherry, applied to a magistrate's court under Section 33 of the Water Act seeking an injunction restraining a paper company from discharging effluent until the company constructed a water treatment plant as required by the conditions of the board's consent orders. The magistrate issued an injunction. The company filed a motion to quash the injunction on the grounds that a magistrate does not have the authority under Section 33 to order compliance with a consent order.

Relevant part of the order

"The next question is what the powers of the Magistrate are when such an application is made. Sub-section (3) deals with these powers. The Court may make an order restraining the petitioner from polluting the water in any stream or well and in doing so, it may in that order direct the petitioner to desist from taking such action as is likely to cause pollution, or, as the case may be, remove from such stream or well such matter, or it can authorize the Board [to do so] under sub-section 3(ii). It is well recognized that where an Act confers a jurisdiction it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution, but before implying the existence of such a power, the court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power.

2. Dr. Indiremani Dyarelai Gupta Vs. Nathu [325]

It has been held [that] to judge whether legally a power could be vested in a statutory body, the proper rule of interpretation is that unless the nature of the power was such as to be inconsistent with the purpose for which the body was created, or unless the particular power was contra indicated by any specific provision of the Act, any power which furthers the provision of the Act, could be legally conferred.

The Water (Prevention and Control of Pollution) Act is social welfare legislation, enacted for the purpose of prevention of pollution of water and for maintaining or restoring wholesomeness of water. Therefore, the Act has to be strictly enforced and every effort should be made to carry out the true intent of the legislation. On these principles, the Magistrate has to act when an application is filed under Section 33 and it would be for him to determine according to the circumstances of the case what order he should pass in order to give effect to the provisions of the Act and to remove the pollution or prevent it.

The Madras High Court clearly found that based on the doctrines of implied powers and strict enforcement of public welfare legislation, courts have broad powers to fashion injunctive relief under section 33 of the Water Act. The Allahabad High Court implicitly adopts this view.[326] When we compare this approach with that of the Delhi high Court in the following excerpt. The

[325] (1963(1) SCR 721)
[326] Sir Shadi Lal Enterprises Ltd. V. Chief Judicial Magistrate, Saharanpur 1990 CRI LJ. 522.

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Central board has issued consent orders to a bottling company on the condition that the company builds a water treatment plant. The company failed to build the plant and was polluting a nearby river with its effluent. The board obtained an injunction under section 33 restraining the company from polluting and ordering the company to build the treatment plant. The company challenged the injunction in the Delhi High Court.

3. **Delhi Bottling Company Pvt. Ltd. Vs. Central Board for the Prevention and Control of Water Pollution**[327]

The learned Magistrate also took note of the fact that the petitioners had not erected any treatment plant as per Cl.5 of the consent order. [Petitioner's counsel] submitted that there was no absolute obligation on the part of the petitioners to erect a separate treatment plant so long as they were not discharging the effluents contrary to the parameters as provided in the consent order. Be that as it may, the true interpretation of the impugned order is that restraint order has been passed against the petitioners restraining them from discharging their effluents in the stream which do not conform to the quality as per the standards prescribed by the Board in its consent order and thereby causing pollution of the stream. We cannot read between the orders that a direction has been given to erect a treatment plant. Such a direction is also perhaps not envisaged by the provisions of S.33 (1) of the Act. [Section] 33(1) only provides for the passing of a restraint order by the court against the Company for ensuring stoppage of apprehended pollution of water in the stream in which trade effluents of the Company are discharged. I, therefore, need not go into the question as to whether the petitioners' non-erection of a treatment plant was such an act on which the impugned order was justified. The restraint order is also not based on that footing. For the non-erection of the treatment plant the Board has the power to launch prosecution against the defaulting Company under the provisions of S.41 of the Act.

Constitutional Challenges to Section 33 Restraining Orders

A tactic of the polluters to avoid the restraining orders under section 33 is a motion to quash the order on the grounds that the Water Act violates the fundamental right to carry on a trade or business guaranteed by Article 19(1) (g) of the Constitution of India.

The Rajasthan High Court balanced the interests protected by the Water Act against the competing interests protected by Article 19(1) (g) in the following case. A lower court had issued a restraining order against textile companies that were discharging effluents after the expiration of consent orders from the state and Central boards. The companies filed writ petitions in the Rajasthan High Court challenging the validity of the restraining order.

4. **Aggrawal Textile Industries Vs. State Of Rajasthan** [328]

[327] AIR 1986 DEL 152.
[328] Rajasthan High Court S.B.C. Writ Petition No. 1375/80 March 2,1981

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The court has vehemently argued that the problem of prevention of water pollution is a problem of vast magnitude and it wouldn't be beyond the means of an individual to prevent or control the pollution resulting from an industry set up by him and that the prohibition contained in Section 24 of the Act would result in complete closure of the business of the petitioners and that it would thus result in imposing unreasonable restrictions to carry on their trade and business. I am unable to accept the aforesaid contention. It is true that the prevention and control of pollution of water may involve expenditure beyond the means of a particular individual carrying on any particular industry and it may require co-operation amongst various units and the local authorities to effectively prevent and control such pollution. The Act also envisages that one of the functions of the State Board is to plan a comprehensive program for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof and to evolve economical and reliable methods of treatment of sewage and trade effluent, having regard to the peculiar conditions of soils, climate and water resources of different regions. But, this does not mean that an individual, while exercising his right to carry on his trade or business, is free to pollute the source of supply of water to other citizens, and thereby cause harm to the interest of the general public. It cannot be disputed that pollution of water is a very serious hazard for the health of the general public, and the provisions of the Act which seek to provide for the prevention and control of water pollution and maintaining or restoring the wholesomeness of water are enacted in the interest of the general public.

The question which next arises for consideration is, whether the aforesaid restriction that has been placed by Section 24 of the Act is an unreasonable restriction. Sub section (2) of Section 24 enables a person to cause or permit a trade effluent to enter into a stream provided the consent of the State Government is obtained. Sections 25 and 26 of the Act make provisions for the grant of consent by the State Board for discharging any sewage or trade effluent into a stream or well. Section 28 provides for an appeal against an order made by the State Board under Sections 25 and 26, and a further right of revision is conferred under Section 29 of the Act. This shows that the Act contains adequate provisions for grant of consent by the State Board as well as provisions for appeal and revision against the orders passed by the State Board so as to enable a person to carry on his trade or business after obtaining the consent of the State Board. It is, therefore, not possible to hold that Section 24(1) imposes unreasonable restrictions on the right of the petitioners to carry on their trade or business.

CRIMINAL LIABILITY UNDER THE WATER ACT

The water act establishes criminal penalties of fines and imprisonment for noncompliance with section 33 orders, section 20 directions concerning information, section 32 emergency orders and section 33A directions issued by a state board.[329]Polluters violating the act are also subject to

[329] Section 41

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criminal penalties.[330] The 1998 amendments to the water act increased the penalties for these offences, bringing them into line with the 1987 amendments to the Air act.

Section 47 of the water act extends liability for violations committed by companies to certain corporate employees and officials. The act also extends liability for violation to the heads of government departments.[331]

The following commentary[332] discusses the liability of corporate officials and employees under the water act " Section 47 of the water pollution act contains the usual provision to the effect that where an offence under the act has been committed by a company, every person, who at the time of the commission of the offence, ' was in charge of , and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.' Under the proviso to the section, such company official is exempt from punishment, if he proves that the offence had been committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence . Company officials may well like to bear in mind that statutory provisions making company officials liable are contained in almost every Central Act that is enacted in recent times. In a way, such provisions impose a fictional liability on the company officer.

The provision usually runs in two sub-sections. The first sub-section provides - as does section 47 of the Water Pollution Act that every person who is in charge of and responsible to the company for the conduct of the affairs of the company 'is liable' for the offence (in addition to the company), unless he can prove that the offence had been committed without his knowledge or that he had exercised all due diligence to prevent its commission. The second sub-section usually provides that where an offence (under the relevant Act) has been committed by a company, and it proved that the offence is due to the connivance of or attributable to any neglect on part of any director, manager, secretary or other officer of the company, then such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. This sub section, it may be noted, is not confined to a person 'in charge' of the company responsible for its affairs. It applies to every officer of the company, however small may be. But his connivance or neglect has to be proved. In this sense, its scope is narrow. But in another respect, the scope is wide, inasmuch as it does not require actual participation or mental support of the officer. In the context of pollution law and offences under such laws, such a provision in the Act would mean that if a company's production manager or technical director has been remiss in ensuring that the pollution regulations have been strictly complied with, and then he would become punishable for the relevant offence under the Act. He may be miles away from the scene of the offence and may not

[330] Section 43 & 44
[331] Section 48
[332] Bakshi; Corporate Executives and the Pollution Law, (1986) 2 Comp. L.J. 61

have sanctioned its commission. He might even have been unaware of it. And yet, he would become criminally liable. Willfully permitting the offence is not necessary in the Water Pollution Act; though such was the shape of the provision in some earlier Central Acts imposing criminal liability on corporate officials.

THE WATER CESS ACT

Parliament adopted the Water Cess (Prevention and Control of Pollution) Act of 1977 to provide funds for the Central and state pollution control boards. The Act empowers the Central Government to impose a Cess on water consumed by industries listed in Schedule I of the Act. Specified industries and local authorities are subject to the Cess if they use water for purposes listed in Schedule II of the Act, which includes: (l) industrial cooling, spraying in mine pits, or 'boiler feed'; (2) domestic purposes; (3) processing which results in water pollution by biodegradable water pollutants; or (4) processing which results in water pollution by water pollutants which are not easily biodegradable or are toxic. A rebate of twenty-five per cent of the Cess is given to complying industries and authorities.

Many companies challenged imposition of the Cess, claiming that they were not within the specified industries.

1. **Andhra Pradesh State Board For Prevention And Control Of Water Pollution Vs. Andhra Pradesh Rayons Ltd.**[333]

The question which is sought to be raised in this petition is whether the respondent Andhra Pradesh Rayons Ltd. Which is manufacturing Rayon Grade Pulp, a base material for manufacturing of synthetics or man-made fabrics is an industry as mentioned in Schedule I of the Water (Prevention and Control of Pollution) Cess Act, 1977 for the purposes of levy on Water Cess under the Act.

Specified industry is one which is mentioned in Schedule I which is as follows:

7. Chemical industry.

17. Textile industry.

18. Paper industry.

15. Processing of animal or vegetable products.

Before us it was sought to be canvassed that Rayon Grade Pulp is covered either by Item NO.7 which is chemical industry or Item No. 10 which is textile industry or Item No. 11 which is paper industry. We are unable to accept the contention.

[333] AIR 1989 SC 611

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It has to be borne that this Act with which we are concerned is an Act imposing liability for Cess. The Act is fiscal in nature. The Act must, therefore, be strict: construed in order to find out whether a liability is fastened on a particular industry The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament be read according to its natural construction of words. The purpose of the Act is to realize money from those whose activities lead pollution and who must bear the expenses of the maintenance and running of the State Board. It is a fiscal provision and must, therefore, not only be literally construed but be strictly construed. We find nothing to warrant the conclusion that Rayon Grade Pulp is included in either of the industries as canvassed on behalf of the petitioner here.

2. Kerala State Board For Prevention And Control Of Water Pollution Vs. Gwalior Rayon Silk Manufacturing (Weaving) Company Ltd.[334]

The Cess Act is not to be read in vacuum or in a manner dissociated with the Water Pollution Act. The learned single Judge [in the lower court] felt that the Cess Act could be viewed in isolation. That is evident from the following observation contained in the judgment:

The purpose of the Pollution Act is to control water pollution; but the purpose of the Cess Act is to levy and collect a Cess, i.e., a tax for a special administrative purpose. You cannot make rules under the Cess Act to achieve the purposes of another Act. [Emphasis supplied by the court.]

In Saraswati Sugar Mills v Haryana State Board[335] the Supreme Court strictly construed the entry covering processing of animal or vegetable products industry to exclude the manufacture of sugar from sugar cane.

PREVENTIVE MEASURES

The Water Act provides for a permit system similar to the one available under the Air Act to prevent and control water pollution. The Water Act prohibits disposal of polluting materials in streams (which includes subterranean waters), rivers, wells, sewers, sea or tidal waters to such extent or, as the case may be, to such point as the State Government may, by notification in the Official Gazette, specify in this behalf, in excess of the standards established by the Central Pollution Control Board. Under the provisions of the Water Act a person must obtain consent from the State Pollution Control Board before taking any steps to establish any industry, operation or process, any treatment and disposal or any extension or addition to such a system which might result in the discharge of sewerage or trade effluents into a stream, well or sewer or onto land. The application to the State Pollution Control Board must be made under Rule 32 of the Water (Prevention and Control of Pollution) Rules, 1975in Form XIII. The application

[334] AIR 1986 KER 256

[335] AIR 1992 SC 224. In view of this judgment, Kisan Sahakari Mills v State of Uttar Pradesh AIR 1987 ALL 298 and Travancore Sugars & Chemicals Ltd. v Pollution Control Board 1990 (2) KER.L.T. 924 are no longer good law. The strict construction test was reiterated by the Supreme Court in a 1995 decision reported at Bihar State Pollution Control Board v Tata Engineering & Locomotive Co. Ltd. 1998 (8) SCC720.

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requires specification of the type as well as quantity of the effluent. The applicant is also required to attach a list of raw materials and chemicals used per month. In the event there is a change in the raw materials used as well as the nature or quantity of the effluent, a fresh consent would be required. Under the Water Act, the State Pollution Control Board has the power to issue directions to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity and any other service. The Powers and functions of the Central Pollution Control Board and the State Pollution Control Boards under the Water Act are similar to those under the Air Act, except in that they have greater powers in respect of certain matters specifically enumerated under the Air Act which have not been mentioned under the Water Act.

PENALTIES

Sections 43 and 44 of the Water Act provide that whoever causes discharge of any poisonous, noxious, or polluting matter into any stream or well or sewer or on land or establishes any industry without the previous permission of the State Pollution Control Board may be punished with a fine and imprisonment for a minimum term of one year and six months and a maximum term of six years. It must be noted that the Water Act provides for certain exceptional circumstances under which a person may discharge polluting material in a water body, such as:

1. Constructing, improving and maintaining in or across or on the bank or bed of any stream any building, bridge, weir, dam, sluice, dock, pier, drain or sewer or other permanent works which he has a right to construct, improve or maintain;

2. Depositing any materials on the bank or in the bed of any stream for the purpose of reclaiming land or for supporting, repairing or protecting the bank or bed of such stream provided such materials are not capable of polluting such stream;

3. Putting into a stream, any sand or gravel or other natural deposit which has flowed from or been deposited by the current of such stream;

4. Causing or permitting, with the consent of the State Board, the deposit accumulated in a well, pond or reservoir to enter into any stream.

In case of offences committed by corporations, the Water Act specifies that in the event any offence is committed by a company, every person who was directly in the charge of and responsible for the conduct of the business of the company (at the time the offence was committed) together with the company shall be liable to be proceeded against and punished accordingly. However, it also provides that no person shall be held guilty in the event it is proved that the offence was committed without the knowledge of such person or despite exercising all due diligence to prevent the commission of such offence. The scope of Section 47 of the Water Act was discussed at length by the Patna High Court in Mahmud Ali v. State of Bihar And

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Another.[336] Looking at the scheme of Section 47, the Court said that Section 47(1) creates a deeming legal fiction whereby every person who is in charge of or responsible to the company for the conduct of its business becomes automatically guilty of the offence committed by such a company and is liable to be proceeded against and punished accordingly. No other overt act or direct commission of the offence by such a person is necessary barring the factum of being in charge of the company or responsible thereto for the conduct of its business.

Once the allegation is leveled or established, then by a fiction of the law every person in charge of and responsible to the company for the conduct of its business is, in the eye of law, deemed to be as guilty of the offence as the primal offending company. However, this strict rule is tempered and softened by the Proviso to Section 47(1).This lays down that such a person may wriggle out of the liability if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence. The burden of proof is clearly laid upon such a person and it is thus plain that the proviso is a rule of evidence that reverses the ordinary mandate of criminal liability that the burden of establishing the offence lies on the prosecution.

The Water Cess (Prevention and Control of Pollution) Act of 1977 was adopted by the parliament to provide funds for the Central and state pollution control boards. The Act empowers the Central Government to impose a Cess on water consumed by industries.

CONCLUSION

After the Stockholm Conference in June 1972, it was considered appropriate to have a uniform law across the country to deal with broader environment problems endangering the health and safety of people as well as of the country's flora and fauna. The Water (Prevention and Control of Pollution) Act, 1974("the Water Act") was the first enactment by the Parliament in this direction. This was also the first specific and comprehensive legislation institutionalizing simultaneously the regulatory agencies for controlling water pollution. The Pollution Control Boards at the Centre and the States came into being in terms of this Act. The Water Act was enacted with the aim of preventing and controlling water pollution in India. Pollution has been defined under the Water Act as, "the contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gas and solid substance into water (whether directly or indirectly) as may be the case or is likely to create nuisance or render such water harmful or injurious to public health or safety or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plant or of aquatic organizations".

[336] AIR 1986 Pat 133

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A CRITICAL ANALYSIS OF THE COURT MARTIALING SYSTEM IN INDIA WITH SPECIFIC REFERENCE TO THE COUNTRIES OF UK, US AND CANADA

-Sahil George Arun[337]

ABSTRACT

The present martial law system in India for the Indian armed forces is provided for by the Army Act of 1950. The topic of this research paper was selected from the initial reading of the Army Act. This act falls short on many accounts, especially with reference to court martialing, and this is the main focus of this research paper. A court martial refers to a military court of trial used to determine the guilt of members of the armed forces. The laws and regulations that govern court martials are filled with various lacunae and inconsistencies in their implementation and their functioning.

The serious holes in the structure and functioning seen in the Army Act of 1950 was the reason to select this topic for the research paper. One felt that it was necessary to point out the many flaws in the Court Martialing procedure and law and attempt to compare and contrast the system present in the sub-continent of India to that of other countries and ultimately attempt to create a suitable new system for court martialing in India.

The review of literature or various articles, used for this research paper, is an attempt to show the source of the various factors that were used as the basis to formulate a reason for the change in the Court Martial law in India while also attempting to create a new design or simple reorganization of the current system of Court Martialing in India.

INTRODUCTION

"The soldier is the Army. No army is better than its soldiers. The Soldier is also a citizen. In fact, the highest obligation and privilege of citizenship is that of bearing arms for one's country" ― George S. Patton Jr.

Many know that India attained independence on the 15th of august, 1947. This might be the official date of the emergence of independent India but true attainment of independence for India was when it created and enforced our constitution on the basis of the ideals of equality, liberty,

[337] Student – Christ University

justice and socialism. The subject of the army was placed in list one under entry I which gives the Union power to control and legislate on any matters that govern the functioning and administration of the army. The country expects the personnel of the Armed Forces to safeguard the security and the sovereignty of India and lay down their lives to achieve it. It is the duty of the country to provide prompt and impartial grievance resolution mechanism especially when speedy justice has been included as a fundamental right in interpreting [338]Article 21 [339] of the Constitution by the Hon'ble Supreme Court of India in Hussainara Khatoon case[340].

The court held that it is the fundamental right of every citizen of the country to have legal aid. Because of poverty, ignorance of law, lack of money and any other factor one cannot be deprived his rights available in the form of fundamental rights. If, the country expects the best talents to join the Armed Forces and is not deprived of the services of bright and courageous young men society, they must be assured adequate machinery to get justice. This is more so when unlike their civilian counterparts, Parliament can by law curtail and even deny to them any fundamental right. Similarly Article 311[341] which contains a very important protection and safeguard to government servants regarding removal, reduction in rank, suspension etc. is inapplicable to the Armed Forces. While indiscipline in any public service is not desirable and every service dispute should be adjudicated promptly the need is definitely much more so in the case of Armed Forces[342]. Thus it is extremely is crucial that the military personnel of the country are governed by laws and subject to fair justice provided to them by the various institutions set up by the military law of the country. One of the most important institutions in this regard, to provide justice to various military personnel is the system of "court martialing" that is set up by the Army Act of 1960[343].

IMPORTANCE OF AN EFFICIENT SYSTEM OF COURT MARTIALING

While maintaining discipline amongst army personnel it is extremely necessary to protect their dignity. It is necessary to ensure that Armed Forces are not deprived of the services of the cream of the society and that the bright and courageous among them don't keep out on account of inadequate machinery for getting justice in the Armed Forces or for fear of being punished for no wrong done by them[344]. It is similarly important to guarantee that the discipline is proportionate to the offense and furthermore to ensure that the military law is more empathetic and dynamic to get it tune with the way of life in the Armed Forces of the created nations[345].

[338] A study of problems, practices of court-martial proceedings and power of judicial review in India, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.
[339] INDIA CONST. art. 21.
[340] Hussainara Khatoon & Ors vs Home Secretary (9 March, 1979) AIR 1369, (1979) SCR (3) 532.
[341] INDIA CONST. art. 311.
[342] A study of problems, practices of court-martial proceedings and power of judicial review in india, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.
[343] Indian Army Act, 1960, Acts of Parliament, 1960 (Army).
[344] A study of problems, practices of court-martial proceedings and power of judicial review in india, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.
[345] A study of problems, practices of court-martial proceedings and power of judicial review in india, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.

A Soldier's life is definitely not an agreeable one. More often than not the soldier stays far from his family. It is the feeling of pride and sacrifice for the nation's safety that supports him. It would not be appropriate to deny him equity which is accessible to different residents of the nation. It should likewise be recollected that military can't be constructed just upon mastery and understood submission to the requests of the bosses. The seniors should constantly show their skill and specialized capacity keeping in mind the end goal to order regard and steadfastness of those under them. It isn't right to state that in light of the fact that the amount of people influenced by military law and the courts are few, in light of the fact that the individuals from the Armed Forces have willfully submitted themselves to the current framework with every one of its rigors, no change of law is called for. Higher benchmarks of direction and teaching in the Armed Forces are called for, not exclusively to keep in availability a proficient battling machine yet additionally to order open regard for the Armed Forces, equity and teach to go together.[346]

COURT MARTIALING: DEFINITION

A court-military is a brief body amassed by the "respective authority" – a senior military officer – subsequent to investigating the charges against a blamed warrior. The assembling officer likewise names the individuals from the court-military, the prosecutor and the safeguard advise, who are for the most part officers drawn from the military[347].

Some court-martials are additionally gone to by a "judge advocate" who is prepared in law and gives lawful counsel to the court, indictment and resistance, yet does not act either as a judge or as a promoter for any side.

Military courts can attempt military offenses, for example, inability to obey orders and furthermore regular citizen wrongdoings. At the point when a military court achieves a finding and honors a sentence, it must be "affirmed" by another senior officer (who is generally the gathering officer). The affirming officer, if disappointed, can arrange the court to change the discoveries or sentence. They can likewise alleviate, dispatch or drive the sentence[348].

Section 108 of the Indian Army Act of 1960 states the various types of Court Martialing present in India. According to the act for the purposes of this Act there shall be four kinds of courts martial, that is to say: (a) general courts-martial; (b) district courts-martial; (c) summary general courts-martial; and (d) summary courts-martial[349].

[346] A study of problems, practices of court-martial proceedings and power of judicial review in india, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.

[347] Shailesh Rai, Senior Policy Advisor, India's court-martial system fails on all counts: competence, independence, impartiality, Scroll (Jul 01, 2015, 08:45 AM), https://scroll.in/article/737413/indias-court-martial-system-fails-on-all-counts-competence-independence-impartiality

[348] Shailesh Rai, Senior Policy Advisor, India's court-martial system fails on all counts: competence, independence, impartiality, Scroll (Jul 01, 2015, 08:45 AM), https://scroll.in/article/737413/indias-court-martial-system-fails-on-all-counts-competence-independence-impartiality

[349] Indian Army Act, 1960, Acts of Parliament, 1960 (India).

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THE NEED FOR A CHANGE IN MILITARY LAW WITH SPECIFIC REGARD TO COURT MARTIALING

The military has created laws and customs of its own. The essential capacity of the Armed Forces is to battle or be prepared to battle should the event emerge. The Armed Forces are not a deliberative body. They have an official capacity. The officer's entitlement to direction and the trooper's obligation to obey can't be addressed. Plus, the military comprises a specific network represented by its own particular laws that perceive one of a kind military offenses, for example, departure, non-appearance without leave, noncompliance of requests and forsakenness of obligation. These offenses exist to guarantee the achieving of military destinations. In the event that a leader can't depend on his subordinates to obey and if the individuals can't depend on one another to take after requests, the viability of a battling power is undermined and the security of the country might be imperiled. No regular citizen parallel might be attracted to clarify the requirement for upholding discipline. Further, the military equity framework is intended to arbitrate cases productively. This is critical in a possibility, when a leader must manage unfortunate behavior quickly to avert corruption of the unit's adequacy and union[350].

To value the requirement for an adjustment in the military equity framework, it is important to comprehend why a different arrangement of equity is required. Military working in modem war requests fast choices that can't be accomplished by a discussing society. In numerous military circumstances, an administrator's choices are authorized through his subordinates. This is the reason behind why the Armed Forces have an arrangement of rank and direction, unmistakably intended to put one individual in control when bunch activity must be settled on. Military equity gives an improvement to developing a propensity for unquestioning acquiescence by representing the risk that rebellion will be punished[351].

DEFICIENCIES IN THE COURT MARTIALING SYSTEM

- **Competence of judges**

One of the most prominent lacunae in the Court Martialing system is the competence of the judges that preside over the trials itself. Members of a court-martial typically don't have any legal training or qualifications. Officers appointed to the armed forces for their military ability are in effect required to perform all the functions of a judge, a job that in civilian courts requires a law degree and years of experience. Soldiers are expected, with the advice of a judge advocate, to assess evidence, determine guilt, and award sentences[352].

- **Independence**

[350] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[351] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[352] Shailesh Rai, Senior Policy Advisor, India's court-martial system fails on all counts: competence, independence, impartiality, Scroll (Jul 01, 2015, 08:45 AM), https://scroll.in/article/737413/indias-court-martial-system-fails-on-all-counts-competence-independence-impartiality

The individuals from a court-martial, the judge advocate, the prosecutor and the safeguarding officer are altogether subordinates in rank to the meeting officer. The individuals from the court-martial are likewise under the meeting officer's hierarchy of leadership. A few previous fighters have condemned this absence of autonomy[353]. Wing Commander (Retd) U C Jha wrote that the convening officer "exercises command and control over his functionaries in all areas of their service career, including assessment in the annual appraisal reports, future promotions, leave, training courses, posting and appointment"[354].

- **Impartiality**

The gathering officer, who chooses whether a case ought to be attempted by a court-military, needs to initially decide whether the proof backs the charges. At the point when a similar individual is then given the specialist to name a court-military's individuals and "affirm" discoveries and sentences, the privilege to a reasonable preliminary is, and has all the earmarks of being, debilitated. The hazard that court individuals will be defenseless to direction impact increments - an issue the Supreme Court has featured. The irreconcilable situation is exacerbated in instances of charged human rights infringement, where worries about the armed forces notoriety and troop resolve become possibly the most important factor[355].

While singular officers can obviously be straightforward and honest, the auxiliary imperfections of the military equity framework make military courts less ready to direct reasonable preliminaries and convey equity[356].

- **Legal aid to the Accused**

The most significant is the absence of the services of an experienced legal officer as counsel for the accused. Military rules permit an accused to engage a civilian lawyer at his own expense or to be defended by a military officer known as the defending officer. In reality, very few of the accused can engage a civilian lawyer at their own expense and service officers normally detailed for the duty are inexperienced and unwilling to undertake this commitment[357]. The infrastructure required to meet this obligation of legal aid has not been developed in the armed forces. The organization does not provide any incentive to the defending officers. The problem is further compounded by the fact that defending officers have little or no interest in the task. Consequently, cases before the court martial are not adequately defended, which is in violation of the provisions of Article 22[358] of the Constitution[359].

[353] Shailesh Rai, Senior Policy Advisor, India's court-martial system fails on all counts: competence, independence, impartiality, Scroll (Jul 01, 2015, 08:45 AM), https://scroll.in/article/737413/indias-court-martial-system-fails-on-all-counts-competence-independence-impartiality

[354] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[355] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[356] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[357] A study of problems, practices of court-martial proceedings and power of judicial review in india, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.

[358] INDIA CONST. art. 22.

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- **Right to Bail**

There is no arrangement of safeguard for a military individual captured on a charge. It involves tact of the boss, or the predominant military specialist. While the Supreme Court has set down completely the standards on which safeguard should be without a doubt, these arrangements have not been made appropriate to military workforce held in military care. Such circumspection in allowing safeguard, is subjective, obligated to abuse and makes the protected certification under Article 21 trivial.

- **Denial of Right to Appeal**

There is no provision of appeal against the finding and sentence of a court martial. Chapter XII of the Army Act[360], which contains sections 153 to 165, provides for the confirmation and revision of the order of the court martial. Section 153 states that[361] "No finding or sentence of a general, district or summary general, court martial shall be valid except so far as it may be confirmed as provided by this Act."[362]

Section 160 provides for the revision of a finding or sentence of a court martial by an order of the confirming authority. Section 164 deals with confirmation and remedy available to those against whom a finding or sentence has been confirmed. In the case of a final finding or sentence awarded by a GCM, DCM and SGCM, the remedy available to the accused is given in section 164 (2), as "Any person...who considers himself aggrieved by a finding or sentence of a court martial...may present a petition to the central government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the central government, the Chief of the Army Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit." This remedy can be invoked only after the finding of the sentence has been confirmed. The privilege of seeking the remedy is, thus, not available to the accused before the confirmation of the sentence. Besides, this remedy is an exercise on paper and takes place in closed rooms where the accused has no right of personal representation. Thus, in reality, there is no right to appeal against the order of the court martial. Article 136(2)[363] of the Constitution stipulates that the Supreme Court (Article 227 (4)[364] in the case of high courts) cannot give special leave to appeal against any judgement, determination or sentence of a military court or tribunal[365].

[359] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435
[360] Indian Army Act, 1960, Acts of Parliament, 1960 (India).
[361] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435
[362] Indian Army Act, 1960, Acts of Parliament, 1960 (India).
[363] INDIA CONST. art. 136(2).
[364] INDIA CONST. art. 227(4).
[365] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

The Supreme Court, on account of Union of India v. Himmat Singh Chahar (1999), has considered the degree to which a high court, under Article 226, of the Constitution can practice the intensity of judicial review over the court martial system.

The Court held: "The judicial review would be for a limited purpose to (a) find out whether there has been infraction of any mandatory provisions of the Act which has caused gross miscarriage of justice; or (b) find out whether there has been violation of principles of natural justice which vitiate the proceedings; or (c) find out whether the authority exercising the power was having jurisdiction under the Act." Thus, the remedy of judicial review provided to a military person under Articles 32 and 226 is limited[366].

COURT MARTIALING SYSTEMS IN DIFFERENT COUNTRIES

- **United States**

In the United States, the modem military justice system is based on the Constitution, which gives the Congress the expert to "accommodate the normal defense", "to raise and support armies", and "to make rules for the legislature and control of the land and maritime forces", and designates the President as Commander-in-Chief of the military. It was established with an establishment resting on four authorities: the Uniform Code of Military Justice (UCMJ); the Manual for Court Martial (MCM); a Presidential Executive Order that includes the rules for preliminary by court military; and the assemblage of case laws created from the courts that survey military justice cases. Military members don't relinquish their constitutional rights. Like every American national, service members appreciate the key protections of the Constitution[367].

The UCMJ represents a masterpiece of legislation that balances the requirement for good request and discipline with the constitutional rights stood to all citizens. It provides for a single criminal code appropriate to every one of the services and a criminal justice system containing safeguards for the soldier that go past the rights appreciated by civilians. The military justice system provides checks and balances to ensure that an accused's procedural and substantive rights are secured. The military judges base their rulings on constitutional provisions, customary law, Rules for the Court Martial (RCM), and Military Rules of Evidence (MRE). These rules and procedures ensure that an accused's rights are kept up all through the preliminary. The military justice system also offers the accused exceptional access to the appeals process through a series of redrafting forums: the Court of Criminal Appeals (one for each service), the Court of Appeals for the Armed Forces, and the United States Supreme Court. Furthermore, the President of the US can, in time of crisis or war, arrange 'military commissions' to be set up to attempt certain offenses. Their 'jurisdiction' can stretch out to civilians[368].

The military justice system gives service members for all intents and purposes every one of the rights and privileges stood to citizens who confront prosecution in nonmilitary personnel courts.

[366] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[367] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[368] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

In numerous areas, such as, the privilege to counsel, pre-preliminary investigations, discovery, sentence, post-preliminary process, and appeals, the military justice system offers benefits that are more positive to the accused than those accessible in the regular citizen system. What's more, Article 37 of the Uniform Code of Military Justice prohibits unlawful direction impact[369].

- **Canada**

The Canadian system of court military was based on the British system. In 1950, a comprehensive National Defense Act was made, which incorporated all legislations identifying with the Canadian Army, Navy and Air Force, established a uniform process for administering justice and gave the privilege to bid from the findings and sentence of courts military to the Court Martial Appeal Board. The subsequent stage relating to offer process came in 1959, when Parliament supplanted the Board with the Court Martial Appeal Court. The selection of the Canadian Charter of Rights and Freedoms in 1982, has resulted in more constitutional issues being raised under the steady gaze of the court[370].

Canadian military courts are required to have a more noteworthy level of institutional freedom from the direction structure of the military. The leader has no expert to choose judges or board members. In cases where the accused is a non-commissioned officer, Warrant Officers are approved to sit as members of the court military board. The Director of Military Prosecutions prefers charges and conducts prosecution at court military. The court members are chosen under a changed irregular selection process based on rank, and there is on the right track to speak to the Supreme Court of Canada on questions of law.[371]

- **United Kingdom**

The English court military system can be followed back to the military court appended to the armed force in Scotland in 1296. Throughout the centuries, the English system created from its primitive beginnings to an unmistakable court. At the point when the Royal Air Force was shaped on 1 April 1918, the Army system was adjusted for its use. This system survived until 1946, when the Lewis Committee report was published. The Air Force Act, 1955, the Army Act, 1955 and the Naval Discipline Act, 1957– all in all known as the Service Discipline Acts (SDA), presented the present system. These legislations stay in drive today though with specific amendments[372].

Preceding 1 April 1997, it was unrealistic to claim against a sentence alone. The change realized by the Armed Forces Act, 1996, conveyed the court military system closer to the regular citizen system for offer. Following an interest to the Court Martial Appeal Court, a further interest is possible to the House of Lords. In cases where a court military decision has been reversed and

[369] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435
[370] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435
[371] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435
[372] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

there has been a miscarriage of justice, the Secretary of State is required to pay compensation to the person who has suffered.[373]

Under the ongoing reforms in the British military justice system, the duties of the administrator have been distributed among three separate bodies. A free prosecuting expert decides whether to indict a military case, an administration officer selects the court military board members, and a looking into officer justifies the decision. The UK's Armed Forces Discipline Act 2000 has also established a summary interest court to hear appeals against the findings and punishments granted by leaders while managing summarily with charges. The request of preliminary in a Summary Appeal Court follows closely that of the Crown Court[374].

CONCLUSION

All in all, we may state that the human rights standards perceive the intrinsic poise and principal opportunities of all individuals from the human family. They frame the establishment of every single fundamental flexibility, equity and peace on the planet. Under Article 14 of the ICCPR, the privilege to a reasonable preliminary and correspondence under the watchful eye of the court has been viewed as crucial guidelines of law[375]. The acknowledgment of these standards has realized changes in the military equity frameworks of the USA, Canada, Australia and the UK. Indeed, even nations like China, Indonesia, New Zealand, Russia, and Thailand have procedural shields and investigative courts which engage offers against the choices of the military court. Be that as it may, in India there are glaring lacks in the shields given to the blamed and in the disposition for those controlling the military equity framework[376]. The framework is viewed as a piece of the official division and is an instrument in the hands of the official to authorize discipline. This, notwithstanding the way that the Constitution of India makes a presentation that equity will be anchored for each subject[377].

The Indian military equity framework is a headache from a period when the combat zone was far away and the Armed Forces should have been independent. No lawful framework can or ought to work in a vacuum, dismissing the changing standards of society. The military equity framework has turned out to be obsolete and the negligible making of a re-appraising tribunal won't make it dynamic. It requires the joining of basic assurances in view of global legitimate standards in the light of the encounters of different majority rules systems on the planet. Accordingly, rather than making changes by making a "tribunal" it would maybe be more prudent to survey the military equity framework in totality, keeping in mind the end goal to advance a sound equity conveyance framework. The framework ought to be normal to all the three Services and capacity as a manual

[373] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[374] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[375] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

[376] A study of problems, practices of court-martial proceedings and power of judicial review in India, http://shodhganga.inflibnet.ac.in/bitstream/10603/132592/18/18_summary.pdf.

[377] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

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for the general population. In the event that the legislature prevails with regards to making military law more others- conscious and dynamic, it will serve to console military faculty that they are administered by a reasonable, just and unprejudiced equity conveyance framework under the Indian Constitution[378].

[378] Wing Commander U C Jha (Retd), Military Justice System in India, The united service institution of India, (September. 19th,2018 17:22), http://usiofindia.org/Article/Print/?pub=Journal&pubno=564&ano=435

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SUSTAINABLE CORPORATE SOCIAL RESPONSIBILITY

-*Shreshth Balachandran*[379]

MEANING AND DEFINITION

When we hear of Corporate Social Responsibility, we always associate these words with Philanthropy. But then even though these two terms might seem similar or carry the same connotation there is actually a present difference between them which we shall discuss ahead.[380]

The meaning of CSR, as the idea of business, has grown and changed with time. At different stages of how business was perceived, CSR was also seen in the same light.[381] So as the idea of how business changed in different economic times, CSR also evolved.

R. Bowen's publication[382] in 1953 was the beginning of modern literature on the subject. But it was only in the year of 1960 that a more formal definition came into being. This definition was made by Keith Davis who in many ways is regarded as the runner-up to the position of the "father of CSR" designation. –

According to him

"CSR is a nebulous idea which must be seen in a managerial context."

He also stated that: -

"Some socially business responsible: decisions can be justified by a long, complicated decision process as having a good chance of long-term economic gain"

Another influential contributor in the early definitions of social responsibilities was William C. Fredrick who in 1960[383] stated in his definition that: -

"Societal responsibility in the final analysis implies a public posture to towards societies economic and human resources and a willingness to see that those are utilized for broad

[379] Student – LLM – CMR University
[380] Maimunah Ismail. "Corporate Social Responsibility and its Role in Community Development. An International Perspective". Journal of International Social Research. Vol 2/9, 2009. p 199.
[381] Pitabas Pradhan, Subhas Parida and Babani Rath. "Corporate Social Responsibility in the Globalised Business Environment". The Indian Journal of Social Work, Vol 66, issue 2, April 2005, p 211.
[382] Howard R. Bowen, Societal Responsibilities of a businessman (1953).
[383] William C. Fredrick, The Growing concern over Business Responsibility, California Management Review, 1960, 2, 4: 54-61.

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social ends and not for simply narrowly circumscribed interests of private person and firms."

Clarence C. Walton and important thinker on business and society in his book in 1967[384] gave varieties to the concept but the fundamental idea in this following quote from his book:

"In short the new concept of societal responsibilities recognizes the intimacy of relationships between corporations and society and realizes that such relationships must be kept in mind by top managers as the corporations and their related groups pursue their respective goals."[385]

Harold Johnson was the first person to discuss on this topic in the 70s in his book[386] where he presented what he termed as 'conventional wisdom'. His definition was:

"A socially responsible firm is one whose managerial staff balances, a multiplicity of interests. Instead of striving only for larger profits for its stockholders, a responsible organization also takes into account the employees, supplier's dealers, local communities and the nation."[387]

But a ground-breaking contribution came from the Centre of Economic Development in 1971 where they introduced the concept by observing that all businesses function by the consent of the public and the basic function of every organization is to constructively fulfill the needs of the society, to its satisfaction.

"Business is being asked to assume broader responsibilities than ever before and to serve wider range of human values. Business enterprises are being asked to contribute more to the quality of lives of the people than just supplying them goods and services. In as much as the business exists to serve the society, the managements will henceforth be judged on what they will be providing to the people in their ever-changing expectations."[388]

They formed the 3-concentric circle idea of societal responsibility: -

The inner circle includes the basic responsibilities for efficient execution economic function-production.

The intermediate circle covers responsibility to exercise economic function with a view of changing social priorities.

[384] Clarence C. Walton, Problems in a Business Society, Belmont, Calif., Wadsworth Pub. Co. [©1967].
[385] Supra note 3.
[386] Harold B. Johnson, Business in Contemporary Society: Issues and Framework (1971).
[387] Supra note 5.
[388] Centre for Economic Development, Societal Responsibilities of Business Corporations (1971).

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The outer circle outlines newly emerging responsibilities that businesses must undertake to become more involved in improving the social environment.

Thomas M. Jones then entered the discussion in the 1980s[389] with a very interesting proposition:

"Corporate social responsibility is the notion that corporations have an obligation to constitute groups in society other than stockholders and beyond that prescribed by law and union contract. Two facets of this definition are critical. One, that the obligation must be voluntarily adopted. Second, the obligation is a broad one, extending beyond the duty of shareholders to other societal groups such as customers, employees, suppliers and neighboring communities."

Last decade of the 20th century witnessed a shift in focus from charity and traditional philanthropy towards a more mainstream development and concern for disadvantaged groups in the society.

CSR UNDER COMPANIES ACT, 2013

The Companies Act, 2013[390] provided the forefront to Corporate Social Responsibility in the last few years. It promotes transparency and disclosures in a streamlined manner. MOC notified Section 135 and Schedule VII of the Companies Act, 2013 and the Companies (Corporate Social Responsibility Policy) Rules, 2014.

Definition of CSR

The term 'CSR' is defined to mean and include but not limited to[391]:

- Projects or programs mentioned and specified in Schedule VII of the Act,
- Projects or programs taken up by the board in pursuance of the recommendations made by the CSR Committee as per declared by their CSR Policy.

Applicability

As per Section 135 of the Companies Act, any company fulfilling any of the following criteria's, this provision will be applicable on it[392]:

- Companies having net worth of Rs. 500 crores or more,

[389] T.M. Jones, Corporate social responsibility revisited, redefined, California Management Review, 59-67, 1980
[390] The Companies Bill 2009 was introduced in the Lok Sabha on 5th August 2009 but failed to be passed. A revised version was introduced in 2011 and was passed in 2013.
[391] Companies Act 2013, Section 135, www.mca.gov.in/SearchableActs/Section135.htm, (Apr. 02nd 2018, 11:00 Hrs).
[392] Supra note 15.

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- Companies having turnover of Rs. 100 crores or more,
- Companies having net profit of Rs. 5 crores or more.

The Companies Act has widened the ambit of holding or subsidiary or even foreign companies having their branches in India so that even they comply with the set norms.

If a company ceases to be a company under sub-section (1) of section 135 of the Act for three consecutive financial years, shall not be required to[393]:-

(1) Constitute a financial year

(2) Comply with sub-sections (2) & (5) of section 135 till such time it meets the criteria of (1) of Section 135.

Therefore, these rules just provide that if the companies do not comply with the Section they may need not undertake the further activities unless they are in a apposition to formulate a CSR Committee.

Figure 2

CSR Committee[394]

Companies which comply with the aforementioned provisions are supposed to formulate a CSR Committee under Section 135. The Board of the company is supposed to formulate and monitor the working of the committee. The committee must include 3 directors out of which one must be an independent director. But CSR Rules exempts unlisted public and private companies from having an independent director in the said committee.

[393] Ibid.
[394] Ibid.

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Among other things, the Rules regarding having 3 directors in the committee have also been relaxed. By even having 2 directors in the committee, the working of the committee can be started.

The CSR Committee of foreign companies must have two persons wherein one or more persons reside in India, and the other person has been nominated by the foreign company.

The Board's report shall disclose the working of the CSR Committee as well.

Functions of the committee[395]

- The CSR Committee shall formulate and recommend to the Board, a CSR Policy which shall indicates the activities which they shall be undertaken by the companies.
- The CSR Committee shall recommend the amount of expenditure to be made in the completion of the activities named in the CSR Policy.
- Further, the committee is under an obligation to monitor its own functioning from time to time.
- They must also implement a transparent monitoring mechanism for implementation of CSR Projects, activities and programs.

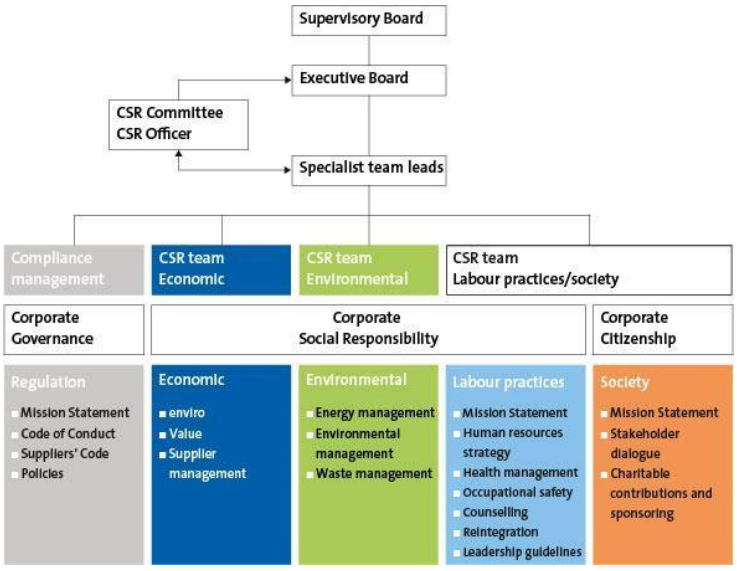

Figure 3

[395] Ibid.

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CSR Policy[396]

CSR Policy is the enumeration of the activities which the companies will undertake as specified in schedule VII of the Companies Act. And it also contains the expenditure which will be made on the completion of these activities in the normal course of business.

A CSR Policy should contain:

- A list of all the activities which the company will undertake.
- The monitoring mechanism in place.

These activities shall not be the ones which the companies already undertake in their due course of business but should be the activities which are given and specified in Schedule VII. The policy must also contain the surplus left out of the CSR activities & they must not be included in the normal profits of the company.

The board after receiving the recommendations of the CSR Committee and with due deliberation must give their approval to the CSR Policy and must also ensure the monitoring of the committee. But other than that, there must be due disclosure of the policy and the activities undertaken thereof in the disclosure report.

CSR Expenditure[397]

- The board of every company must ensure that the company is spending up to 3% of their average net profit earned in the previous three financial years for the financing of CSR activities which they will undertake.
- If the company fails to spend the abovementioned amount in that year, they must with reason specify as to why such expenditure was not made.
- The companies shall give preference to the local areas where it operates as a part of their Corporate Responsibilities.
- Expenditure incurred on activities undertaken in India will only be counted as CSR activities.
- Expenditure done on activities which the company already does in its due course of business shall not be considered. The company must distinguish between activities which they do in normal course of business and what are the activities which are enshrined in the CSR Policy.
- Any surplus arising out of the activities undertaken will not be considered as profits for the company to spend.

[396] Ibid.
[397] Ibid.

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- Foreign holding companies expending some money on CSR activities in the country will be considered so if they do it through a subsidiary Indian company and the said company is required to do so under Section 135.

Disclosure Requirements[398]

It is mandatory for the companies to make disclosure of their CSR Activities in their annual business report. So is the nature of such requirement that companies must maintain that level of transparency between itself and the stakeholders so that even they are aware of the standard of care employed by the company to its societal responsibilities.

The disclosures which are required to be made are: -

- A brief of the CSR Policy.
- Composition of the CSR Committee.
- Average net profit of the company in the preceding three years.
- Prescribed CSR Expenditure
- Details of expenditure in the last financial year.
- In case the company has failed to make such disclosure then the reason as to why they have failed in doing so.
- A responsibility statement of CSR activities along with the monitoring mechanisms, implementation schemes and the compliance with the CSR goals and objectives.

THE NEED FOR SUSTAINABLE CSR

*"*The era of Procrastination, of Half-Measures, of Soothing and Baffling Expedients, of Delays is coming to its close. In its place we are Entering a Period of Consequences."-Sir Winston Churchill (November 12, 1936*)*

In the world we live in nowadays, acts of terrorism, acts and ethnic genocide and cleansing, political and economic debacles are found in our news headlines every day and believe me they are eyebrow raising. But nothing is scarier than Global Warming. We are now living on a planet which is boiling in its interior and every year we are breaking the record of it being the hottest year. With United States of America and China majorly responsible for the environmental degradation, the effects of their could be seen in the fact that small island countries like Kiribati will be completely submerged underwater due to the melting of the polar ice caps which is leading to the rising sea levels across the globe.

*"*What gets us into trouble, is not what we don't know .It's what we know for sure, that just ain't so."-Mark Twain

[398] Ibid.

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This is one of the wisdoms which dictate the current train of the thought and the assumption that is surrounded on the whole topic of global warming. The assumption is something like this, the earth is so big, that we can never have lasting detrimental impact on it. This assumption was correct at one time, but is not so anymore, since the most vulnerable part of our earth, the ozone layer's condition is slowly and steadily depleting to the point where now the global temperature is on the constant rise.

As we step more and more towards economic development, we slowly and steadily are deteriorating the condition of our planet, to the point where in a few years, the conditions here will be unlivable. Realizing this very fact, all the countries on this planet congregated in Paris in 2015 to `come to a common consensus as to how can this problem be solved. Some of the key highlights of this Convention were:-

- Keeping temperature rises below 1.5C.
- More than 180 countries submitted pledges to cut or curb their carbon emissions.
- Long term global goal for net 0 emissions.
- Taking stock every five years of the progress the countries have made in safeguarding the environment.
- Countries which will bear the brunt of the climate change will be offered liability compensation in return.
- Financial help will be given to developing countries to help curb carbon dependence and transition into clean energy.

But this whole agreement falls flat on its face since the election of Donald Trump as the President of USA. Why?

Since in the entirety of his election campaign he has been dismissing the whole idea of climate change and global warming and belongs to the same ideological group who say that the concept of global warming is a hoax created by hysteria loving scientists. The country which is one of the reasons why the whole world is in this mess in the first place is not even ready to accept the problem. And he also stated that he will be scrapping the ratification of the USA to the Paris Convention which he eventually did in 2017.

Continent	**Disaster type**	**Disaster subtype**	**Events count**	**Total deaths**	**Total affected**	**Total damage ('000 US$)**
Africa	Extreme temperature	Cold wave	7	73	1757605	47000
Africa	Extreme temperature	Heat wave	8	291	86	809

Americas	Extreme temperature	Cold wave	66	3323	4645272	10833850
Americas	Extreme temperature	Heat wave	34	6107	20221	9025000
Americas	Extreme temperature	Severe winter conditions	13	112	1036364	1000000
Asia	Extreme temperature	Cold wave	83	8564	7073279	3193133
Asia	Extreme temperature	Heat wave	67	15953	211668	419000
Asia	Extreme temperature	Severe winter conditions	17	2075	80315052	21960200
Europe	Extreme temperature	Cold wave	132	5368	964955	2424301
Europe	Extreme temperature	Heat wave	62	138082	2120	12763050
Europe	Extreme temperature	Severe winter conditions	37	1450	432098	1000000
Oceania	Extreme temperature	Heat wave	7	509	4602784	200000

The above table[399] is taken from the official record keeper of all-natural disasters which have taken place from 1900 to 2016, run by the United Nations Organization, which clearly shows the graphic picture that just by extreme weather conditions the number of deaths which have taken place over the years. And these extreme weather conditions facilitate a barrage of climactic changes which result in natural calamities across the globe. There floods in countries which never have experienced such weather, there are dormant volcanos active again, in our very

[399]EM-DAT, International Disaster Database http://www.emdat.be/disaster_profiles/index.html

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country, who can forget the horrific flood scenes in Uttarakhand, Bihar and Haryana, the extreme drought situation in Maharashtra resulting farmer suicides increasing by the number.

It becomes not only imperative but a necessity to have sustainable practices in our businesses. As we humans have always faced an odd predicament whenever it comes to such instances where we have to choose between two things, the same comes in this instant case where we as a nation want to progress to new and greater heights, but then the question arises,

At what cost?

Is any economic growth, growth, if we put our own environment at risk, our own selves at risk? We need to have better businesses practices which not only help the environment but would help create awareness among other the business world that profit maximization is not the only way to go. Some examples of such practices by major corporations are[400]:-

Board Leadership: Alcoa

1/5th of the executive cash compensation is devoted to environment protection safety and stewardship and also in helping reduction of green-house gases and carbon efficiency.

Stakeholder Engagement: PepsiCo

They disclose their sustainability strategy in their annual shareholder meeting and also disclose issues such as climate change, water scarcity etc. in its annual financial filings.

Employee Engagement: General Electric

Slowly and steadily they have integrated a culture of sustainable use of resources in their workforce and it has now become one of the core values for which the company stands for.

Water Stewardship: Coca-Cola

On realizing the amount of wastage of resources that used to occur in their manufacturing and production, they have changed their complete manufacturing process and are now using water in a much efficient manner. To be precise it has improved by 20%.

Innovation: Nike

They created an app in 2013 called Making App which provides the sustainability index to the public. The sustainability index shows the quality of materials used in their products, which helps designers to achieve better and much sustainable product designs via suggestions from the public and product designers from around the globe.

[400] Jo Confino, Best practices in sustainability: Ford, Starbucks and more. https://www.theguardian.com/sustainable-business/blog/best-practices-sustainability-us-corporations-ceres

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Supply Chain Management: Ford Motor Company

As we all know one of the main causes of pollution in USA is because of car emissions, hence Ford Motor Company have begun to set emission standards and targets which are revised constantly to meet the current emission norms.

These examples paint a clear picture that it is not hard for companies to indulge in such practices and make changes in their practices which not only helps their economy but also raises the profile of the company in the eyes of the public since it shows that the company is ready to tackle the problem in hand.

Even in the Indian scenario there are quite a few companies who are changing the scene an entering the fray of green businesses.

*"*There is an enormous potential in green business in India. Heavy energy users, steel, cement and paper have adapted to this change quickly."[401]

Green then seem to be the new way for the Indian companies now, where cement companies such as ACC Cement[402] and Vesvadatta Group[403] have molded and changed their manufacturing processes in such a manner that they are now more efficient than before. Real Estate Firm DLF[404] are now more inclined towards meeting the new energy efficient standards in their latest projects. Hindustan Unilever Limited[405] is planning to cut down on their carbon emissions by 22 percent. Kirloskar Brothers are now changing the technology they employ in their factories to having more energy efficient pumps in their industries. Ultratech Cement[406] helps burn and treats waste in its waste treatment plant every day. The amount of waste treated every day is close to 100 tones.

[401] Jamshyd Godrej, CMD, Godrej & Boyce and Chairman CII-Godrej, GBC
[402] http://www.acclimited.com/sustainable
[403] http://birlashakticement.com/
[404] http://www.dlf.in/environmental-policy.aspx
[405] https://www.hul.co.in/sustainable-living/
[406] http://www.ultratechcement.com/sustainability

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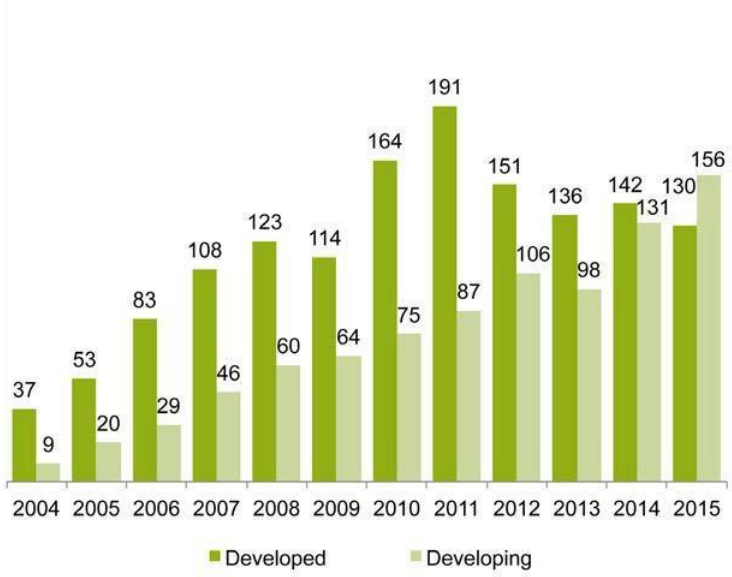

Figure 5[407]

The above data has been taken from a report compiled by UNEP to show the amount of investment being made by countries (Governments and Companies alike) in renewable resources. It shows the sides of both developing and developed nations as well. What this above graph entails is that in the course of 11 years there has been a sharp rise since 2004 in the renewable energy investment but has taken a decline since 2011 to the point where for the first time since 2004, developing nations have made more investment than the developed nations in renewable energy. This paints a picture that the developing nations have taken a step further in increasing their investments in such fields and have recognized the need of doing so. But among all the developing nations, India ratified the Paris Convention in the year 2016 and even during the meetings it was said by the then Environment Minister of India Mr. Prakash Javdekar that this agreement is nothing but a compromise for the nation of India. And when the Indian contingent responsible for implementing these regulations in our country has an attitude of such half-heatedness, how can we expect them to ever work for the better of the environment and make policy changes in our country which promote sustainable business practices.

Add to that the fact that nowadays many majority companies like Google, Apple, Microsoft who are planning to run on completely renewable and environmental friendly energy by 2018, would prefer to invest in a country which has the same idea and works in the same lines as they are. What we as Indians and as a nation needs to realize that the new way of economic progress, of attracting new investors is not only by money but also by our nature friendly policies and practices, and most of all, our infrastructure.

[407] UNEP Report 2016, Global Trends in Renewable Energy Investment 2016.

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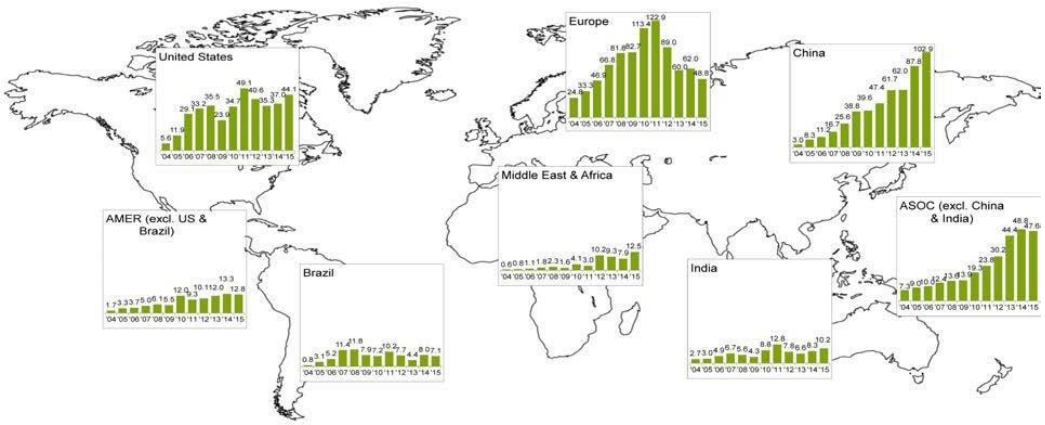

Figure 7[408]

The argument that I was making earlier is only furthered by the above map which shows the amount of investment which are being made in the across the globe by the most major economies. Showing that India stacks at a very low rate of investment and the only other region with investments rates lower than India is the region of Africa. And when you see the nations where India sees itself as being in the coming few years, we do not invest 10% of what they do annually. This just goes to show that we have our priorities quite mixed up which need to change accordingly. And this is still not only in comparison to how we ourselves majorly behave in comparison to quite developed economies, but how do we stack up against our own compatriots Brazil and China.

Country	**Asset Finance**	**% Growth on 2015**	**Small Scale Investment**	**% Growth on 2015**
China	95.7	18%	5.5	81%
India	9.1	34%	0.4	12%
Brazil	7.7	40%	0.04	317%

The data enlisted here is also taken from the abovementioned UNEP Report of 2016. This data also affords the same idea that India is nowhere close to it rival in China which invests 10 times the amount in renewable energy asset finance, their growth percentage was less but that can be accounted for the economic slowdown which they experience in that year. But even then, even

[408] Ibid.

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after having an economic slowdown like situation, they still did not deter from their investment promises. They are the largest emitter of Carbon and other harmful gases and gaseous substances and this data clearly states their intentions.

And when it comes to Brazil, even though their investments are less than what of our country, their growth percentage is still better than India. This does not paint a good picture for India since a country like India who is considered to be more economically developed to Brazil, invest more in renewable energy and still has returns less than what Brazil has.

So, in comparison to these two nations we can easily come to the conclusion that when it comes investment in renewable energy, India is one

- Investing less, &
- Whatever investment they are making is not giving them the require returns as expected.

Therefore, this cannot continue for much longer since we strive ourselves and pride ourselves as being the fastest growing economy but when it comes to reality we do lack in such implementation and achieving our desired results as we so predict.

CONCLUSION & SUGGESTIONS

After careful consideration we can begin to wrap up the complete discussion regarding whether these new provisions regarding CSR work in the real world or not. But before we go ahead deciding that we must commend the effort made by the government in making the companies and corporation within operating within the geographical boundaries of India more accountable and responsible for the acts they do and make them work for the social welfare of their area of operation. This is more of an evangelical provision which has the potential of bringing the concept institutional philanthropy in the core values of companies and corporations.

But when we study or read about CSR, we must ensure that we are looking at it in a broader concept. This broader idea means that we must also include the idea of sustainable development and changes in the eco-system of an organization. It should be seen more in the angle of it being a perfect blend of corporate philanthropy but with a touch of business and finance to it.

The idea which should be inculcated more in the brains of the people running corporations and companies that there is a difference in ‘spending’ money and ‘investing’ money. When they are working for the social welfare of the population, what they are really doing is investing in goodwill and ‘moral capital’. Doing so with a more aligned approach as to what would be major areas of concerns which they would like to address, would help them

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garner a better treatment from the mass and the population of the country. Just by working in a little more socially aware manner just goes to show in the eyes of the consumers that the top-level management is well aware of the problems plaguing the people.

Some of the suggestions which can be given to overcome such issues can be:

- Due to lack of a clear-cut policy as to how companies could invest in social investment projects has created a problem since companies have been unable to join any such project. So, it is advised that the Ministry of Corporate Affairs make it a mandate that all the companies which fall under Section 135 should create a clear policy as to their social investment project and must include ethical business practice such as human rights and environment protection. And if not followed by the companies, they must be heavily penalized.[409]
- The National Voluntary Guidelines must be integrated with the current CSR policies so that companies can have a clearer approach to their activities.[410]
- Companies must employ trained professional ad workers who take care of the functioning of the CSR activities of the company and that they are followed in the true spirit of justice and law. The IICA even offered a certification course where they would give certificates to trained officials in the field of CSR. They can later be employed by the companies.[411]

[409] National Human Rights Commission, Developing Code of Ethics for Indian Industry , available at: http://nhrc.nic.in/Documents/reports/misc_dev_code_of_ethics_for_indian_industry_ICSM.pdf

[410] Samir Saran and Vivan Sharan, Less corporate, more social, 10th August 2013, http://www.thehindu.com/opinion/op-ed/less-corporate-more-social/article5007515.ece, (Apr. 24th 2018, :0845 Hrs).

[411] (1) Every company having a net worth of Indian rupees five hundred crore or more, or a turnover of Indian rupees one thousand crore or more or a net profit of Indian rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.
(2) The Board's report under sub-Section (3) of Section 134 shall disclose the composition of the Corporate Social Responsibility Committee.
(3) The Corporate Social Responsibility Committee shall,-

(a) formulate and recommend to the Board a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;
(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and
(c) Monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-Section (1) shall,-
(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such a manner as may be prescribed; and
(b) ensure that the activities as are included in Corporate Social Responsibility of the company are undertaken by the company.

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- The companies must ensure that all the grey areas plaguing the new provisions are sorted out with the ministry so that there can be a more concerted effort to eradicate the social evils in our country.
- We are aware that the 2% limit is the least the companies must spend annually to achieve their CSR targets, but what must also have been clarified is the maximum amount of money a company can invest in CSR.
- There must be tax deductions given to companies which invest in mitigating environmental pollution or invest in socially sustainable behavior. This can be used as an incentive for the other companies which have not even begun such practices.
- The Ministry must also make a regulation which states the minimum amount of money a company can spend on environment protection. Some portion of their expenditure must be set out to meet the needs of the environment.
- There must be proper checks and balances which must be installed in the current mechanism, since under this regime as we saw, it is easier for companies to not follow these regulations and get away without any punishment. There must a penal provision which imposes some sort of fine on a company which does not comply with the regulations set forth under Section 135.

(5) The Board of every company referred to in sub-Section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:
Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:
Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-Section (3) of Section 134, specify the reasons for not spending the amount
Explanation- For the purposes of this Section "average net profit" shall be calculated in accordance with the provisions of Section 198.

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THE SCHEDULED CASTES & THE SCHEDULED TRIBES- (PREVENTION OF ATROCITIES) AMENDMENT BILL- 2018

- Shikhar Srivastava & Nikhil Verma[412]

INTRODUCTION

"The taste of anything can be changed. But venom cannot be altered into nectar." – BR Ambedkar

Caste has been a never-ending speed-breaker in the growth of our nation, and 29 years after a law to safeguard the scheduled castes and scheduled tribes from atrocities came into existence, the Supreme Court diminished one of its provisions.

On 20 March 2018, the Supreme Court issued guidelines that would provide immunity to public servants and private individuals from whimsical and prompt arrest under the Scheduled Tribes (Elimination of Atrocities) Act.

While the Central government urged the apex court to seek recall of its verdict, nine people lost their lives and dozens were mutilated as Dalit out-cry during a day-long nation-wide closedown on Monday, 2 April, snowballed into harsh confrontations.

Between aggravation and revolt over the dissolution of one of India's most progressive statutes, the outcome of the verdict, on the increasing quantum of atrocities that afflict the country's lower castes, remains to be seen.

Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989, it is popularly known as Prevention of Atrocities Act. The guidelines of the Hon'ble Apex Court in their verdict in the matter of Dr. Subhash Kashinath Mahajan Vs the State of Maharashtra and Another[413], have amounted to alterations in the Prevention of Atrocities Act that have weakened the provisions of the respective Act.

The instructions of the Hon'ble Supreme Court, regarding regulation of a preliminary inquiry under seven days by the Deputy Superintendent of Police concerned, to find out whether the allegations make out a case under the Prevention of Atrocities Act and that arrest in appropriate cases may be made only after approval by the S.S.P., would delay registration of First

[412] Students- Indore Institute of Law
[413] Criminal Appeal No. 416 of 2018

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Information Report and will impede strict enforcement of the provision of the Prevention of Atrocities Act.

It may also be cumbersome to complete the preliminary interrogation administered within seven days as enough number of Deputy Superintendent Police ranking officers are generally not in place. Typically, the Deputy Superintendent Police is located at the district level and not at block level. Other effects of the said guidelines of the Apex Court are that adjournment in registration of First Information Result would result in holding-up in discharge of the quantum of justifiable assistance to the victims of atrocities permissible, available only on lodging of an FIR.

All this would gravely influence the sole objective of the Statute to obviate commission of offences against members of Schedule Caste and Schedule Tribe and be seriously injurious especially in disgraceful wrongdoings like sexual victimization of SC/ST women consisting molestation, gang rape, acid attacks and homicide etc. This issue, being of extremely sensitive character, has caused a lot of agitation and a sense of enmity in the nation. As such, a Review Petition was filed by the Union of India in the Hon'ble Court praying for recalling and reviewing their Order but no relief has been granted so far. Hence, it was considered expedient and meaningful to reaffirm the reliance and trust of members of SCs and STs on the provisions of the Prevention of Atrocities Act.

ABOUT THE BILL

The Scheduled Castes and Scheduled Tribes (Elimination of injustice) Alteration Bill, 2018 was presented in Lok Sabha by the Minister for Social Equity and Emancipation, Mr. Thaawarchand Gehlot, on August 3, 2018. It sought to alter the Scheduled Castes and Scheduled Tribes (Elimination of injustice) Act, 1989.

In 2018, the Supreme Court mentioned that for individuals charged of committing a misdeed under the Statute, acceptance of the Senior Superintendent of Police will be needed before an arrest is made. Further, the Deputy Superintendent of Police may go for a preliminary inquiry to discover whether there is a prima facie case under the Statute.

The Bill declares that the investigating official will not be needing the permission of any command for the detainment of an accused. Further, it imparts that a preliminary inquiry will not be required for the filing of a First Information Report against an individual accused under the Act.

The Act declares that persons accused of executing an offence under the statute cannot claim anticipatory bail.

Section 18A has been inserted to nullify conduct of a preliminary enquiry before registration of an FIR, or to seek approval of any authority prior to arrest of an accused, and to reinstate the clauses of Section 18 of the Act.

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Section 18A, placed in the Act, mentions that: -

(1) For the purpose of the Prevention of Atrocities Act:

(a) Advance inquiry shall not be needed for lodging of an First Information Report against any individual; or

(b) The investigating official shall not need an approval for arrest, if becomes obligatory, for any individual, against whom a charge of having found committing a crime under the forbidding of Atrocities Act has been made and no procedure other than granted under the Elimination of injustice act or the Code of Criminal Procedure, 1973, shall be applicable.

(2) The provision in respect of section 438 of the Code[414] shall not be applicable to case under the Act, notwithstanding any of the judgment or order or direction given by any Court.

CHARACTERSTICS

- The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 protects marginalized communities against discrimination and atrocities.
- It forbids the commission of transgression in opposition to the members of SCs/STs and establishes special courts for trial of such offences and rehabilitation of victims.

In 2018, Hon'ble Supreme Court had expressed concern over misuse of Act and ruled against automatic arrest of booking of accused under this law.

- The provisions are also incorporated in regards with the concept of anticipatory bail.

[414]438. Direction for grant of bail to person apprehending arrest.

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-
(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
(iii) a condition that the person shall not leave India without the previous permission of the Court;
(iv) such other condition as may be imposed under sub- section (3) of section 437, as if the bail were granted under that section.
(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, be shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub- section (1).

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It had stated that for the persons accused of committing offence under Act, approval of Senior Superintendent of Police will be required before an arrest is made. Further, Deputy Superintendent of Police may conduct preliminary enquiry to find out whether there is prima facie case under Act.

FEATURES OF BILL

- The Bill expresses that investigating officer will not require the prior approval of any authority for the arresting of accused.
- It communicates that the preliminary enquiry will not be required for the registration of First Information Report (FIR) against person who is accused under the Act.
- The Act enunciates that the persons accused of committing offence under the Act cannot be apply for anticipatory bail.
- It also reveals that, this provision will apply, despite any of the judgments or orders of any Court.

Its prime objective is to deliver justice to the marginalized through proactive efforts, giving them a life of dignity, self-esteem and a life without fear, violence or suppression from dominant castes. The Act lists 22 offences relating to various patterns or behaviors inflicting criminal offences and breaking self-respect and esteem of SC/ST community which is inclusive of denial of remunerative, lucrative, representative and communal rights, prejudice, unfairness, utilization, exploitation and abuse of legal process as well as resources. The Act also provides fortification to SC/ST community group from social disabilities such as denial of access to certain places and to use customary passage, personal atrocities like forceful drinking or eating of inedible, contaminated food, injury, hurt, sexual exploitation etc, atrocities affecting properties, malicious prosecution, political afflictions and economic destruction.

THE APEX COURT'S RULING BEFORE THE SC/ST BILL, 2018

- **Terminating the clause of immediate arrest -** The Supreme Court laid down in its ruling that in many stances the person of schedule caste or schedule tribe may file a false First Information Report against a public official or an innocent citizen on false lines just for his personal gains or political benefits.

As a consequence of this, the public servant's right i.e., Right against arbitrary arrest is being violated i.e., Article 22(3) of the Indian Constitution.

Also, regarding this clause, the apex court established a provision of investigation by the concerned officer to find out whether First Information Report lodged falling within the parameters of the atrocities act or it is false or motivated.

The apex court said that their verdict enacts what is mentioned in the Suprema Lex or Constitution. The Court stated its awareness of the rights of the deprived civilians and that they

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have to be placed equally with society but at the same time a person cannot be falsely imprisoned without genuine proof.

- **Verification of claims-** The Apex Court also held that there will be a provision of a 'preliminary inquiry' by a public exchequer regarding the grant of claims of compensation to the parties affected by the offences or atrocities.
  In the present scenario, the individuals of scheduled castes and tribes have started using this clause for their personal advantage which results in the deprivation of compensation to subsequent victims genuinely affected by atrocities
- **Grant of anticipatory bail-** The prevention of Atrocities, Act of 1989 stated that the person arrested for committing an offence against schedule caste or schedule tribe will not be allowed to apply for anticipatory bail.

The reason behind this motion was that if he is allowed the anticipatory bail, there are absolute that the accused may harass the victims again, which violates the Right to Live with dignity under article 21.

However, the apex court on March 20 in Subhash Kashinath Mahajan v. state of Maharashtra and another[415] overruled this clause and established the provision of anticipatory bail as this infringed the Right to Life and personal liberty.

CONCLUSION

Thus, the Act was conceived as a strong safeguard against castes and tribes that have been historically exploited and abused. Liberation of the Dalits and tribal communities are also significant electoral assurances utilized by several political parties to gather votes in the elections. Dalits are a necessary segment of the population in many states and make up about 200 million of the nation's aggregate population of 1.3 billion.

The legislative comments highlight the main Act's provisions which deal with the provision where amendment came into the effect, about the bill such as the reason for bringing in such an implementation in existence, along with the characteristics in relation with the prevention of atrocities in relation with the marginalized communities, in context with the anticipatory bail and also in regards with if the offence is committed by the member of SCs/STs. This paper also explains about the features in accordance with the Bill's provisions which talks about the work or functions of the investigating officer, requirement of the procedures of the enquiry and also the commission of the offences, when the anticipatory bail has been granted.

[415] CRIMINAL APPEAL NO.416 OF 2018

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AMNIOCENTESIS AND PROTECTION OF UNBORN CHILD: AN INTERNATIONAL PERSPECTIVE

- *Rakesh Sharma*[416]

ABSTRACT

Pregnancy is the most exciting and joyful time for a mother-to-be. The last few months are usually filled with anticipation of the birth of baby. When the delivery day finally arrives, most mothers are happy to finally meet their little one. In some rare instances, complications may occur, and the baby may have one or several birth defects. Luckily, modern medicine has advanced, so that a variety of diagnostic tests are available to ensure that the baby is healthy, and to help parents of babies that will be born with complications be better prepared. One such diagnostic test is an amniocentesis.

Amniocentesis is the surgical insertion of a hollow needle through the abdominal wall and into the uterus of a pregnant female and the aspiration of fluid from the amniotic sac for analysis. Examination of the amniotic fluid itself as well as the foetal cells found in the fluid can reveal the sex of foetus, chromosomal abnormality, and other types of potential problems. The process of Amniocentesis is mostly used to determine the sex of the foetus and have abortions if the test result shows their babies are girls.

Two laws that prohibit the sex selection of a foetus in India are the Medical Termination of Pregnancy Act, 1971, as amended in 2002, and the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, as amended in 2002. The former Act prohibits abortion except only in certain qualified situations, while the latter prohibits the sex selection of a foetus with a view towards aborting it. The objective of paper is to focus on the laws relating to sex selection and abortion in order to prevent the crimes against the unborn child, the role of the Supreme Court and various High Courts and a comparative study of the laws relating to amniocentesis in USA and India.

INTRODUCTION

Childhood is the first stage of life. It is the parents and other family members who are actually responsible in shaping a child's future and also in making their childhood memorable. The most

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important thing which makes childhood memorable is love and care of the family and family members. A child has the purest heart any human being can possess and all that that heart desires is love; no matter what the circumstances are. Any person who claims that he or she had an amazing childhood has witnessed sufficient amount of love, care and affection from their family members.

Children are the foundation of human society. The shape of the future human society shall be determined by mental and physical well-being of its members. Just as the personality of an adult is built in his or her formative years, the development of the Nation is determined by the priority given to its children. The children are the supreme assets of the Nation, hence in the National policy child care should occupy the most prominent place. Specific care should be taken that children grow up to become agile citizens, physically fit, mentally sound and alert, socially and morally healthy. But unfortunately, in spite of there being a number of resolutions and laws both at national and international level, the condition of children is far from satisfactory. History is witness to the fact that innocent and helpless creatures have been subjected to a variety of exploitation. Generally the offences committed against children or the crimes in which children are the victims are construed as crimes against children.

AMNIOCENTESIS

Amniocentesis (also referred to as amniotic fluid test or AFT) is a medical procedure[417] used in prenatal diagnosis of chromosomal abnormalities and foetal infections[418], and also for sex determination, in which a small amount of amniotic fluid, which contains foetal tissues, is sampled from the amniotic sac surrounding a developing foetus, and then the foetal DNA is examined for genetic abnormalities. The most common reason to have an "amnio" is to +determine whether a baby has certain genetic disorders or a chromosomal abnormality, such as Down syndrome. Amniocentesis (or another procedure, called chorionic villus sampling (CVS)) can diagnose these problems in the womb[419]. Amniocentesis is performed when a woman is between 14 and 16 weeks of the gestation period. Women who choose to have this test are primarily those at increased risk for genetic and chromosomal problems, in part because the test is invasive and carries a small risk of miscarriage. This process can be used for prenatal sex discernment and hence this procedure has legal restrictions in some countries.

[417] The word amniocentesis itself indicates precisely the procedure in question, Gr. ἀμνίον amníon being the "inner membrane round the foetus" and κέντησις kéntēsis meaning "pricking", i.e. its puncture in order to retrieve some amniotic fluid.
[418] "Diagnostic Tests – Amniocentesis". Harvard Medical School. Archived from the original on 2008-05-16. Retrieved 2008-07-15.
[419] Carlson, Laura M.; Vora, Neeta L. (June 2017). "Prenatal Diagnosis: Screening and Diagnostic Tools". Obstetrics and Gynaecology Clinics of North America.

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CAUSES OF CRIME AGAINST CHILDREN

1) Lack of awareness and care by parents

In rural parts of the country we often hear of poverty stricken families with a large number of children and as a result of which the parents often fail to give adequate care to each and every child and the children eventually become victims of various crimes. Sometimes the parents also sell off their own children in the hands of criminals, owing to poverty.

2) Poverty

Poverty also forces many people to choose the path of crimes and children form the bulk of their prey because these people think that they can get away with committing crimes against children.

3) Corrupt government officials

There are many laws, facilities and other incentives that are announced and offered by the government for the protection of children but the bitter reality is that a vast majority of these incentives fails to reach their target i.e. children of the nation, courtesy of the evil minded corrupt officials who are responsible for bringing these incentives to the children.

4) Society

The society is equally responsible for the increase in crime rates against children. People who indulge kids in heinous crimes, people who overlook the crimes taking place etc are all responsible for the current scenario.. A dramatic increase in rape incidents against children is another area of concern.

5) Internet

A lot of inappropriate material is just a click away on the Internet and more care and stricter measures must be taken so that such information does not reach non-desirable audiences, who may be influenced by it and commit crimes, especially against children.

6) Television

The crime shows that are aired on a lot of entertainment channels have both pros and cons. On one hand it creates awareness among people to stay safe while on the other hand it provides criminal minded people with new ideas to prey on the kids.

RIGHTS OF AN UNBORN CHILD UNDER INTERNATIONAL INSTRUMENTS

A number of civil and criminal statutes both under International level and domestic level, directly or indirectly guarantees certain protection to the unborn child.

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- Article 25(2) of the Universal Declaration of Human Rights, 1948 says that motherhood and childhood are entitled for special care, protection and assistance.
- Principle 2 of United Nations Declaration of the Rights of the Child, 1959 says that the Child shall enjoy special protection and shall be given opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a normal and healthy manner with freedom and dignity.
- Principle 4 of United Nations Declaration of the Rights of the Child, 1959 says that Child shall enjoy the benefits of social security.
- Article 10(2) of International Covenant of Economic, Social and Cultural Rights, 1966 says mothers are entitled for special protection during reasonable period before and after childbirth.
- Article 11(2)(d) of Convention on the Elimination of All Forms of Racial Discrimination says that mothers should be provided with special protection during pregnancy at work from anything harmful to them.
- Article 12(2) deals with provision of appropriate services and nutrition to women during pregnancy.
- Article 6(1) of United Nations Convention on the Rights of the Child, 1989 says that every child has the inherent Right to Life.

The rights of an unborn child are recognized in various different legal contexts; e.g. in criminal law, causing death of a foetus has been held to be an offence under Sections 312 to 316 of the Indian Penal Code, and the law of property considers the unborn child in being for all purposes which are to its benefit, such as inheritance by will or descent. An unborn child aged five months onwards in mother's womb till its birth is treated as equal to a child in existence. The unborn child who is never born is held to be a 'person' who can be the subject of an action for damages for his death. The foetus is actually a loss of a child in the offing[420].

RIGHTS OF AN UNBORN CHILD IN INDIA

In India, despite there not being any legislation or statute that specifically defines the rights and the position of an unborn child under the law, several statutes[421] recognize and mention the unborn and defined it to be a legal person by fiction, but they too mention that an unborn acquires rights only after being born. Thus, the state can and is required to interfere in abortion matters only after the unborn child has attained the stage of viability. To protect the right of a human being falls under the right to life and hence has to be protected.

[420] Prakash & others vs. Arun Kumar Saini & another 2010 (2) Law Reports on Crime 169 (Delhi HC)

[421] S.13 of TP Act 1882 deals with the transfer of property for the benefit of unborn which defines Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property

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When it comes to the of abortion laws in India, they fall under Section 312 to 316 of the Indian Penal Code, 1860[422] And the Medical Termination of Pregnancy Act, 2002. The Medical Termination of Pregnancy Act lists out the number of provisions guiding the process and the ability of how and when women can get their unborn aborted if need be. The law laid down makes it very clear that despite the woman's choice, the abortion had to be signed on and agreed to by a Registered Medical Practitioner up till 12 weeks of pregnancy and between 12-20 weeks of pregnancy to Registered Medical Practitioners have to agree to do an abortion. Also, the act specifies the reasons upon which abortions can be carried out and on whom. The inherent flaw in this act is that it refuses to acknowledge the existence of a large section of population who don't fall under the purview of the provisions mentioned yet might be in need of abortions, also it takes away the right of choice and privacy that should be given to every to be mother as the act says that terminations of pregnancies should be carried solely on medical reasons and nothing else.

Two laws that prohibits the sex selection of a foetus in India are the Medical Termination of Pregnancy Act, 1971, as amended in 2002, and the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, as amended in 2002. The former Act prohibits abortion except only in certain qualified situations, while the latter prohibits the sex selection of a foetus with a view towards aborting it. The objective of paper is to focus on the laws relating to sex selection and abortion in order to protect the crime against the unborn child.

On one hand the foetus[423], the unborn which is denied personality as such but anomalously granted the same, on contingent basis[424], in cases of transfer of property or creation of trust in the name of the unborn[425]. For instance, in India Section 20 of the Hindu Succession Act, 1956 recognises the rights of a child in the womb by providing that it retains the right to inherit property of the intestate as if it was alive (already born) at the time of death of the intestate. Sections 13 and 20 of the Transfer of Property Act 1882 deal with situations in which on a transfer of property, an interest therein is created for the benefit of a person not in existence. As per Section 20, where on a transfer of property an interest therein is created for an unborn person, he acquires on his birth, a vested interest. Thus, at least in case of inheritance of property,

[422] Indian Penal Code, 1860

[423] For a detailed elaboration on the legal status of the foetus see J Seymour, Childbirth and the Law (Oxford: Oxford University Press, 2000).

[424] Live birth being the condition imposed.

[425] See Transfer of Property Act 1882, s 13 that provides for transfer of property for benefit of unborn person. Typically, the parties to a transfer of property must be living persons (including juristic persons), but Section 13 is an exception to the general rule of transfer providing a way through which property can be transferred to a child in the mother's womb. This Section does not apply to Mohammedans meaning a gift to an unborn person is void. Also, under the Hindu Law, in a joint family, when partition is being contemplated and any woman of the family is pregnant at the time, Hindu law recommends postponing the partition till the child is born. However, if it is not possible to reschedule the partition, a share must be kept aside and that share must be equal to the coparcener's share. If, this also is not done, the after born son has the right to get the partition reopened. A son begotten as well as born after partition can demand a re-opening of partition, if his father, though entitled to a share, has not reserved a share for himself.

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a fiction has developed in the law that places an unborn child who is subsequently born alive in the same position as a child living at the time of the death of the benefactor. This fiction has existed since times immemorial and is so well entrenched in the legal systems that for a statute conferring property rights on children to be interpreted as excluding a child who was en ventre sa mère at the time of the death of the father would require specific words of exclusion.

In 1964, in the Indian case of Aswini Kumar Pan v Parimal Debi[426], it was held by the Calcutta HC that: In law, a child in the mother's womb is deemed to be in existence, at least for purposes of inheritance, which alone are relevant here, and has thus a right to challenge any transaction, which affects its interest at the time. If so, it has a right of action or a cause of action in respect of the said transaction and is entitled to institute a suit upon the same and, as such a child, as aforesaid, cannot, under the Indian Majority Act 1875, be held to be a major, it must be held to be a minor, that is, a person, suffering from disability, as contemplated under Section 6 of the Indian Limitation Act 1963[427].

Likewise, on the other hand dead human beings in whom personality is deemed to have extinguished. But still in cases of testamentary succession, wishes of the dead are observed and respected[428]. In cases of copyright, right subsists in works for 60 years after the death of the author[429].

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The preamble is very clear in stating that termination of pregnancy would be permitted in certain cases. The cases in which the termination is permitted are elaborated in the Act itself. Moreover, only a registered medical practitioner who is defined in Section 2(d) of the Act as "a medical practitioner who possess any recognize medical qualification as defined in Cl.(h) of sec.2 of the Indian Medical Register and who has such experience or training in gynaecology and Obstetrics as may be prescribed by rules made under this Act" is permitted to conduct the

[426] AIR 1964 Cal 354.
[427] Section 6 of the Limitation Act 1963: The Act provides that if a person is entitled to institute a suit or make an application for execution of a decree but, is minor or a foetus at the concerned time, he may institute the suit or make the application within the same period after the disability has ceased
[428] For instance, it is illegal to speak ill of the dead, and it may amount to defamation under section 491 of the Indian Penal Code 1860. Presence of such provisions do indicate a semblance of personality in the dead, for it is almost as if the deceased is displaying legal personality and asserting its 'right' not to be defamed; the reasons might be holistic and not hard core legal in nature (a moral virtue being elevated to the status of law positive) but they are real nonetheless.
[429] See The Copyright Act 1957, s 22 which explains the term of copyright and states that-Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until 60 [sixty] years
from the beginning of the calendar year next following the year in which the author dies.

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termination of pregnancy. Also other matters connected there with the incidental thereto are incorporated, for example, the question of consent of termination of pregnancy, the place where the pregnancy could be terminated, the power to make rules and regulations in this behalf.

The key features of the Medical Termination of Pregnancy Act, 1971:

1) *It indicated when pregnancy could be terminated i.e. upto twenty weeks of pregnancy.*

2) *It specified the indications when termination of pregnancy could be done.*

3) *It indicated that only a qualified registered medical practitioner as defined under the Act could conduct termination of pregnancy and relied upon the Indian Penal Code for punishment if conducted by any other.*

4) *It also indicated that termination of pregnancy could be done only in a place established, maintained or approved by the Government.*

Thus it did help to legalize and regulate the termination of pregnancy and really did much for upliftment of women. Gradually, with an increasing number of centres and with new problems cropping up, the Act was amended and passed on December 18, 2002.

Essential features of the amendment*:*

1) *In the amended Act, the word "mentally ill person" covers a wider variety of mental diseases and disorders than the word "lunatic" of the Principal Act.*

2) *In the amended Act, recognition of a place for the purpose of carrying out MTP is now at district level rather than the state capital and hence procedural delays should be less.*

3) *In the Principal Act, there was dependence on IPC to enforce discipline. In the amended Act, the punishment is incorporated in the Act itself.*

THE PRE CONCEPTION AND PRE NATAL DIAGNOSTIC ACT, 1994

Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994 is an Act of the Parliament of India enacted to stop female feticides and arrest the declining sex ratio in India. The act banned prenatal sex determination.

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This process began in the early 1990s when ultrasound techniques gained widespread use in India. There was a tendency for families to continuously produce children until a male child was born[430]. Foetal sex determination and sex selective abortion by medical professionals has today grown into a Rs. 1,000 crore industries (US$ 244 million). Social discrimination against women and a preference for sons have promoted female foeticide in various forms skewing the sex ratio of the country towards men[431]. According to the decennial Indian census, the sex ratio in the 0–6 age group in India went from 104.0 males per 100 females in 1981, to 105.8 in 1991, to 107.8 in 2001, to 109.4 in 2011. The ratio is significantly higher in certain states such as Punjab and Haryana (126.1 and 122.0, as of 2001)[432].

Male child preference in the society and girls are considered to be a burden. Easy availability of intra-uterine sex determination leads to female foeticide.

These are the reasons for female foeticide that has supplanted the earlier practice of female infanticide.

The Government concerned with a 10% fall in girls at the all India level in the 0-6 years age group is determined to curb female foeticides. Rights activists and organizations like UNICEF, UNDP, WHO are closely following and monitoring the increasing number of missing female children in India. The Government in its wisdom has created a stringent act, the PC&PNDT Act to curb the social evil of female foeticide.

I. Implementing and prosecuting authority.
    1. The appropriate authority (AA) at District, State and union Territory level
    2. Any officer authorized by the AA. Any officer authorized by the central / State Govt.
    3. Any person, which includes a social organization, who has given a notice of 15 days; of the alleged offence to AA and his intention to make a complaint in the court.

II. Gravity of the offence
    1. Cognizable offence; on a complaint by the above authorities in the court of the judicial magistrate 1st class/metropolitan magistrate; the magistrate takes cognizance of the case and charges are framed against the doctor concerned, for the violation of The Act.
    2. Non-bailable offence. No bail shall be granted to such an accused.
    3. Offence non-compoundable: The case cannot be compromised without judicial proceedings.

[430] "orissa gov. India" (PDF). Dr. Krushma chandravv
[431] "UNICEF India". UNICEF
[432] Arnold, Fred, Kishor, Sunita, & Roy, T. K. (2002). "Sex-Selective Abortions in India". Population and Development Review. 28 (4): 759–785. doi:10.1111/j.1728-4457.2002.00759.x. JSTOR 3092788.

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LEGAL STATUS IN THE US CRIMINAL LAW

In the USA, because of the efforts of the Judiciary and also the Legislature, the tendency towards recognising foetal rights in the arena of Criminal Law has seen an upward trend. The federal 'Unborn Victims of Violence Act 2004' (UVVA, 2004) (more commonly known as 'Laci and Conner's Law') recognise an unborn child as a separate victim of criminal violence and treat the killing of an unborn child as a form of homicide. This operates in 36 states. In addition, 22 states define non-fatal assaults (hurt etc) on unborn children as criminal offenses. Prior to enactment of the federal law, the foetus in utero who was killed as a result of an assault on the women was, as a general rule, not recognised as a victim of homicide or any other Federal crime of violence.

CONCLUSION

In some rare instances of pregnancy, complications may occur, and the baby may have one or several birth defects. Luckily, modern medicine has advanced so that a variety of diagnostic tests are available to ensure that the baby is healthy, and to help parents of babies that will be born with complications be better prepared. One such diagnostic test is an amniocentesis. Pre-natal genetic testing is also an option. A new born baby can be tested for a genetic disorder before adverse symptoms develop so that gene therapy can be prescribed to effectively treat the disorder. A sample of cells can be obtained from the new born via a cheek swab, blood sample, or biopsy (examination of some sort of tissue removed from the living new born to identify a genetic disease).

Beside the development in the science and technology for human advantages, the same technique is also used as an instrument of satisfying ones on ill will and selfish demand for procuring a male child, and abort the female foetus. In order to prevent the misuse of the technique of Amniocentesis, laws have been enacted, but, the misuse still continues. A proper implementing and executing agency should be created and the same would monitor the use of this technology for the well being and proper treatment of person in various hospitals, clinics and various private nursing homes so that the technology so discovered could prove to be a boon to the human society rather than a curse.

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CLINICAL TRIAL IN INDIA: AN ETHICAL, LEGAL AND GLOBAL ANALYSIS

- *Rajath Ariga*[433]

ABSTRACT

Clinical Trials are being carried out, in the name of development, not only in India, but all over world. Trials are being globalized for the need of growth and development in science and technology which has caused an adverse effect on the ethical aspect of these trials regarding protection of the rights of the participants. The Indian Government promotes such trials in India but there is no proper mechanism guiding the investigators and practitioners and no proper protection given to the volunteers of such trials and often the poor people are exploited as their financial status prevents them from receiving proper treatment, hence they are forced to partake in such trials to get rid of their problems. The worst part however that medical professionals themselves induce patients to take part in trials and are given substantial incentives and monetary compensation to recruit them.

Due to the improper mechanism and lack of laws, medical professionals often exploit the vulnerable sections of the society who lack in literacy and finance and these people are often incentivized through monetary terms to take extraordinary risks in the trials they take part .

Another major problem emerges from globalisation of clinical trials as once again the proper measures to regulate them are absent. India is an attractive site for offshoring of clinical trials because of its lack of stringent laws, its population and also because of the support received by the government to conduct the trials.

INTRODUCTION

Pharmaceutical companies are believed to play an important role in the society by formulating new drugs in order to tackle the health problems faced by the society by curing diseases, etc. But what the society is generally unaware of is that these drugs go through a series of tests and trials. The definition of clinical trials according to the World Health Organization is as follows —

"For the purposes of registration, a clinical trial is any research study that prospectively assigns human participants or groups of humans to one or more health-related interventions to evaluate the effects on health outcomes. Interventions include but are not restricted to drugs, cells and

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other biological products, surgical procedures, radiological procedures, devices, behavioral treatments, process-of-care changes, preventive care, etc."[434]

Rule 122 DAA of Drugs & Cosmetics Rules, 1945[435] defines clinical trials as a "systematic study of new drug(s) in human subject(s) to generate data for discovering and/or verifying the clinical, pharmacological (including pharmacodynamics and pharmacokinetic) and/or adverse effects with the objective of determining safety and / or efficacy of the new drug"

India as country is often used by drug companies all over the world to conduct trials for drugs for various reasons such as the population, the illiteracy, the low labour expense, the friendly drug laws and many other reasons. While in some ways this is uplifting news for India's economy, the expanding clinical trial industry is raising concerns as a result of an absence of direction and regulation of private trials and the uneven application of requirements for educated and informed consent and appropriate ethics review. The government is aggressively promoting India as a location for clinical trials even before setting up the structure to regulate the conduct of these trials.[436] Clinical trials are conducted by contract research organisations which are making inroads into small towns, identifying trial sites in small private hospitals and developing databases of potential trial participants.

ETHICS IN CLINICAL TRIALS

India, as a country, has been encouraged to be outsourced by the Indian government to conduct trials. The lack of a regulatory mechanism and the bill for clinical research which has been in place for five years has made things worse for the participants of the trial. There is a necessary requirement to protect the trial participants who are vulnerable to the exploitations of the drug companies, researchers and investigators.[437]

The objective of clinical trial or research is to attain and/or improve knowledge regarding the human health or in the understanding of the human biology. Tests on patients or volunteers must be conducted in order to gain knowledge regarding the test. The only way to find out if the drug is safe is by testing the drug on patients and volunteers and in these situations there are chances of them being exploited. The purpose of the ethical guidelines is to protect these vulnerable patients and volunteers from being exploited and to protect the mechanism and the integrity of science.[438] The ethical guidelines in place today were primarily a response to past abuses, the most notorious of which in America was an experiment in Tuskegee, Alabama, in which treatment was withheld from 400 African American men with syphilis so that scientists could

[434] Clinical trials, World Health Organisation (Sep 4,2018), http://www.who.int/topics/clinical_trials/en/
[435] Drugs and Cosmetics Act, 1940, No.23, Acts of the Parliament,1940 (India)
[436] Sandhya Srinivasan, The Clinical Trials Scenario in India,Vol. 44, Econ Polit Wkly, 29, 29 (2009)
[437] Sandhya Srinivasan, Clinical Trial Industry: No Accountability?, Vol. 46, No. 35, Econ Polit Wkly, 19, 19 (2011)
[438] Journal of the American Medical Association, Vol. 283, No. 20, May 24, 2000, pp. 2701-2711.

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study the course of the disease. Various ethical guidelines were developed in the 20th century in response to such studies.

Some of the influential codes of ethics and regulations that guide ethical clinical research include:

- Nuremberg Code (1947)
- Declaration of Helsinki (2000)
- Belmont Report (1979)
- CIOMS (2002)
- U.S. Common Rule (1991)

The most important and basic principle of clinical research ethics is informed consent. Informed consent has four key components: disclosure, understanding, voluntariness and competence. This creates challenges for researchers in pediatrics, psychiatry, emergency and critical care medicine. Surrogate consent or waived consent can be taken in certain situations where for example people who are at risk for suffering with Alzheimer's disease, almost 90% thought that with minimum risk surrogate consent could be taken. Whereas in case of intensive care and surgery patients their consent is also informed consent, but in reality people are not aware of the fact that they are in clinical trials. This is revealed in number of studies.[439]

Surrogate consent cannot be completely eradicated as it would then completely eliminate critical care research because many critically ill patients are unable to give consent in such situations. As family members cannot be available every time and they cannot always give the decisions for the patients due to lack of knowledge of the situation of the patient. Therefore, the question arises whether informed consent must be taken in such critical conditions. The 'Final Rule' of the 1996 US Drugs and Food administration has made a waiver for informed consent. These require community consultation, public notification, and independent data and safety monitoring to allow exemption from informed consent[440]. Other methods of consent like deemed, deferred and delayed consent are no longer acceptable.

Medical professionals are given substantial incentives to recruit their own patients into these trials thus creating a major conflict of interest that threatens the well-being of patients[441]. More often than not volunteers of such experiments are given monetary compensation but this compensation should not be an incentive to drive people to take risks which are higher than normal. The monetary compensation given should be for the loss caused through any

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[440] Id
[441] Sandhya Srinivasan, The Clinical Trials Scenario in India,Vol. 44, Econ Polit Wkly, 29, 29 (2009)

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inconveniences or for any loss of time. The decision made by the volunteers with regard to participation of trial should be made with voluntary and informed consent with full knowledge of all the risks. The investigators and the volunteers must have a discussion regarding informed consent and it must be in a written form which includes detailed explanation of important issues.

There have been any situations in which informed consent wasn't taken for the trial. In November 1999, 25 people went to the government-run Regional Cancer Centre in Thiruvananthapuram. They were not informed that they were a part of a trial as the drug that was used was an experimental drug and the procedure for trying out an experimental drug was not followed. Moreover, an experiment drug was used without following the established treatment for the condition. It was also found that the trial had not been approved by the Drugs Controller of India.[442]

In 2002, the multinational company Novo conducted multi-centre phase III clinical trials of a diabetes drug even before getting the results from the animal studies. Before moving to phase III, a drug must be tested on animals, after which if the results are positive the drugs which move to phase I where the drug will be tested on a few hundreds of volunteers or patients after which the drug will move to phase II where a few thousands which will move to phase III. The study found from the Novo drug that the drug caused urinary bladder tumours in rats and this information must have been disclosed even before moving to phase I. The trials were conducted on 650 people from North America, 200 from Latin America, 100 from Australia / New Zealand, 800 from the European Union, and 200 from non EU Europe and 550 from Asia -- including 130 people from India. Half of these people received the experimental drug. [443]

In 2003, a "research" programme was launched by the Mumbai-based Sun Pharmaceutical Industries Limited .The programme got private doctors to prescribe the anti-cancer drug Letrozole to more than 400 women as a fertility drug for ovulation induction. They then publicized the doctors' reports to other doctors as "research", using their network of medical representatives. This then made off-label prescription of drugs which was prohibited in India, which then induced the Indian Medical Association to launch a campaign to permit off-label prescription.

Another instance in which the ethical aspect of a trial was questioned significantly in India is in a case in 2009, wherein the states of Andhra Pradesh and Gujarat launched a vaccination project against HPV, some types of which can cause cervical cancer. The trial included girls aged 10-14 years who would receive the vaccination. The project had two components: a Phase 4 clinical trial of the HPV vaccination and observational research on the delivery of the vaccine. The project was designed and executed by PATH (Program for Appropriate Technology in Health), an US-based NGO, in collaboration with the Indian Council for Medical Research (ICMR) and the State Governments of Andhra Pradesh and Gujarat. Pharmaceutical company Merck

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[443] Id.

developed and provided the vaccine Gardasil and GlaxoSmithKline developed and provided the vaccine Cervarix. The project was funded by the Bill and Melinda Gates Foundation. In April 2010, the ministry of health and family welfare suspended the program following the deaths of seven tribal girls and strong opposition by women's groups, health activists, and some doctors who questioned its rationale, ethics, and informed consent procedures.[444] At the time of the suspension, about 23,000 girls had already been vaccinated. The Indian Government set up an inquiry committee to look into the "alleged irregularities in the conduct of studies using HPV vaccine" by PATH in India.[445] The report that was made by the inquiry committee stated that there had been a number of violations which infringed the rights of the participants. The report, did not make any recommendations regarding punishing of those who were held accountable and those involved in the trials were not held accountable despite the fact there were clear violations.[446]

The ethical and procedural violations led the 72nd Parliamentary Standing Committee on Health and Family Welfare (MoHFW) to look into these shortcomings which have drastic effects and carried out an enquiry and presented a report on the same— "Alleged Irregularities in the Conduct of Studies using Human Papilloma Virus (HPV) Vaccine." This report (henceforth referred to as the 72nd Report), is proof of the many allegations made regarding the violations in the vaccine trials. The report acknowledges the unethical nature of the trials conducted by PATH in India in the year 2009 and clearly states that the "demonstration project" as it was repeatedly referred to by PATH, was a clinical trial, irrespective of what PATH called it. The report takes note of the observations of the MoHFW's enquiry committee that, "The demonstration project is a study of a pharmaceutical product carried out on humans and since the primary objectives include the study of serious adverse events, it is clear that clinical trial rules and guidelines should apply." The report further states that by carrying out the clinical trial in the disguise of an "observation/demonstration project," PATH has violated the laws and regulations laid down for clinical trials by the Government of India.[447]

[444] G. Mudur, "Human papilloma virus vaccine project stirs controversy in India," BMJ 340 (2010); G.Mudur, "Row erupts over study of HPV vaccine in 23,000 girls in India," BMJ 344(2012)

[445]Enquiry Committee, "Alleged irregularities in the conduct of studies using human papilloma virus (HPV) vaccine by PATH in India," Final Report of the Enquiry Committee appointed by the Govt. of India, Vide notification No.V.25011/160/2010-HR (February 15, 2011).

[446] Final Report of the Committee appointed by the Government of India (vide notification No. V 25011/160/2010 – HR dated April 15, 2010) to enquire into "Alleged irregularities in the conduct of studies using Human Papilloma Virus (HPV) vaccine by PATH in India". New Delhi: Government of India (Sep 1, 2018)

[447] Department-related Parliamentary Standing Committee on Health and Family Welfare, Department of Health and Family Welfare, Seventy second report on alleged irregularities in the conduct of studies using Human Papilloma Virus (HPV) vaccine by PATH in India, New Delhi: Rajya Sabha Secretariat; 2013 Aug 30 (Sep 1, 2018), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/72.pdf

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The 72nd Report also recognizes that the project design was flawed and hence disapproves of the same due the failure to report certain events. There was also an absence of independent systems or detailed monetizing of the same. The 72nd Report also observes that there were numerous violations in regard to consent and the legal requirements for it. This conclusion was drawn from the "incomplete and inaccurate" consent form and the failure to give all relevant information to the participants as well as the parents or guardians in regard to the vaccination. On top of this there was direction by the state (Andhra Pradesh) to hostel wardens to sign the consent forms on behalf of the parents/guardians. Another major issue was that no insurance cover was given for the girls.. There was a gap in the report however as to failed to talk about the funding from the Bill and Melinda Gates Foundation and other sources, or of the money spent by the ICMR and state governments. Hence, the actions of PATH are a clear violation of human rights the trial participants.

Another major problem faced in India is that the government has been promoting the country as a location for trials despite the fact that there is no adequate regulatory method existing. A bit on clinical research has been sick in the parliament foe a very long period of time and no move has been made by the parliament to approve the same. There is an urgent need to protect trial participants who are vulnerable to exploitation by the drug companies, the contract research organisations and investigators.[448]

Schedule Y of the Drugs and Cosmetics Rules (government of India 2005), the Indian Council of Medical Research guidelines and the Indian GCP guidelines [449]clearly stated that informed consent form (ICF) [450]must include the compensation procedure as an essential part in the document. Another and separate compensation is provided to in cases where there is any kind of injury or temporary/permanent disability. In cases of death of the participant, their dependents are entitled to monetary compensation[451]. The Drug Controller General of India has stated that the clause mentioning that any trial injury or death and medical care will be compensated by the sponsor must be included in the informed consent form.

CLINICAL TRIALS IN THE INDIAN SCENARIO

There are many laws governing Clinical trials in India in order to protect the participants from being exploited by the practitioners. The major provisions for this purpose are contained in—

- Drugs and Cosmetics Act - 1940

[448] Sandhya Srinivasan, Clinical Trial Industry: No Accountability?, Vol. 46, No. 35, Econ Polit Wkly, 19, 19 (2011)

[449] Central Drugs Standard Control Organisation, Ministry of Health and Family Welfare, Government of India, Good Clinical Practice-CDSCO (Oct 28, 2018), http://www.cdsco.nic.in/html/GCP1.html

[450] Drugs and Cosmetic Act, 1940

[451] Indian Council for Medical Research, Ethical Guidelines for Biomedical Research on Human Participants, ICMR. 2006 (Oct 29, 2018), http://www.icmr.nic.in/ethical_guidelines.pdf

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- Medical Council of India Act - 1956, (amended in the year2002)
- Central Council for Indian Medicine Act - 1970
- Guidelines for Exchange of Biological Material (MOH order, 1997)
- Right to Information Act - 2005,
- The Biomedical Research on Human Subjects (regulation, control and safeguards) Bill - 2005

Despite there being a number of legislation the most important one concerning clinical trials is The Indian Council of Medical Research (ICMR), 1947. This council was set up with the object to cultivate research culture in India and also help the growth of medical infrastructure.

.The Drugs and Cosmetics Act, states that all clinical trials in India should follow the ICMR guidelines of 2000. Every doctor is governed by the act and any doctor doing wrong in a trial can be prosecuted and the hospital can be closed. [452] The Drugs and Cosmetics Act is a strong act and has the power to take punitive measures in case of certain violations.

The Drugs Controller General of India (DCGI) is responsible for regulatory approvals of clinical trials in India. The DCGI's office depends on external experts and other government agencies for advice. Separate authorisation is needed for the purpose of export of blood samples to foreign laboratories. The Indian Council of Medical Research has a central ethics committee known as the Central Ethics Committee on Human Research (CECHR). This committee audits the functioning of this Institutional Ethics Committee (IEC). Schedule Y of the Drugs and Cosmetic Rules lay down the provisions for the composition of the IEC.

Out of the total population in India, 70 million suffer from rare disorders like cystic fibrosis, Wilson disease, etc. many of which still does not have any cure. Moreover, the cost of treatment of many of such disorders is very high. Apart from this the research in India is more skewed towards non- communicable diseases like cancer etc. Less focus is done on communicable diseases like TB, malaria etc. So, clinical trials in this arena brings a balance in overall research. Although most of the trials in India are Phase III trials that involve testing of already 'well tested' drugs, therefore, done to test the therapeutic dose of the drug on large population. Hence, not only is the risk minimal, but also participants gain access to new treatments before they are widely available.

[452] Drugs and Cosmetics Act, 1940, No.23, Acts of the Parliament, 1992 (India)

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One of the most important problems is that the consent of the participants in the clinical trials is not taken. It is due to a large proportion of participants in India is illiterate and lured into trials by offers of free healthcare but they are not informed of the difference between treatment and research. For instance-In 2004, Bhopal gas leak survivors getting treated at Bhopal Memorial Hospital and Research Centre (BMHRC), were recruited for clinical trials without their knowledge and 14 of them died while conducting the trials. [453]

CLINICAL TRIAL IN GLOBAL SCENARIO AND ITS ISSUES

Trials on humans for testing drugs are happening not only in India but all over the world and it is being developed and globalized like any other industry. Governments all over the world especially in wealthy countries promote clinical trials and conduct these trials in less developed countries[454] Especially in India Global clinical research is exploding. Yet, it is certainly not the West that is introducing clinical research to India. Two ancient scripts, Charaka Samhita (a textbook of medicine) and Sushruta Samhita (a textbook of surgery), compiled as early as 200 B.C. and 200 A. D. respectively, show India's age-old proficiency in medical research. However, a lot has changed in the clinical research scenario since then. In the contemporary world, clinical trials are conducted through a regulated approach and fixed procedure of Phases following certain guidelines laid down by the International Conference on Harmonisation (ICH). Globalisation of international clinical trials raises the ethical question regarding testing on humans in different countries and exploiting their marginalised or vulnerable section.[455]

Since 2002, the number of active Food and Drug Administration (FDA)–regulated investigators based outside the United States has grown by 15% annually, as compared to the number of United States based investigators which has declined by 5.5%.[456] This shows that clinical research is going through globalisation similar to that by other industries. One use of the Clinical Trails government registry in the United States is to examine recruitment in industry-sponsored phase 3 clinical trials as of November 2007 for the 20 largest U.S based pharmaceutical companies; it was found that approximately one third of the trials (157 of 509) are being conducted solely outside the United States and that a majority of study sites (13,521 of 24,206)

[453] www.gktoday.in/gk/clinical-trials-in-india-key-issues

[454]Seth W. Glickman, John G. McHutchison, Eric D. Peterson, Charles B. Cairns, Robert A. Harrington, Robert M. Califf, and Kevin A. Schulman, Ethical and Scientific Implications of the Globalisation of Clinical Research, The New England Journal of Medicine, (Sep 2, 2018, 5:00 PM), https://www.nejm.org/doi/full/10.1056/NEJMsb0803929

[455] P. Sree Sudha, How ethical are clinical trials in India?, India Law Journal, (Sep 2, 2018, 6.50 PM), http://www.indialawjournal.org/archives/volume2/issue_3/article_by_sreesudha.html

[456] Getz KA, Global clinical trials activity in the details. Applied Clinical Trials,(Sep 9, 2018, 9:00 PM), http://appliedclinicaltrialsonline.findpharma.com/appliedclinicaltrials/article/articleDetail.jsp?id=453243

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are outside the United States. Many of these trials are being conducted in developing countries, including the rapidly evolving countries of Eastern Europe and the Russian Federation.[457]

Clinical trials, like most industries have experienced a huge increase in numbers over recent times and are being globalized all over the world like any other industry. One reason for this may be that pharmaceutical companies can substantially reduce their costs by carrying out these trials in developing countries like India due to which they are shifting trials (especially phase 2 and 3) to such countries. It was reported by a pharmaceutical executive that a first-rate academic medical centre in India charges approximately $1,500 to $2,000 per case report. This cost is less than one tenth the cost at a second-tier centre in the United States.[458]

There are certain benefits to conducting trials in developing countries. Some of these are helping create good relationships among clinical investigators globally and also answering any queries about the safety and efficiency of drugs that are useful all over the world. However, globalisation of trials raises some ethical and scientific questions. Some of these are that local regulatory bodies are more often than not structured to monitor the quality and safety of trials and drugs in their local markets; due to which they may not have the required information on certain aspects of research conducted especially if such research is outside the country.

A huge issue is that there are a number of ethical oversights in researches that involve human trials in countries that are still developing. There are wide disparities in areas like education, health care, economy, social standing etc. that jeopardises the rights of the participants.[459]There may be instances where the financial compensation for the trial participants may be more than they annual wages itself and these people may not have any other way to get the medical care required. Hence, their only choice becomes to take part in the corresponding trial.

As a result of the poor standards in the health care of developing countries, they may sometimes even allow study designs and trials that will not be allowed in wealthier nations.[460]Another concern is that the transparency of research in developing nations. The International Committee of Medical Journal Editors has issued some guidelines for the purpose of investigators with regard to participation in study design, access to data, and control over the publication of results.

[457] Seth W. Glickman, John G. McHutchison, Eric D. Peterson, Charles B. Cairns, Robert A. Harrington, Robert M. Califf, and Kevin A. Schulman, Ethical and Scientific Implications of the Globalisation of Clinical Research, The New England Journal of Medicine, (Sep 2, 2018, 5:00 PM), https://www.nejm.org/doi/full/10.1056/NEJMsb0803929

[458] Jean-Pierre Garnier, Rebuilding the R&D engine in big pharma, 86 Harv Bus Rew, 68, 70 (2008)

[459] The ethics of clinical research in developing countries. London: Nuffield Council on Bioethics, 1999. (Aug 29, 2018, 7:00 AM), http://www.nuffieldbioethics.org/fileLibrary/pdf/clinicaldiscuss1.pdf

[460] Jayaraman KS, Indian regulations fail to monitor growing stem cell use in clinics, Nature (Sep 5, 9:00 PM), https://www.nature.com/articles/434259a

[461] Protecting the publication right of investigators is crucial for the transparency and ethicality of the research. This is an issue in India (being a developing country) as the investigators tend to be less aware of these guidelines and hence, less likes to be able to have proper access to trial date and to publish the same.

Despite all these issues it still becomes important for developing to take part in clinical trials for the purpose of advancement of health. Given the increasing commonness of conditions such as cardiovascular disease, it is necessary to test drugs and devices on a global scale. Multiple advances are required to solve the issues caused by globalisation of clinical research. In general, the goal is to encourage innovation and access while at the same time making sure that clinical research is conducted in numbers in proportion to the potential uses of the products after approval. It is also important to create a strong framework to ensure morality in any research that takes place.

The International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use has issued certain Guidelines for Good Clinical Practice (ICH-GCP guidelines). These guidelines are useful in respect to technical standards and ethical oversight. However, certain guidelines, such as the one indicating that sponsors should ensure that trials are "adequately monitored," are subject to interpretation and are only as effective as to the degree in which they are implemented. The solution is not simple; different types of trials require different monitoring procedures. A rigid set of rules will not be enough and may even impair the quality of the research[462] instead, an extensive improvement in the quality of clinical research is required, so that trial processes meet the research goals and needs of the society.

CONCLUSION

Despite there are so many provisions for the purpose of regulating clinical trials there is a huge gap in the law and this paper explores how this problem can be solved. The Ministry of Health & Family Welfare had constituted an Expert Committee under the Chairmanship of Prof. Ranjit Roy Chaudhury to formulate policy and guidelines for approval of new drugs, clinical trials and banning of drugs.[463] The committee made several recommendations that helped narrow this gap and the same were adopted. However this does not seem to be sufficient.

[461] International Committee of Medical Journal Editors. Uniform requirements for manuscripts submitted to biomedical journals: writing and editing for biomedical publication. (Sep 10, 12:00 PM), http://www.icmje.org/

[462] Yusuf S, Bosch J, Devereaux PJ, et al, Sensible guidelines for the conduct of large randomized trials, Clin Trials,38,38-39 (2008); Eisenstein EL, Collins R, Cracknell BS, et al, Sensible approaches for reducing clinical trial costs, Clin Trials, 75,75-84 (2008)

[463] Report of the Prof. Ranjit Roy Chaudhury Expert Committee to Formulate Policy and Guidelines for Approval of New Drugs, Clinical Trials and Banning of Drugs, (July 2013)

The government proposed to regulate all biomedical and health research activities by bringing them under a law to ensure ethical research in all institutions with proper care, and a compensation policy for human participants. [464] For this purpose the Biomedical and Health Research Regulation Bill was proposed in 2013. However the bill was never passed and is hanging in the parliament till date. The objectives of the bill was to provide ways to protect ethical values in accordance with both local cultural values and international standards. It is important that a separate legislation be passed wide the large and rapid growth in clinical trials not just in India but all over the world. The protection of participants in clinical trials requires regulation, including in trials that are outsourced and off-shored.

Informed consent and proper monitoring are the most important aspect of ethical trials. These two points must be taken into foremost consideration while addressing the problem of protection of participants. The more that the ethical aspects of trials are recognised especially legally, the more easy it becomes to protect it through litigations. For this purpose the proceeding in the case of the HPV vaccination project can be used as an example.

Globalisation of trials becomes another aspect of concern. Ethical and scientific integrity is the only way to solve this problem. The World Health Organisation may be able to commission a comprehensive review for this purpose. An effort to make more efficient regulations by employing faster and simpler working methods governing clinical trials can ensure more ethical conduct. Furthermore, improving research efficient can reduce the cost differences among different countries hand help ensure that trials are conducted wherever the drug under trial will be sold once approved. Greater use of centralised review boards, standard terms for research contracts, and the development of streamlined best practices in order to decrease unneeded work for investigators and medical institutions are required.

[464] Aarti Dhar, Bill to make biomedical, health research ethical, The Hindu, June 2, 2016, https://www.thehindu.com/todays-paper/tp-national/bill-to-make-biomedical-health-research-ethical/article5143738.ece

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VALIDITY AND ENFORCEABILITY OF RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS IN INDIA

-Dsouza Kyle Nathan[465]

ABSTRACT

Organizations make an attempt to protect their trade secrets and confidential information by the use of 'restrictive' agreements between employers and employees, which place limitations and restrictions on the latter, pertaining to the knowledge and information gained in the course of employment and how it shall be disseminated. It is a moot debate that disputes arise as a result of diverging interests between the employer and employees and there is a need to protect the interest of each party. However, where the employer has the right to protect the invented and technical secrets, the employee has a right to strive for progress and to earn his livelihood.

Article 19(1) (g) of the Constitution of India grants every citizen the right to practice any profession, trade or business. This is not an absolute right and reasonable restrictions can be imposed on this right in interest of public. The use of restrictive covenants such as Non-competition agreement, Non- solicitation agreement and Non- disclosure agreements by the employers for protecting their trade secrets and to retain the competitive edge deprives the employee of their growth and livelihood. The Indian precedents have, however, highlighted the need for protection of rights of an employee seeking employment, as priority, over protecting the interests of the employer seeking to avoid competition. The numerous precedents have, in light of the constitutional and statutory provisions under the Indian Contract Act, 1872, held that the right to livelihood of the employees must prevail inspite of an existing agreement between the employer and the employee.

The author, through his research, attempts, to decipher the legal framework existing in India to address the validity and enforceability of such restrictive covenants between the employers and employees that seek to determine their rights post-termination of employment.

INTRODUCTION

Most employers in India have some form or the other of a standard employment contract. Often the employer gives a detailed offer to the prospective employee. In some cases, the offer as and when it is accepted by the employee becomes an "Employment Agreement" or Employment Contract". In some cases, the offer is a small cover note with an Annexure giving a draft of a

[465] Student – Christ University

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formal Employment Agreement. As and when the employee accepts the offer, the draft formal Employment Agreement is printed on a stamp paper and duly signed by both the employer and the employee. From a legal standpoint, in both cases a contractual relationship is created between the employer and the employee. The relationship is evidenced by the document which can be in any form and which states the terms and conditions agreed to between the two.

Employers face problems of attrition, lack of loyalty, leakage of key confidential information, weaning of clients by existing and past employees, etc. Employers try to protect themselves by inserting restrictive clauses in Employment Agreements. As is to be expected, every employer wants to have restrictive clauses that are cast in stone and allow no leeway to any present or past employee. The obstacle in such restrictive clauses comes from constitution of India, laws of India and courts. The chains that lawyers create for employers are often broken by courts. It is hence important for employers to understand what is permissible under the law and what is clearly forbidden.

This Research Paper is to enable the reader to get an understanding of various types of restrictive clauses and also the applicable laws. We also look at some key judgments of Honourable Supreme Court and High Courts in light of the same.

APPLICABLE LAWS

1. Labour laws

There is no specific law in India related to employment agreements. If an employee is covered under labour statute, then he / she enjoys the protections and benefits under the relevant Act. Restrictive Covenants cannot override or infringe upon such rights conferred by any statute.
Generally speaking, employers do not have employment contracts for employees covered by labour laws. The practice is to have a formal employment agreement (or an offer for employment duly accepted by the employee) for employees who receive monthly salary above the threshold limit. Service conditions for such employees are not subject to any labour laws and are only subject to the employment agreement, which is treated as a contract and is hence subject to the law related to contracts in India.

2. Indian Contract Act

The Indian contract Act contains general principles regarding contracts, the Restrictive covenants cannot override such provisions of law and any contradiction would render the covenant void and thus unenforceable in the eyes of law.

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3. Constitution of India

The constitution of India is the Supreme law of the land, no contract can violate Article in the Constitution. Restrictive Covenants cannot infringe any Right guaranteed in the Constitution and any violation would render the covenant void and unenforceable.

TYPES OF RESTRICTIVE COVENANTS

1. Non- compete agreements

Non-compete clause is a clause forming a part of the employment contract which restrains an employee from practicing a similar profession that requires him to perform similar duties so that the trade secrets of the employer are not divulged. Even though non-compete provisions that restrict the employee are held to be against the right to profess profession and earn his livelihood; an employer is still entitled to protect his business interest. He has the right to ensure that the knowledge, training and confidential information acquired under his expertise is not promulgated and used against his business interests by the competitors. This clause protects the employer from misuse of his business secrets, or unauthorized disclosure of secret information pertaining to his field of trade.

The courts have, through their judgments, provided that the various types of restraint clauses may relate to:

- Goodwill;
- competitive business during the term of contract, franchise/collaboration agreement in a specified area during the period of contract;
- partnership agreements providing for restraint of trade after dissolution of the partnership;
- restrictions put on employees joining during the course of employment in another business; restraint of using information acquired during employment, after employment[1] etc.

The court explained a non-compete clause to be, either a paragraph that forms a part of the employment agreement or can be an entirely separate document which the employees are bound to sign when hired. The courts have, through their judgments, provided that such non- compete clauses are operative in franchise agreements as well so that the franchiser can protect his confidential information and the technical know-how from a franchisee who may exploit such trade secrets or divulge them to a significant competitor. The non-compete clause would restrict the franchise owner to conduct business within certain geographical limit so as to not hamper the business of the franchiser or may but in [466]other conditions as agreed to by the parties.

However, the reasonableness and the enforceability would depend on the facts of the case. In the case of Gujarat Bottling Co. Ltd. and others v. Coca Cola and Ors, an agreement for grant of

[466] IEC School of Art & Fashion Vs.Mr. Gursharan Goyal and Others 1998(18)PTC493(Del)

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franchise by Coca Cola to Gujarat Bottling Company to manufacture, bottle, sell and distribute beverages under trademarks held by the franchiser contained a restrictive stipulation restraining the franchisee from carrying out the same functions for any other competitor during the subsistence of the franchise agreement.

The court held that the restriction was intended to promote the trade and protect the trade secrets and formulas. The stipulation was only a restriction for the period till the contact was valid and not after the termination. It was held not to be in restraint of trade. The Supreme Court stated that: "There is a growing trend to regulate distribution of goods and services through franchise agreements providing for grant of franchise by the franchiser on certain terms and conditions to the franchisee. Such agreements often incorporate a condition that the franchisee shall not deal with competing goods. Such a condition restricting the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchisor and it cannot be regarded as in restraint of trade."

2. Non- solicitation agreements

A non-solicitation clause is also a restrictive stipulation that prevents any employee, existing or former, to indulge into any business activities with the other employees or customers of the company in a way that it would prove to be against the interest of the company of the existing employer.

In a recent judgment, where Desiccant Rotors[2467] prayed to the Delhi High Court to grant an injunction against the manager, prohibiting him from soliciting the customers and connections of the employer company, the court held in favour of the plaintiff. The court also observed that a marketing manager cannot be accused of holding all major confidential information and his written declaration in the employment agreement with respect to the same is immaterial. The claim to enforce a confidentiality clause against the defendant was rejected by the court. The Delhi High Court, in the Wipro case[3468], held that "the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act, 1872 as being void".

But in the case of Pepsi Foods Ltd. and Ors Vs. Bharat Coca-Cola Holdings Pvt. Ltd. & ors[469] the Court held that the non-solicitation clause is within the purview of Section 27 of the Indian Contract Act. It was further held that encouraging the employees of a competitor company to work in the company of the inducing company is prohibited and opposed to the contract of employment.

3. Non-disclosure agreement

The employee is directed not to divulge any trade secrets, business connections and confidential information to any competitor, or any person or entity, which poses reasonable threat to the

[467] Desiccant Rotors International Pvt. Ltd vs Bappaditya Sarkar &Anr CS(OS) No.337/2008
[468] Wipro Limited Vs. Beckman Coulter International S.A 2006(3)ARBLR118(Delhi)
[469] 1999(50)DRJ656

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business interest of the employer. The employee must not succumb to any monetary or employment benefits offered by a competitor which will eventually force him to divulge the confidential information of his employer and his business efforts. There shall be no disclosure of any information by the employee to any unrelated person except under the mandatory provisions of law.

In Diljeet Titus v. Mr. Alfred A. Adebare[470] and Others, it was held that the plaintiff has a clear right in the confidential business material data such as client lists and proprietary drafts. If the defendant, who is a mere employee of the employer's law firm, claims that he has a copyright over certain drafts since they were created while their employer-employee relationship was subsisting, it was held to be impermissible under law and his contention was rejected. The Court put an injunction on the defendant only for the purpose of using the information he took from the advocate's law firm so that the interest of the plaintiff could be protected. The defendant could, however, carry out similar profession.

4. Non-poaching agreements

This agreement is executed between two competitors wherein they agree not to encourage or entice the employees of the other party to extract confidential information or to get the benefit of the trained skills of the employees. In the ongoing development and industrialization phase, where every profession and trade requires a niche talent, the employers expend heavy amounts to train the employees as per the requirements of their concerned businesses. When such employees join the firms of the competitors by will, or when the competitor employer poaches such trained employees, it causes immense loss to the former employer. This agreement does not explicitly form a part of section 27 of Indian contract Act, 1872, as it does not put a restrain on trade or prohibit an employee from seeking an employment. Such an agreement simply puts an imposition on the contracting parties to refrain from hiring the employees of one another.

5. Training bonds

The employer seeks to ensure that his interests are safeguarded and his investments are channelized for his own business efforts for which he makes the employee sign a specific training bond. Such a bond imparts an obligation on the employee to utilize the training received from the employer for the benefit of the business of the employer for certain specified duration. The employee must perform his part of the contract and if the employee fails to comply with the contractual obligation, the employer can recover compensation for the investments made in the training of that particular employee. The recovery is only of the amount of investments made and not an imposition of penalty for terminating the employment contract.

Where the Defendant, who terminated the employment without due notice, was sued by the plaintiff company to pay liquidated damages to suffice for the investments made on his training. The amount charged by the employer as per the stipulation in the employment contract included damages and penalty amount. The Andhra Pradesh High Court held that the amount demanded by

[470] 2006 (32) PTC 609 Del

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the plaintiff company is not equivalent to the loss incurred by them and hence, reduced the amount of compensation. The employer must, however, establish that he had incurred expenses in the training of the employee and the employee has not performed his part of the contract of working for the business of the employer for a stipulated time period.

Non-compete clauses have a significant effect on competition and an aspect of it has been adjudicated within the ambit of the Competition Act, 2002. The Competition Commission held in the case of Mr. Larry Lee Mccallister v. M/s. Pangea Legal Database Systems Pvt. Ltd. & Ors, that the non-compete clause does not violate Section 3 of the Act which prohibits person from entering into agreements which cause an adverse effect on competition within India. The CCI further held that "the relevant dominant position enjoyed by the company is with respect to its competitors, not its employees, and that an employment contract has nothing to do with the market of the company."

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IMMUNITY AND ACCOUNTABILITY MECHANISM OF MULTILATERAL DEVELOPMENT BANKS- WITH SPECIAL REFERENCE TO ASIAN INFRASTRUCTURE INVESTMENT BANK

- *Priyanshi Dixit*[471]

ABSTRACT:

International organisations that function based on treaties, that play a crucial role in lending long term and short term loans both locally and globally, are Multilateral Development Banks. These banks are Financial Institutions owned by sovereigns of developed and developing countries. They have immunity in the national jurisdiction mentioned essentially in their respective Articles of Agreements, which in turn protects their bank operations. This paper aims to analyse the immunity aspect and the accountability that is to be maintained by these banks. Further, main focus is moved to analysing the immunity mentioned in the Articles of Association of Asian Infrastructure Investment Bank and its oversight mechanism to hold accountability. This paper thus, in its conclusion has established the reason as to why change in the limits to immunity and their accountability mechanism should be made, by analysing and criticizing the same.

INTRODUCTION:

Multilateral Development Banks are International Financial Institutions owned by the governments of developed and developing countries, specialised in order to foster social and economic progress of its developing member countries by acting as long term lending intermediaries at both global and regional level. These banks have played a vital role in the development sector after the World War II period. The World Bank, European Bank of Reconstruction and Development (hereinafter referred as EBRD), the International Monetary Fund (IMF), Asian Development Bank etc., are recognised as Multilateral Development Banks according to international standards.[472] The MDBs (except the EBRD, which is the youngest and constitutionally the most different of the MDB family) have grown significantly in the size of

[471] School of Law, Christ University, Bangalore
[472]INTER-AGENCY TASK FORCE ON FINANCING FOR DEVELOPMENT, Issue Brief on Multilateral Development Banks, World Bank Group 2016.

their lending operations, staff and balance sheets since their inception.[473] The Asian Infrastructure Investment Bank in the year 2016 was added as an emerging Multilateral Development Bank lead by China with a base capital of $250 billion [with the contribution of New Development Bank (NDB) and the BRICS Contingent Reserve Arrangement (CRA)][474]

MULTILATERAL DEVELOPMENT BANKS – POSITION UNDER INTERNATIONAL LAW*:*

These institutions are established by forming an agreement (treaty) between the leading countries. They are governed by Public International Law. The nature of treaty agreement allows these institutions to be recognised as legal entities that are capable of entering into contracts. The AfDB's Articles of Agreement sets forth the bank's legal status more generally: "To enable it to fulfil its purpose and the functions with which it is entrusted, the Bank shall possess full international personality."[475] To sue or be sued with the privilege of certain immunities from the normal legal process, is in furtherance the nature of the banks. There exist specific statutory grounds for these institutions, as can be seen with regard to the International Monetary Fund which was established by the Britton Woods Agreement Act, 1945 that provided legal recognition to the organisation.[476] To be an international organization, an entity must be created by a multilateral treaty, consist of sovereign states, and possess institutional organ of its own.[477] MDBs meet all these standards. MDBs a function based on the constituent principles referred to as Articles of Agreements conferred by the sovereign state. The articles establish the functioning, organising, legal responsibility and the immunity of the banks. For example, as a subordinate of the United Nations, all the members of the World Bank are sovereign states.[478] Some MDBs, however, involve non-state members. For example, Hong Kong, China is a member of the ADB.[479] The AIIB, by making reference to ADB membership,[480] accepts non-state members as well.

CONCEPT OF IMMUNITY UNDER INTERNATIONAL LAW:

The doctrine of immunity rests on the basis of equality of sovereigns. The maxim 'par in parem non habet imperium' is the governing principle of this doctrine. This maxim establishes that there ought to be absolute equality and independence of the sovereigns. Thus the rationale

[473]Multilateral Development Banks: An Assessment of their Financial Structures, Policies and Practices, FONDAD, The Hague, 1995, (www.fondad.org).
[474]Asian Infrastructure Investment Bank: As a new comer in the society of Multilateral Development Banks Zongyuan Liu Research Assistant, Naoki Umehara Senior Economist, Emerging Economy Research Department, Institute for International Monetary Affairs (IIMA.)
[475]Artciles of Agreement AfDB.
[476]International Monetary Fund. IMF history (http://www.imf.org/external/about/history.htm.)
[477]Nigel White, The Law of International Organizations 30 (quoting Amerasinghe, Principles of the Institutional Law of International Organizations 78) (2nd ed. 2005), pg- 13-14.
[478]Id.
[479]Id.
[480]Id.

behind this theory is to protect the sovereign from the jurisdiction of territorial courts. This first articulation of the principle of state immunity was recognised by the United States Supreme Court in its famous 1812 judgement of the Schooner Exchange V McFaddon.[481]

Many noted lawyers across the world have accepted immunity to be a part of customary international law, thus being valid and binding.

The argument that has been often relied on is- as according to existing law, no execution by way of seizure or otherwise can in any case be levied against a foreign state, the exercise of jurisdiction even if limited to act jure gestionis must remain no more than a nominal gesture.

Further, however the concept of absolute immunity has now been largely criticised and boiled down to restrictive immunity.

After this shift towards restrictive immunity, the distinction between acts done jure imperii and jure gestionis was brought to the surface. Thus, immunity is only available to acts done in the nature of sovereign (jure imperii) and not tot acts done in any commercial activity or commercial assets. This view was first brought by the courts in Austria in the year 1950[482] whereafter the classic doctrine of absolute immunity had its limitations. The court observed that the doctrine of absolute immunity had its origin when all the activities of commercial nature were in the political interest of the states. However, with time, the trade conditions evolved and thus the need to restrict absolute immunity was the need for to protect the essence of international law.

WHY DO INTERNATIONAL ORGANISATIONS REQUIRE IMMUNITY?

Post World War II, there developed a need to protect International Organisations, as they had just been incorporated and needed special protection. It was recognised in the Article U.N. CHARTER art. 105, para. 1 that these organisations require protection to carry out functions 'necessary to fulfill their purpose.'[483]

The said Article quotes '"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." [484]

Further, on the same grounds the concept of 'functional necessity' developed. In addition, the same has been established through international practice and theory.[485] Thus it has been established that international practices have been based on functional necessity. Along the same

[481]The Schooner Exchange v. McFaddon and Others, 11 U.S. 116 (1812).
[482]PRINCIPLES OF PUBLIC INTERNATIONAL LAW (3d ed. 1979) I. BROWNLIE, 682.
[483]United Nations Charter, 1945.
[484]Id.
[485]Supra note 11 at 687.

timeline, it was established that functional necessity has jurisdictional immunity as an important component.[486]

Essentially, three parties are affected directly by the jurisdictional notion of International Organisations, that is, the parties that are linked with the organisations, the territory within which they operate and the organisation itself. Thus, a special need to protect the interest of the organisation exists to protect the individual functioning of the organisation and to maintain its independent functioning.

Further, the trust of the member states is only established when they have confidence on the functioning of the organisation on the grounds of equality.[487]Thus, this concept does not entirely foster the concept of immunity but helps determine on what basis and when can immunity be granted to the organisation.

However, in any case, these organisations cannot obtain more immunity and privileges than UN does.

IMMUNITY OF MULTILATERAL DEVELOPMENT BANKS WITH RESPECT TO NATIONAL LEGISLATIONS:

The International Organizations Immunity Act of 1945, in the US provides for "International organizations, their property and their assets, wherever located, and by whomever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." [488]

However, this was promulgated long before the evolution of absolute immunity to restrictive immunity had developed. In the case of Atkinson v. Inter-American Development Bank[489] the US court discussed the drawback in using the state immunity with respect to foreign states. In the said judgement the court acknowledged that the text of the IOIA does not provide an express guidance on whether the Congress intended to incorporate the subsequent changes to the law governing the state sovereign immunity.[490]

If the Atkinson decision was not a proper construction of the IOIA, the IOIA, by its reference to the immunity enjoyed by foreign governments, should be understood as having incorporated the subsequent change to the law of sovereign immunity represented in the FSIA. Thus, the exceptions to immunity, such as commercial activities and tortious act, will apply in a case where an international organization is involved. Accordingly, when actions against MDBs are

[486]Supra note 11.
[487] Peter H.F. Bekker, The Legal Position of International Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities 39 (1994).
[488]The International Organizations Immunity Act of 1945.
[489]Supra note 16.
[490]Steven Herz, Ineternational Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity, 31.

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brought in U.S. courts, the MDBs should be subject to the exceptions to immunity in the same manner as foreign states.

IMMUNITY OF MDBS ACCORDING TO THEIR AGREEMENTS:

Multilateral Development Banks function primarily based on their treaty agreements with respect to their Articles of Agreement. In order to understand the concept of immunity in the light of MDBs, their Article of Association must be taken into account.

Firstly, IBRD in its Article of Association does state that the bank has immunity but does not state the types of specific claims that can be made. The provision essentially sates that:

"Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."[491]

Similarly when taken into consideration the Articles of headquarters of EBRD (European Bank of Reconstruction and development) gives a broad aspect to the exceptions of immunity.

The provisions under Section 45-51 clearly provide for the action arising out personal injuries, or enforcement of an arbitration award made against the bank, also falls within the permissible types of actions that can be brought against the bank and therefore is included in the jurisdiction of local courts.

IMMUNITIES OF MDBS UNDER CUSTOMARY INTERNATIONAL LAW

When there is no specific provision for an immunity, customary international law is applied on the grounds that there is lack of international treaty or legislation.[492] For example, when the party that is not a member of the MDB and there is no specific regulation regarding granting immunity for the smooth functioning of the bank, then customary law is applicable. It has been established International organisations independent of international treaty obligations can also enjoy immunity under customary international law.[493] Thus it makes it an implied obligation for states to grant immunity to international organisations. However, customary international law does not provide for the limit of immunities that can be applied.

[491]The IBRD Articles of Agreement art. VII § 3.
[492]Supra note 16 at 38.
[493] Peter H.F. Bekker, The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities 144 (1994)

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IMMUNITY UNDER THE ARTICLES OF AIIB

The articles of AIIB 'The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to raise funds, through borrowings or other means, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has an office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.'[494]

The expanded exceptions are also found in the Headquarters agreement of AIIB, like that of EBRD.[495]

WHAT IF OBLIGATIONS NECESSARY TO BE FULFILLED ARE NEGLECTED BY THE BANK?

Multilateral Development Banks on a very large basis specifically deal with developing countries. They have an obligation to ascertain that the projects taken up by the bank do not hinder the environment of the member countries and in turn promote environment protection. Thus they ought to act as catalyst for fostering government policies that focus on sustainable development. [496]

Further, if these obligations are not fulfilled by the bank, then in order to shield the distressed countries, accountability mechanisms are available. The World Bank, in order to aid its member nations established an inspection panel with members that are independent of the bank itself. The panel can promptly disagree and criticize the policies of the bank and suggest to alter the same.[497] It helps shield the member countries from being affected if the bank misuses the immunity and privileges enjoyed by it. Further it also focuses on the protection of human rights and watch over the procedures followed by the bank. However, it protects the bank from any false allegations that are brought by the member countries that shift liability on the bank in pursuance of failure of a project.[498]

After the establishment of this panel by the World Bank, other MDBs also brought into light their accountability mechanisms. For example, EBRD's Independent Recourse Mechanism in 2003; the IDB's Independent Investigation Mechanism established in 1994, superseded by the enhanced Independent Consultation and Investigation Mechanism in 2010; ADB's inspection function first established in 1995, replaced by the Accountability Mechanism (introducing the permanent Compliance Review Panel) in 2003 and updated in 2012; IFC/MIGA's Compliance

[494] AIIB AOA Art. 46.1.
[495] EBRD Headquarters Agreement, Art. 4.1.
[496] What should the multilateral development banks do? Willem Buiter and Steven Fries [working paper.]
[497] Accountability at the World Bank, The Inspection Panel 10 Years On.
[498] Id.

Advisor Ombudsman (CAO) in 1999;[499] and AfDB's Independent Review Mechanism in 2004, updated twice in 2010 and 2015.

ACCOUNTABILITY MECHANISM OF AIIB:

Article 26 (iv) of the AIIB Article of Association[500] explicitly states that the board of directors must supervise the functioning of the bank, further an oversight mechanism that protects transparency, independence and accountability' of the bank must be looked by the board of directors. Further, with respect to environment protection, para 64 of the AIIB Environmental and Social Framework (February 2016) offers a general provision on the oversight mechanism. It states that "People who believe they have been or are likely to be adversely affected by a failure of the Bank to implement the ESP may also submit complaints to the Bank's oversight mechanism in accordance with the policies and procedures to be established by the Bank for such mechanism"[501]

Thus, the bank has a credible mechanism to look into the accountability if or whether the bank fails to comply with its obligations.

CONCLUSION:

The shift from absolute immunity to restrictive immunity has altered the ways in which the bank would have had an arbitrary power over its member nations. As these banks focus primarily on aiding the developing countries, a safety measure to shield the same is required. However, as has been established by the author in the paper that immunity differs from impunity, the same given to the bank does not deprive the party from going to a fair trial. Many dispute resolution mechanisms are available under the Articles of Agreements of the MDBs. The argument that the MDBs hinder the rate at which commercial banks work does not hold value as these banks focus on providing long term loans for developmental projects the same seem risky for commercial banks.[502]

The immunity clause of AIIB being restrictive, however does not have a wider aspect like that of EBRD or other MDBs. This gap provides a leeway to the bank to misuse the privilege of immunity offered to it as a Multilateral Development Bank.

However, when looked into the accountability mechanism of the AIIB that aids the members from being defeated by the immunity clause of AIIB, consists of Board of Directors of the bank. This board is if looked with respect to hierarchy is under the board of governors.[503] Thus when compared to other accountability mechanisms of the MDBs, as mentioned in the paper, that

[499] Environment policy of EBRD, April 2013.
[500] AoA, AIIB 2016.
[501] AIIB Environmental and Social Framework (February 2016).
[502] A Critique of Immunity for Multilateral Development Banks in National Courts, Chengjin Xu.
[503] Article 23 (3) of the AoA, AIIB 2016.

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constitute a separate independent body known as the inspection panel – this accountability mechanism is extremely weak. As is a fact that this bank aids various third world developing countries, and is financially and politically stronger than many, conferring such huge power along with having immunity clause deters the protection of member countries.

Thus, the immunity provided by the bank must contain wider approach and an independent body to control the oversight mechanism must be formulated, in order provide for a smooth and fair functioning of the bank and foster the trust of its member countries.

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INTERFACE BETWEEN SECTOR REGULATORS AND COMPETITION COMMISSION OF INDIA

– *Sourabh Battar*[504]

INTRODUCTION

According to the section 18 of the Competition Act, 2002, it shall be the duty of the Competition Commission to eliminate practices having adverse effects on competition, to promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India.[505] Section 18 has a wide amplitude, it is agnostic about specific sectors. If we see the preamble of the Competition Act, 2002, the same language has been used. An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.[506]

Section 62 of the competition act, 2002, states that the provisions of this Act shall be in addition, and not in derogation of the provisions of any other law for the time being in force.[507] Let's reproduce Section 60 of the Competition Act to compare the language of both provisions. According to section 60 of the competition act, 2002, which states that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.[508]

While on one hand Section 60 proclaims the overriding effect of the Competition Act over anything that is inconsistent with the Act, Section 62 states that the Act shall be in addition to, and not in derogation of other laws. Prima facie there is an overlap between section 62 and section 60. Both sections are couched in mandatory language. An exercise in harmonization is

[504] Shri Venkateshwara University
[505] The Competition Act,2002,s.18
[506] The preamble of the Competition Act, 2002 reads: "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."
[507] Section 62 of the Competition Act, 2002 reads: "The provisions of this Act shall be in addition to, not in derogation of, the provisions of any other law for the time being in force".
[508] Section 60 of the Competition Act, 2002 reads: "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

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necessary because the overriding effect of Section 60 of the Competition Act can take effect only when it is established that two provisions are "inconsistent" i.e. they are in conflict with each other. According to the section 21(1) of the Competition Act-Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.[509] Section 21(1) with reference of current section 62 suggests directory, not mandatory address of competition issues by other statutory authorities. Section 18,60,62,21 constitute the four corners of the interface between competition authority and sector specific regulators.

REGULATION AND COMPETITION

1. Genesis of regulation in India-

Sector Regulators are specialized bodies created to supervise and regulate a specific sector of the economy. India started developing regulatory institutions with the introduction of reforms in 1991.The history behind Indian strand of regulation has a close relationship with the advent of the process of liberalization, privatization, globalization in 1991. While the fast paced development has uplifted millions of people from poverty levels, it has also led to concomitant challenges. In spite of more than one and a half decade of commitment to economic reforms, there is no consensus amongst the political parties regarding the rationale behind the reforms. India has seen governments run by two different hues of political parties in seventeen years since the reforms. While both NDA and UPA government have carried on the process of economic reforms, left leaning political parties such as CPI(M) oppose the process of economic reforms . Arguably, there has been increasing realization that government ought to focus only upon its core activity-governance instead of manufacturing, for instance, hair oil or bread.[510] India has seen several economic scandals and other crisis during the period of economic boom. A significant feature of Indian economic and legal regime during this period has been mushrooming of innumerable regulatory authorities. Before reforms, the important sectors, including infrastructure and public utilities, were regulated by the immediate line ministries which were also the operators. The rationale for not allowing private participation was the urgency to expand service coverage towards universality. However, the shortcomings of state ownership became increasingly visible with time. After reforms, the government made a paradigm shift in its policies and governance structure in some key infrastructure sectors. Specialized regulatory agencies were established in the telecom, electricity and oil & gas sectors.

[509] Section 21(1) states: "Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission."

[510] Government of India used to manufacture bread through Modern Foods Limited which has been sold to Hindustan Lever Limited.

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2. Inception of Indian Competition Law

The Constitution of India, in its effort in building up a just society, has mandated the State to direct its policy towards securing that end. Articles 38 and 39 of the Constitution of India, which are part of the Directive principles of the state policy, mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice –social, economic and political-shall inform all the institutions of national life, and the state shall, in particular, directs its policy towards securing-

1. That the ownership and control of material resources of the community are so distributed as best to subserve the common good[511], and

2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment[512].

The MRTP Act was in consequence of the aforesaid mandate in the Directive Principles of constitution of India, namely, prevention of concentration of economic power. The Preamble of the Competition Act, 2002, reads- An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. The Economic philosophy has undergone a momentous change. The Goals and Objectives of Competition law as enunciated in section 18 and preamble of the competition law is similar. A comprehensive, overall market vantage point is not available to any sector specific regulator.

3. Regulation/Competition dichotomy

1. Sector specific regulator tells business "what to do" and "how to price product" while competition authority tells business "what not to do".

2. Sector specific regulator focuses upon specific sectors of the economy while competition authority focuses upon the entire economy and functioning of the market.

3. Sector specific regulator addresses behavioral issues before problem arises while competition authority addresses behavioral issues after problem arises.

4. Sector specific regulator focus upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare while competition authority focus upon consumer welfare and unfair transfer of wealth from consumers to firms with market power.

[511] The Constitution of India, Article 38
[512] The Constitution of India, Article 38

5. Sectoral regulators are usually more appropriate for access and price issues such as changing the structure of the market, reducing barriers to entry and opening up the market to effective competition while competition legislation is usually more appropriate for affecting conduct and maintaining competition.

Therefore, it is evident that the role of sector specific regulators is overlapping but quite distinct. Unlike the sector specific regulators, competition authority takes the holistic view of the economy and addresses behavioral issues after the problem arises. The competition authority also addresses the unfair transfer of wealth that may take place between the consumers and firms wielding market power.

4. **Overlapping jurisdiction**

1. Electricity regulator

The Electricity Act, 2003 is redolent of the conundrum caused by overlapping jurisdictions of regulatory authorities in India. Though the Electricity Act was passed by the Parliament on May 26, 2003, which is a good four and a half months after the Competition Act, 2002 was passed on January 13, 2003, one of the objectives behind the Electricity Act is that of promotion of competition.[513] Indeed, the framers of the legislation exhibited amnesia about the competition legislation and conferred power upon the regulator to deal with anti-competitive agreements, abuse of dominant position and mergers related to impediment to competition in electricity.[514] The regulator, while fixing tariff levels, is to be guided by the principle of competition and efficiency.[515] In order to promote competition, it is open to the regulator to issue directions to the licensees engaged in transmitting, distribution or trading in electricity. The regulator has also been entrusted with the task of advising the government in competition within electricity

[513]The preamble of the Electricity Act, 2003 states that it is "*a+n Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

[514] Section 60 of the Electricity Act, 2003 states: "The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agradverse effect on competition in electricity industry".

[514] Section 23 of the Electricity Act, 2003 states: "If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, preement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry".

[515] Section 61 in, relevant parts, state: "The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely, :-… (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimal investments; … (e) the principles rewarding efficiency in performance…". Further, the second proviso to section 62(1) states that "in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity".

sector.[516] The regulator has been mandated to be guided by the lodestar of competition while evolving scheme for reorganization of provincial electricity boards that were under financial distress.[517]

To add insult to the injury inflicted upon the competition legislation, the electricity regulator, too, has been armoured with the non obstante powers that stipulates that the electricity legislation trumps other enactments.76 Like competition authority, the electricity regulator also finds itself hamstrung by a duty to act in aid of other regulators.[518] In Shri Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. & Ors. [Case No. 6/2009], in which the anti-competitive behavior of the electricity distribution companies was alleged, there was clear confusion regarding the jurisdictional authority in competition related issued. The Discoms alleged before the CCI that only the Delhi Electricity Regulatory Commission (DERC) under the Electricity Act, 2003 had jurisdiction to deal with the issues relating to anti-competitive behavior of electricity distribution companies. However, this regulator appears to be in favor of leaving the competition related issues exclusively in the hands of the competition authority and retaining the responsibility of deciding on the technical issues with themselves. The DERC, in the said case categorically stated in its communication to the CCI that although all matters pertaining to electricity tariff have to be decided as per the provisions of the Electricity Act and DERC Regulations, allegations of anti-competitive behviour, including abuse of dominant position by the Discoms fall within the jurisdiction of the CCI.

2. The Airport Economic Regulatory Authority of India

The Airports Economic Regulatory Authority (AERA) is a statutory body constituted under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008). The objective of the said Act is to regulate tariff for the aeronautical services, determine other airport charges for services rendered at major airports and to monitor the performance standards of such airports.[519] The operating environment in the domestic airline industry has become extremely competitive over the last few years with increase in the number of players leading to a fragmented market

[516] Section 23 of the Electricity Act, 2003 states: "If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof."

[517] Section 79(2), in its relevant part, states: "The Central Commission shall advise the Central Government on all or any of the following matters, namely: - (a) (ii) promotion of competition, efficiency and economy in activities of the electricity industry…". See also, Section 86(2) (i) that stipulates for the counterpart provincial regulator that "*t+he State Commission shall advise the State Government on all or any of the following matters, namely … promotion of competition, efficiency and economy in activities of the electricity industry…"

[518] Section 79(2), in its relevant part, states: "The Central Commission shall advise the Central Government on all or any of the following matters, namely: - (a) (ii) promotion of competition, efficiency and economy in activities of the electricity industry…". See also, Section 86(2) (i) that stipulates for the counterpart provincial regulator that "*t+he State Commission shall advise the State Government on all or any of the following matters, namely … promotion of competition, efficiency and economy in activities of the electricity industry…"

[519] Preamble of the Airport Economic Regulatory Authority of India Act, 2008 – An Act to provide for the establishment an Airports Regulatory Authority to regulate tariff and other charges for the aeronautical services rendered at airports…..

share, growing competition and pricing pressure on players. The scope for competition in provision of air navigation services is limited and direct competition between different air navigation service providers within the same airspace is not a practical possibility. Therefore, to protect the user from abuse of dominant position, greater transparency could be insisted upon.
However, under the said Act, the jurisdiction of the Act is specifically ousted in matters that fall under the purview of the Competition Act, 2002.[520]

3. Telecom Regulator

The telecom regulator is perhaps another interesting instance. It was established, inter alia, in order to ensure orderly development of telecom sector.[521] Accordingly, one of the critical functions of the telecom regulator is to „facilitate competition and promote efficiency".[522]Nevertheless, the appellate authority established to adjudicate telecom disputes[523] excludes competition matters, albeit those arising under the old, MRTP Act[524]Unlike the insurance regulator, the telecom regulator, does not have a generic, but a limited duty to aid other authorities existing in the telecom sector[525] and does not possess any overarching powers over other regulators.
In the case of Consumer Online Foundation v. Tata Sky Ltd. & Other Parties [Case 2/2009], Dish TV submitted that the CCI could not claim jurisdiction over this matter as Telecom Regulatory Authority of India (TRAI) and Telecom Disputes Settlement and Appellate Tribunal (TDSAT) were already vested with the "jurisdiction and responsibility to govern and regulate the telecommunication industry covering telecom, broadcasting and cable TV services….". CCI held that any matter that raises competition concerns would fall within the purview of the Competition Act, 2002 enabling CCI to exercise its jurisdiction.

[520] S. 17(a)(iii) of the Airport Economic Regulatory Authority of India Act, 2008.
[521] The preamble of the Telecom Regulatory Authority of India Act, 1997 states that it is "an Act to provide for the establishment of Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto".
[522] Section 11 of the Telecom Regulatory Authority of India Act, 1997 states: "(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to (a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:…(iv) measures to facilitate competition and promote efficiency in the operation of telecommunications services so as to facilitate growth in such services… (viii) efficient management of available spectrum".
[523] Section 14 of the TRAI Act, 1997 states: "The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to – (a) adjudicate any dispute – (i) between a licensor and a licensee; (ii) between two or more service providers; (iii) between a service provider and a group of consumers…".
[524] Proviso (A) to section 14(a) of the TRAI Act, 1997 states: "Provided that nothing under this clause shall apply in respect of matters relating to – (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969".
[525] Section 38 of the TRAI Act, 1997 states: "The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 and, in particular, nothing in this Act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority."

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POSSIBILITY OF REDUCTION OF CONFLICT BETWEEN SECTORAL REGULATORS AND CCI

Having settled for some sort of framework overseeing business conduct, the Indian policy makers are faced with the dilemma of choice between sectoral regulation and competition law. In order to organize the division of labor between sectoral regulators and competition authorities, there are three board options available:

(a) Clear separation of competition enforcement functions from technical functions:

Sectoral regulator may be vested with powers of *ex ante* control and the competition authority may be given the *ex post* authority. E.g. fixation of electricity tariffs may be left to the electricity authority constituted under the Electricity Act unless the prices are claimed to be excessive or predatory which then may require an *ex post* review by the competition authority.

(b) Competition authority substitutes sectoral regulator:

Another option is to make competition authority responsible for both sector specific regulation as well as overarching competition enforcement. This approach is advantageous as this reduces the problem of multiplicity of regulators and accumulates sectoral expertise. Indeed, Australia has taken this approach to settle for an economy-wide economic regulator that integrates technical and competition regulation.[526]However, experts have expressed their concern that this may lead to complex bureaucratic structure. There is also a lingering danger that the regulator may prefer using direct regulatory power over indirect competition enforcement powers.[527]

(c) Concurrent existence of competition authority and sectoral regulator:

Institution-building is a complex, time-consuming exercise. At a pragmatic level, sector specific regulators are here to stay as it would be practically impossible to abolish the authorities that have already come into existence.[528]

Further, experiences of other countries aren't of much assistance. There is a wide diversity in models that are available. While Australia on one hand, privileges competition authority, the UK grants explicit concurrent powers to sectoral regulators.[529]

The optimal, sui generis model must be rooted in contextual legal milieu. To be sure, both sector specific regulator and competition authority have unique core competencies to offer.

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[526] "Subgroup 3: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Third ICN Annual Conference, Seoul, April 2004, pp. 20-23.

[527] Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Third ICN Annual Conference, Seoul, April 2004, p. 5.

[528] "Subgroup 2: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Fourth ICN Annual Conference, Bonn, June 2004, p. 9.

[529] See generally, Department of Trade and Industry and HM Treasury, "Concurrent Competition Powers in Sectoral Regulation", May 2006, URN 06/1244.

Nevertheless, there are pragmatic, descriptive as well as normative justifications why Indian competition authority ought to trump sectoral regulators.

Descriptively, the compelling justification behind primacy of competition authority is that unlike legislations governing sector specific regulators, competition legislation grants private right of action along with provision of damages. The twin rubrics of private enforcement and damages ensure a qualitatively higher standard of consumer welfare which is unavailable under the legislative framework of any sector specific regulator.

CONCLUSION

The seemingly uneasy interface between the two is evident from the legislative framework. A closer examination of the interface requires exploratory as well as normative insights. Unlike sectoral regulators, competition authority combines the twin powers of private enforcement with right to claim damages. In the absence of the two, sector specific regulators cannot possibly serve as an effective instrument for promotion and protection of consumer welfare. Competition enforcement is a sophisticated, complex process. Therefore, in order to reduce transaction cost and efficiently enhance legal certainty, the realm of competition law enforcement ought to be left in the hands of the competition authority.

This does not necessarily mean that the sector specific regulators must wind up their shops. However, clarity about the jurisdiction of the sectoral regulators and the competition authority is must for the smooth functioning of both.

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PREVENTION OF CHILD LABOR

- *Naina Srivastava*[530]

INTRODUCTION

"The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into a fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation."- P N Bhagawati, Former Chief Justice of India

Around 33% of the total populace comprises of children. Along these lines they should be protected and secured, to keep up and enhance descendants. Children are a vital part of the social structure and the potential future. Presently the inquiry emerges, who is a child? Or on the other hand who can be considered as a child? Finding a solitary definition to depict a "child" is a tough assignment. The plain lexicon significance of the word 'child' is that, a youngster particularly among outset and youth. Naturally, a child is anybody between the phases of an early stage in life and adulthood, or tyke is a person between the phases of birth and pubescence. The lawful meaning of "child" alludes to a minor, or someone who is yet to wind up as a grown-up. It is utilized as an inverse to 'grown-up'. The definition is not particularly concerned with the characteristic. The major part of the meaning is that the tyke ought to be not able look after himself.

India appears to have done what's needed for the security of kids from every untoward situation. With regards to universal improvement in the zone of tyke welfare, India as a law based State has propelled scores of programs and strategies formulated on statutory balance. The Ministry of Women and Child has been instrumental in this path and it has especially taken into account youngsters in emergency circumstances, for example, homeless children on the streets, children who have been manhandled or abused, relinquished, children in struggle with law and so forth. The United Nations Convention on the Rights of the Child characterizes a youngster as "each individual underneath the age of 18 years except if under the law pertinent to the kid, larger part is achieved earlier." "Child" implies a man who, if a male, has not finished twenty-one years old, and if a female, has not finished eighteen years of age[531].

"A child is a person who is going to carry on what you have started…the fate of humanity is in his hands."- Abraham Lincoln.

[530] Amity Law School, Amity University, Lucknow
[531] Sec. 2(a) of The Prohibition of Child Marriage Act, 2006

As do adults, even children have certain rights of which they should not be denied. The privilege accorded to children is a generally acknowledged wonder globally. Additionally, UN embraced the Declaration of the Rights of Child[532]. Children have rights as people and need uncommon consideration and security. "A child is any person underneath the age of eighteen years, except if under the law appropriate to the youngster, dominant part is accomplished earlier."[533]

Perceiving that the child, for the full and agreeable advancement of his or her identity, ought to develop in a family situation, in an environment of joy, love and fondness. Considering that the children ought to be completely arranged to carry on with an individual life in the public arena, he must be ensured with the soul of peace, respect, resistance, opportunity, balance and solidarity.

Children' rights are the apparent human privileges of children, with specific regard for the privileges of exceptional insurance and care to the young , including their entitlement to relationship with both natural guardians, human way of life and also the essential requirements for sustenance, an all-inclusive state-paid instruction, social insurance and criminal laws suitable for the age and advancement of the child .The mandatory training law says children up to 14 are qualified for nothing education[534].

Child[535] work alludes to the work of children as standard and supported work. This training is viewed as exploitative by numerous worldwide associations and is illicit in numerous nations. Children who are under the age of 14 can't carry out a business. In the event that they are discovered working in an establishment[536], the business is charged under work laws that forbid work of any child until the point that they accomplish adulthood.

Through the medium of this paper, I endeavored to distinguish the issue of child labor and its socio-moral and legitimate measurements in the Indian culture.

CHILD LABOR

Meaning

The fact children should need to work is acknowledged by all, but rather there are no inclusive answers as to why the issue of child labor endures and how it should be handled. India has the critical assignment of ending child labor which is pervasive in all circles of life. A huge number

[532] At General Council meeting in 20th Nov, 1959
[533] http://en.wikisource.org/wiki/UN_Convention_on_the_Rights_of_the_Child
[534] Article 21 and 41 of The Indian Constitution
[535] Sec. 2(ii) of The Child Labor (Prohibition and Regulation) Act, 1986, says "child' means a person who has not completed his fourteenth year of age;
[536] "establishment' includes a shop, commercial establishment, work-shop, farm, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;[Sec. 2(iv) of The Child Labour (Prohibition and Regulation) Act, 1986]

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of children are occupied in the cover processing plants, glass production lines and different perilous ventures everywhere throughout the nation.

The term child labor has for the most part two-crease translations. Right off the bat, it is suggested to be a financial need of poor family units and besides, the unstable angle in child labor, worried about the benefit augmenting desire of business foundations wherein youngsters are made to work for extended periods of time, paid low compensation and denied of instructive chances.

International Labor Organization[537] (ILO) characterizes child labor to "… incorporate kids driving for all time grown-up lives, working extended periods of time for low wages under conditions harming their wellbeing and physical and mental improvement, at some point isolated from their families, as often as possible denied of significant instructive and preparing openings that could open up to them a superior future".

Explanations behind child labor

There are numerous explanations behind the presence of child labor and it differs from place to place. In India, neediness is one of the critical elements for destitution, yet it's not the sole factor. Kids might do shoddy work, thus, the individual who needs work done needs to pay less to them than to a grown-up doing the same work. The kid can be directed in excess of a grown-up. The draw factor of the youngster work is the benefit expansion.

The primary reason of the inability to control child labor are: neediness, lower wages than grown-ups, joblessness, non-attendance of plans for family remittance, movement to urban regions, huge family estimate, youngsters being efficiently accessible, absence of strict arrangements for mandatory training, lack of education, obliviousness of guardians and conventional attitudes[538].

CHILD LABOR IN INDIA

India represents the second most astounding estimates of child labor worldwide. Africa represents the most noteworthy number of kids utilized and misused. The truth of the matter is that over the length and broadness of the country, youngsters are in a despicable condition.

Child Labor in India is a human right issue not only for the country, but for the entire world. It is a genuine and broad issue, with numerous youngsters younger than fourteen working in cover making processing plants, glass blowing units and making firecrackers with exposed little hands, face. As indicated by the measures given by Indian government there are 20 million child workers in the nation, while different offices guarantee that it is 50 million.

[537] ILO 1983
[538] M C Mehta v. Union of India, AIR 1997 SC 699

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The circumstance of child labor in India is edgy. Children labor for eight hours at a stretch with just a little break for dinners. The dinners are likewise thrifty and the youngsters are not well fed. The greater part of the vagrant children, who can't go home, rest at their work put, which is terrible for their wellbeing and improvement. Seventy five percent of Indian populace still lives in rural zones and are extremely poor. Kids in rustic families who are sickly with destitution see their children as a salary producing asset to enhance the family pay. Guardians forfeit their youngsters' training to the developing needs of their more youthful kin in such families and view them as workers for the whole tribe.

In Northern India the misuse of little youngsters for work is an acknowledged practice and seen by the nearby populace as a need to mitigate neediness. Cover weaving ventures pay low wages to child workers and make them work for extend periods of time in unhygienic conditions. Kids working in such units are for the most part vagrant laborers from Northern India, who are shunted here by their families to procure some cash and send it to them. Their families' reliance on their salary, drives them to bear the difficult work conditions in the cover production lines.

While specialists accuse the framework, neediness, absence of education, grown-up joblessness; yet the truth of the matter is that the whole country is in charge of each wrongdoing against a tyke. Rather than nipping the issue at the bud, tyke work in India was permitted to increase with each passing year. What's more, today, children under the age of 14 have turned into a critical part of different enterprises; at the expense of their honesty, adolescence, wellbeing and so far as that is concerned, even their lives.

INDIAN CONSTITUTION AND CHILD LABOR

Article 23 of Indian Constitution declares the trafficking in people and constrained work as unconstitutional. What's more, Article 24 precludes the work of youngsters in industrial facilities. It says that no child under the age of fourteen years will be utilized to work in any production line or mine or occupied with some other perilous business.

The general comprehension was that privilege anchored by Article 24 will barely be powerful without an enactment denying and punishing its infringement. In any case, Supreme Court obviously expressed that Article 24 "must work with proper energy" regardless of whether the preclusion set down in it isn't "followed up by fitting legislation."[539] In Laborers, Salal Hydro Project v. Territory of J&K[540] it was again held that the work of kids beneath 14 in development work damages Article 24.

It was noted in M C Mehta v. Territory of Tamil Nadu[541], that threat of youngster work was across the board. In this way it issued colossal bearings with regards to work and abuse of

[539] Union for Democratic Rights v. Union of India, AIR 1982 SC 1473
[540] AIR 1984 SC 177
[541] (1996) 6 SCC 756

children in Sivakasi, precluding work of kids underneath the age of 14 and making course of action for their training by making a store and giving work to the guardians or the capable grown-ups in the family. These headings were repeated in Bandhu Mukti Morcha v. Association of India[542], concerning the work of children in cover weaving industry in U.P.

The State will, specifically, coordinate its arrangements towards anchoring the wellbeing and quality of specialists, people, so that children are not manhandled and that subjects are not constrained by monetary need to enter side interests unsuited to their age or strength[543].

Also the State will coordinate its approach towards anchoring the given chances and offices to create in a solid way and in states of opportunity and poise and that adolescence and youth are secured against abuse and against good and material relinquishment to the children[544].

Article 45[545] of Indian Constitution makes arrangement for early youth care and instruction to youngsters underneath the age of six years. According to this Article the State will tries to give early youth care and training for all kids until the point that they finish the age of six years.

GLOBAL FRAMEWORK TO ELIMINATE CHILD LABOR

The issue of child labor isn't restricted to our nation, it exists all over the world. Numerous International Conventions were received by General Assembly of International Labor Organization and numerous nations have confirmed it; we are additionally the signatory to a large number of them.

1. ILO Con. No. 5 of 1919 – disallows the work of people underneath 14 years of age.

2. ILO Con. No. 6 of 1919 – disallows the work amid night of people underneath 18 years of age.

3. ILO Con. No. 15 of 1921 – disallows a man who is underneath 18 years old from being utilized on Vessel as Toimmer or Stockers.

4. ILO Con. No. 16 of 1921 – necessary restorative examination of child.

5. ILO Con. No. 90 of 1948 – reexamined the tradition 6 of 1919 and put 12 continuous hours.

6. ILO Con. No. 123 of 1965 – denies the work in mines of the kid underneath the age of 16 years.

[542] AIR 1997 SC 2218
[543] Article 39 (e) of Indian Constitution
[544] Article 39 (f) of Indian Constitution
[545] Substituted by the Constitution (Eighty-sixth Amendment) Act, 2002 for "45. Provision for free and compulsory education for children.- The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

7. ILO Con. No. 124 of 1965 – mandatory medicinal examination of youngster working in mine.

8. ILO Con. No. 138 of 1973 – restricts the work of a tyke underneath the age of 15 yet permitted after consent up to 14 years.

NATIONAL FRAMEWORK TO ELIMINATE CHILD LABOR

Our Constitution gives exceptional arrangements to the assurance of kids. A few Articles are as per the following – 15(3)[546], 21, 21-A, 23, 24, 39 (e), 39 (f), 43, 45 and 51-A (k)[547]. In connection with the previously mentioned Conventions and Constitutional arrangements, we have established extraordinary laws to dispose of the kid work; some imperative ones are as per the following.

1. The Children (Pleading of Labor) Act, 1933.

2. The Factories Act, 1948.

3. The Minimum Wages Act, 1948.

4. Ranch Labor Act, 1951.

5. The Mines Act, 1952.

6. The Merchant Shipping Act, 1958.

7. The Motor Transport Workers Act, 1961.

8. The Apprentices Act, 1961.

9. The Schools and Establishments Act, 1961.

10. The Beedi Cigar Workers (Conditions of Employment) Act, 1966.

11. The Child Labor (Prohibition and Regulation) Act 1986.

Child Labor (Prohibition and Regulation) Act, 1986

Perceiving the expanding issue of kid work in India, the Parliament passed 'The Child Labor (Prohibition and Regulation) Act, 1986'. The motivation behind this Act was to announce child labor as unlawful and make it a culpable demonstration by any subject of India. The Act is to convey to the notice of the general population of this country that there are child labor laws to

[546] Nothing in this article shall prevent the State from making any special provision for women and children.
[547] It shall be the duty of every citizens of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years. Inserted by the Constitution (Eighty-sixth Amendment) Act, 2002.

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secure the child. Be that as it may, disregarding this, the circumstance have not enhanced, nor has child labor been brought under control.

National Child Labor Project

The Child Labor (Prohibition and Regulation) Act was authorized in the year 1986. Under the arrangements of this Act a national approach on child work was defined in the year 1987. The strategy tries to embrace a steady and successive methodology with an attention on restoration of kids working in unsafe occupations and processes. As neediness is the main driver of kid work, the activity plan stresses the need to cover these kids and their family under different destitution mitigation and business age plans of the legislature.

As per this, in 1988, the NCLP was propelled in 9 locales of high child labor populace in the nation. The plan visualized exceptional schools for the child laborers pulled back from work. The inclusion of the NCLP has expanded from 12 locales in 1988 to 250 regions in the tenth arrangement. A portion of the notable highlights of the arrangement methodology 2001[548] are - engaged and fortified activity to dispense with youngster work in the unsafe occupation before the finish of plan period.

PRESENT SCENARIO

National level and nearby level numerous organizations[549] are occupied to secure the privileges of youngsters and also to take care of the issue of tyke work with the assistance of subsidizing offices and with the assistance of government apparatus. Government's duty regarding the issue of child labor is reflected in the National Agenda of administration. What's more, when we look in to the resolutions on child labor, the lowest pay permitted by law isn't endorsed for the occupation allowed for children and no arrangement exists for working kids.

ROLE OF JUDICIARY REGARDING THE ISSUE OF CHILD LABOR

The Supreme Court of India, in its judgment dated 10th December, 1996 in Writ Petition (Civil) Number 465/1986, has given certain headings in regards to the way in which kids working in the risky occupations are to be pulled back from work and restored, and the way in which the working status of youngsters working in non-perilous occupations are to be controlled. The judgment of the Supreme Court visualizes:

(a) Simultaneous activity in all areas of the nation;

(b) Survey for distinguishing proof of working youngsters (to be finished by June 10, 1997)

(c) Withdrawal of children working in risky enterprises and guaranteeing their training in proper organizations;

[548] http://labour.nic.in/cwl/ChildLabour.htm last accessed on 8th October 2009 at 21:43
[549] CAVL, UNICEF, Gantar, Shaishav, Childline, etc.

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(d) Contribution of Rs.20, 000 for every youngster to be paid by the culpable bosses of kids to welfare store to be built up for this reason;

(e) Employment to one grown-up individual from the group of the children so pulled back from work, and if that isn't conceivable, a commitment of Rs.5000 to the welfare reserve to be made by the State Government;

(f) Financial help to the groups of the children so pulled back to be paid out of the premium income on the corpus of Rs.20,000/25,000.00 kept in the welfare subsidy as long as the child is really sent to a school;

(g) Regulating long stretches of work for youngsters working in non-dangerous occupations with the goal that their working hours don't surpass six hours out of every day and training for somewhere around two hours is guaranteed. The whole expenditure on training is to be borne by the concerned business which has employed the child;

(h) Planning and readiness with respect to Central and State Governments as far as fortifying of the current authoritative/administrative/authorization outline work (taking care of expense of extra labor, preparing, versatility, computerization and so on.) and suggesting extra necessity of assets.

CONCLUSION

Offspring of the country are remarkably imperative resource. Youth based projects should occupy an unmistakable part in our nation so as to lead to the development of human resources, so that our children grow up to end up as powerful subjects, physically and rationally fit, and ethically solid; supplied with the aptitudes and inspirations required by the general public.

Child labor is a huge issue in India. Its predominance is apparent through the child labor support rates which are higher in Indian than in other nations. Creation of open doors for improvement to all kids amid the time of development ought to be the focus of the nation. For this reason even we nationals should hold hands with the government and different establishments which are set up for this reason.

Instructing the kids can be an answer for taking care of the issue of child labor. To give obligatory essential training and with a specific end goal to lessen the weight on guardians to meet the use for their youngsters' instruction, while they are battling for a day's dinner, our Government had apportioned assets. Be that as it may, because of the absence of mindfulness a large portion of poor people families are not profiting these offices. Along these lines, appropriate advances must be taken to make mindfulness.

Child labor can't be killed by concentrating on one determinant, for instance, instruction, or by implementation of child labor laws. The legislature of India must guarantee that the requirements of the poor are filled before assaulting youngster work. In the event that neediness is tended to,

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the requirement for child labor will consequently reduce. Regardless of how hard India attempts, child labor dependably will exist until the point when the requirement for it is evacuated.

The improvement of India as a country is being hampered by tyke work. Youngsters are growing up ignorant, in light of the fact that they have been working and not going to class. A cycle of destitution is shaped and the requirement for youngster work is reawakened after each age. India needs to address this circumstance by handling the fundamental reasons for child labor through administrative arrangements and the implementation of these strategies. At exactly that point will India prevail in the battle against child labor.

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GENERAL VIEW OF MARITIME LAW

T. D. Sowmya[550]

ABSTRACT

The law of sea is a primarily based on the International Agreements and Conventions which makes sure that a state can occupy or cover a region. The United Nations Convention on the Law of the Sea, 1982 which consists of 320 articles, 17 parts, and together 9 annexes created an overarching authority which stated the rights of the states over the world's oceans, it also governs use of the oceans for navigation, shipping, mining, and fishing. The UNCLOS is an all-embracing treaty and covers many topics and every state will have their own laws pertaining to maritime. This article outlines the arduous maritime law both from a National and International perspective.

INTRODUCTION

Whenever a ship is in the International waters or Indian waters, during its voyage they must deal with numerous things such as registration, enter into different contracts, and, most importantly there might be disputes which might arise at any point of time. No branch under the public international law has ever undergone such revolutionary changes during the four decades. Even before the British rule, India had already created an impressive history of its own. It used to trade a lot with the Middle-East countries and Asia. Once the Britishers entered India and began ruling, they had no freedom to trade and the primordial shipping industry were not encouraged, and they started imposing their own rules and regulations. First preference was always given to the European ships. The British Navigational laws were enacted, and it was told that the Indian ships had to be registered under the UK Merchant Shipping Act which technically was British registered Indian ships. There were various matters which weren't discussed during the first and second conference on the law of the sea, they are

- "The precise breadth of the law of the sea"
- "The right of passage through and overflight in relation to the waters of archipelagos; and"
- "The problem of protection and conservation of marine resources beyond the territorial sea".[551]

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There were a few main achievements at the final session of the convention, they are:

1. It said, it would maintain security and international peace. Because there would be chaos between two coastal states, so, they agreed to universally set a limit on the contiguous zone, territorial sea, continental shelf, and exclusive economic zone.
2. The interest of the international community in the utilization and conservation of the living resources of the sea should be enhanced as mentioned in the provisions of the convention related to the exclusive economic zone.
3. There were new rules inserted in the convention and they are to be followed for the protection and preserving the marine environment from pollution.
4. Whenever a conflict arises between two states then, no kind of force should be used for settling the international dispute. Disputes should be settled as provided in the convention.
5. The convention came up with new rules regarding the marine scientific research and struck an equitable balance between the state research and the exclusive economic zone or the continental shelf for the which the research was carried out.[552]

GENERAL VIEW OF THE MARITIME LAWS IN INDIA

The Maritime law in general, is a vast topic which includes shipping, financing, paying wages, carriage of goods, marine insurance, registration, and ownership, mortgages, claims, port, and customs laws etc. The legislation which was enacted by the British covered all the above mentioned and the Indian parliament came up with amendments where necessary.

- Merchant Shipments Act 1958: The Act was first enacted in 1923 and the provisions of the act were according to the UK law, to look after all the shipping industries and other industries related to shipping the parliament came up with the Merchant Shipments Act in 1958. There has constantly been a call for amendments and revising the act because the International Maritime Organization wanted changes. The bill was amended 17 times right from 1966 to 2014. There was an amendment that was brought in 2015, which was approved by the Indian Prime Minister, Shri Narendra Modi. The amendment talks about the Bunker Oil Pollution Damage and India's accession to the International Convention on Civil Liability, International Maritime Organization, and the Merchant Shipments Act 1958. The Bunkers convention talks about the compensation for the spills that usually takes place during the oil spills. Whenever such an event takes place, the territorial jurisdiction for damage extends to the Exclusive Economic Zone and the Territorial sea. It is applicable for all the vessels with the foreign flag within India's jurisdiction and no matter where ever it is situated. On the question of how the compensation can be claimed, it is stated that every owner should insure his vessel, only then he can claim compensation. The director general

[551] I.A. SHEARER, STARKE'S INTERNATIONAL LAW (Eleventh edition) (,1994).
[552] Ibid point no 1.

of shipping is a Board that will issue a certificate to all those ships that carry above one thousand gross tonnage and in the other foreign countries, their respective board shall issue the certificate for them. No such vessel without an authorized certificate will be allowed to leave India.[553] The salient features of the bill are as follows,

- Augmentation of Indian Tonnage promotion/development of coastal shipping in India

1. Tonnage was to be recognized as a separate category.
2. There were separate rules for coastal vessels to promote and develop coastal shipping.
3. Issuance of a license for the Indian vessels and for port clearance and coastal operation by the Customs authorities.
4. The Bare-Boat-cum-Demise to be registered as Indian flag vessels by the Indians.

- Introduction of Welfare Measures for Seafarers:

1. The crew engaged should be insured by the owner of the vessel which includes whose ever-net tonnage is below 15, fishing and sailing without mechanical means of propulsor.
2. The usual practice of signing the articles and agreements by the crew members before the shipping master is not necessary now.
3. All the seafarers whoever is held as a hostage will receive the wages the wages till they are back home safe and secure.[554]

- IMO Conventions and Protocols:

1. The International Convention for Bunker Oil and Pollution Damage 2001: The Prime Minister Shri Narendra Modi's accession to the international convention for bunker oil and pollution damage. This convention gives compensation for all kinds of damages caused due to the oil spill. The jurisdiction for the compensations is extended to the exclusive economic zone, territorial sea, to all the foreign vessels within India's jurisdiction and to all the Indian vessels regardless of the location of the ship. [555]
2. The International Convention on Salvage 1989: This came into force on 14 th July 1996. They had incorporated the principle of "no cure no pay" which simple means that the salvor will be given a reward if he successfully finishes off the operation. The "Special compensation" in the act talks about the efforts put in by the salvor to prevent any damage or a loss to the environment. Usually he will be paid 100% more than the actual expenses incurred, and this will be decided either by an arbitrator or a tribunal. [556]

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[553] News Updates, PMINDIA, (10TH June 2015), Retrieved from http://www.pmindia.gov.in/en/news_updates/merchant-shipping-amendment-bill-2015-for-amending-the-merchant-shipping-act-1958/.

[554] Live law News Network, Introduction of new merchant shipping bill in the parliament, (Nov 24th 20116), Retrieved from http://www.livelaw.in/cabinet-approves-introduction-new-merchant-shipping-bill-2016-parliament/.

[555] The Times of India, Government Ratifies Bunker Convention, (June 10th, 2015), Retrieved from https://timesofindia.indiatimes.com/home/environment/developmental-issues/Government-okays-ratification-of-Bunker-Convention/articleshow/47615020.cms.

[556] International Maritime Organization, International Convention on Salvage 1989, Retrieved from http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Salvage.aspx.

3. The Search and Rescue Convention 1979: The International, Maritime Organization formed a committee and named it as the safety committee and this committee came up with the idea of dividing world oceans into 13 search and rescue areas. Most of the countries never gave ratification as there were many obligations imposed. The convention is divided into different chapters.

- Chapter 1: This chapter makes clear that the parties and the government are responsible for the rescue and search operations within their sea area and 24-hours service should be their and all the staff should be well trained. They should know English and should be able to communicate.
- Chapter 2: The states should coordinate with each other during the rescue operations and there shouldn't be any tiff. Unless the states agree upon the other state entering its territory for search and rescue happen, the operation would be unsuccessful.
- Chapter 3: Whoever is taking part in the search operation should all be prepared. They shall continue to search unless the hope of rescuing is lost.
- Chapter 4: The ship reporting system would make it easy for searching and it provides appropriate information. [557]

4. The Nairobi Wreck Removal Convention Act 2007: This convention was adopted in Kenya through an International conference held in 2007. They came up with some rules that ensure safety and removal of wrecks which are located beyond the limits of the territorial sea and those which are within the limits of the territorial sea. Th wrecks might cause danger for the ships and would cause difficulty for the ships to navigate which would certainly take away the life of the crew members. Removal of wrecks has become an obstacle because the State is not allowed to interfere in matters outside their territorial limits. But, after this convention had been accepted, the States could go beyond their territorial sea limits to ensure effective and prompt measures for the removal of wrecks. The three main objectives of the convention are as follows,

- It is the duty of the ship owners to report and remove if there is any wreck.
- They should at any cost insure or have any other financial security for the ship owners.
- This objective gives the coastal state the right to remove wrecks that are situated outside the Exclusive Economic Zone.

The convention also talks about the liability of the ship owners, the affected states. [558]

5. The International Convention for Control and Management of Ships Ballast Water and Sediments 2004: The species present in the waters act as a threat to the marine ecosystems. This Convention came into force to prevent spreading harmful aquatic species from one part of the region to the other part. The ships on their way should maintain their ballast water

[557] Ibid point no 6.

[558] Axel Luttenberger & Biserka Rukavina, THE IMPLEMENTATION OF THE NAIROBI INTERNATIONAL CONVENTION ON REMOVAL OF WRECKS 2007, Retrieved from https://bib.irb.hr/datoteka/353646.Luttenberger_ICTS_11_The_implementation_of_Nairobi_Con_on_Wrecks.pdf.

according to the standards specified in the convention. The convention is further divided into Articles and Annexes.

- Marine Claims and Admiralty Jurisdiction

The Union Cabinet had approved the bill on Sept 21st, 2016 with the Law Commission's recommendation. As soon as the bill was passed, the present bill also repealed 5 British statues that dealt with matters on admiralty jurisdiction in civil matters and the 5 statutes are as follows, "Admiralty Courts Act 1840, Colonial Courts of Admiralty Act 1891, Admiralty Court Act 1861, Colonial Courts of Admiralty Act 1890 and the provision of the letter patent 1865 which is applicable to Bombay, Madras and Calcutta High Courts". By repealing the previous statues enacted by the britishers, there was a call for enacting new legislations by the Director General of Shipping in 1986 for disposing of any marine related issues and to serve the needs of the industries faster and expeditiously. This drew attention in a case that was dealt by the Supreme Court- M.V. Elizabeth and Ors Vs Harwan Investment Trading Pvt Ltd- 1992 wherein it was held that the High Courts are the Superior Courts and had complete jurisdiction to decide cases on the principle of natural justice, equity and good conscience. Because of the vexatious issue, a committee headed by Praveen Singh who was then the Director General of Shipping, Mumbai, relooked into the existing marine laws and their jurisdiction and in his opinion, he told that there should be new enactment of admiralty laws as the others are outdated. Since there are no Indian Statutes that talk about Jurisdiction, the Supreme Court made the principles of International Convention on Maritime Laws applicable in India and called for a new legislation. [559] Every High Court has been given the power under the Admiralty Jurisdiction Act to frame its own rules to exercise its jurisdiction. This Act doesn't apply to any of the foreign vessels that is being used or has been used for any commercial purpose as notified by the Central Government.

In India, International trade is given a lot of importance. Around 80% of the goods are transported through sea ways. There is a risk to both the human life and the goods. Usually, the goods are always insured for security purposes. In the era of globalization, marine insurance is very old and marine transportation is considered as extremely formidable. The Marine Insurance Act 1963 deals with the marine claims. Marine insurance is a contract that is based on utmost good faith, yet the principles of the Law of Contract does not apply. It only follows the principle of Indemnity. Back then, there were three main problems faced by them and they are as follows:

- The first problem is, either the ship or cargo would get lost due to various issues like distance and there's a great threat during war.

[559] Abhay Kumar Singh, The Admiralty Jurisdiction and Settlement of Marine Claims, Retrieved from https://idsa.in/idsacomments/admiralty-maritime-claims-bill-2016_aksingh_031016.

- Secondly, if the insurer misreports on the value of goods or if the ship itself sinks involves a lot of risk.
- Thirdly, insurance only reduces the liability of the underwriter and he may face loss if there's a lot of hazard.

They usually pay the premium in excess so that it is financially secured. Section 25 of the Marine Insurance act deals with important matters,

- The name or names of the insurer
- The sum or sums insured
- The voyage and the period
- The subject matter and risk involved
- The assured person's name.

There are certain risks not covered by marine insurance and the underwriter should make sure he has knowledge and access regarding the movement of the ship and he should be aware of all the developments that are political in nature

- Partial damage or loss incurred by any ship or cargo due to accidental cause
- Any loss that has been incurred that makes the property worthless to the insured
- Any voluntary sacrifice considered the safety.
  Marine insurance provides insurance for any damage or loss that has been caused due to war, thieves, fire or pirates etc.[560]

PRINCIPLES OF MARINE INSURANCE:

- Doctrine of Indemnity:
  This doctrine says that at no cost, the insured is not allowed to make profit from the sum that he has received an insurance claim. The Marine Insurance Act has been incorporated for indemnifying the insurer. While calculating the insured value, the transportation cost and the anticipated profits are considered so, when he claims for the insured money, he can recover only that amount of cost for the loss of goods and he will receive a percentage of profit also.

- Doctrine of Subrogation:
  The doctrine says that the insured will not receive any additional cost except for the actual loss of goods or damage. The insurer has the right to receive compensation form a third party as well only if he has an obligation to receive it legally.[561]

[560] Addaya Mishra& Archika Agarwal, Marine Insurance and its legal aspects in India, Retrieved from http://ijlljs.in/wp-content/uploads/2014/12/Short_Article_Marine_insurance_and_its_legal_aspects_in_Indi-1.pdf.

- Principle of Utmost Good Faith: As mentioned above, a marine insurance is a contract that is based on utmost good faith this is a fundamental principle. If this is not evident in either of the party, then the contract entered by them can stand void. There is an obligation on the part of the assured that he is supposed to disclose everything even after the contract between them has come to an end
  .
- Principle of Insurable Interest: This contract is a wagering contract and the assured must have interest in the subject matter when loss has occurred. The following are the persons having insurable interest and they are: The owner of the ship, the creditor, the owner of the cargo, the crew members, mortgagor etc. [562]

The following documents are required for the claiming marine insurance effectively and expeditiously:

1) Copy of the bill of Lading
2) Original Copy of Insurance or the Certificate
3) Missing and Survey Report
4) Copies of Correspondence exchanged
5) Claim bill
6) Original invoice and packing list.

MARITIME CLAIMS CASES:

1) Enrica Lexie Case: Recently in Kerala, two fisher men were shot dead by two Italian nationals and, after arrest, they were sent back to their country as one of the accused has suffered a brain stroke and promised to return and they never returned till date. This act has left open a lot of questions about their jurisdiction like whether they can be tried as per Indian law or would Italian law apply? But then the incident happened in the contiguous zone where Indian Law would partially apply.[563]

2) State of Orissa Vs United India Insurance Co. Ltd- 1997.
The question is this case was "whether the appellant was entitled to damages from the insurance company for non-supply of 12 bulldozers through their agent Vijay Commercial Corporation who had the insurance from the Insurance Company"? It was held that the

[561] Indian Maritime laws and their Efficacy, Retrieved from http://shodhganga.inflibnet.ac.in/bitstream/10603/73384/14/14_chapter%206.pdf
[562] All Answers ltd, Legal Aspects of Marine Insurance in India, Retrieved from https://www.lawteacher.net/free-law-essays/commercial-law/legal-aspects-of-marine-insurance-law-essays.php
[563] The Economic Times, Italian Marine Case, Retrieved from https://economictimes.indiatimes.com/news/politics-and-nation/italian-marines-case-sc-allows-substitution-of-sureties-for-massimiliano-latorre/articleshow/64417355.cms.

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branch manager was not given authorization for covering risk under for non-supply of 12 bulldozers and that the insurance company is not liable on their part to pay any damages.

CONCLUSION:

Marine Insurance reduces the financial loss on the part of the insurer if any loss occurred in transit or loss of goods etc. There are various aspects under this law and the party when entering into a contract should enter in utmost good faith. If the party plays any fraud it would be a loss for him. As of now, the present regional and international laws are good going and majority of the states have enacted laws in conformity with the UNCLOS. But when compared to the 16th and the 17th century there is not much freedom of navigation due to various reasons.

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CRIME AND BEHAVIOUR: IS ALL CRIMINALITY DEVIANT?

- Aishwarya Prasad[564]

ABSTRACT

Deviance and crime are the two concepts that entail the violation of social norms and laws, respectively. Society has no coercive power to impose penalties or punishment on perpetrators whereas police and the judiciary have coercive power to punish and penalise the perpetrators. Deviance differs from one society to the other whereas crime is often universal but its punishments differ.

OBJECTIVE

The objective of this article is to understand why and whether social deviance is clubbed with the term "crime" and usually, both are read in consonance.

STATEMENT OF PROBLEM

The rights of every individual are respected and guaranteed under various Indian laws like the IPC, Constitution, Indian Evidence Law etc. However, despite having fundamental rights such as Freedom of Speech and Expression and others, an individual who commits a socially deviant act is sentenced to be a "criminal" without taking into account there difference between a criminal act and a simply socially deviant act. This paper aims at drawing a line of distinction between the two terms and also defining what exactly is meant by social deviance, and how it must not be mistaken for a crime, always.

INTRODUCTION

Groups, as we have seen, constantly try to enforce conformity on their members through the use of sanctions - both positive and negative; formal and informal. Deviance is the violation of a social norm.

Generally, "deviance" is regarded in a negative light, but there are many "positive" sides to deviance. What is socially deviant to one section of the society may not be so to another group of

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people. The most common and simple example for this would be of the beliefs regarding "cows" between Hindus and Muslims.

Emile Durkheim made a very strong and controversial claim in The Rules of Sociological Method. He said that: "No act is inherently deviant in and of itself Device is defined socially and will vary from one group to another**."**[565] Obviously, then, the group in a given society that has a lot of power will have a major role in defining what acts are deviant. But for this to work most people must acknowledge that power. That is, they must recognise or feel that that power is legitimate and that the state, or those in control have authority over them. This is an important distinction between force and coercion (i.e. raw power without recognition or consent of the people) and legitimate authority where people recognise and acknowledge the power over them.

This raises the interesting question of whether there are any universal laws? It seems that in every society murder is a crime. But there are a very wide set of circumstances under which killing is permitted. What one society considers to be murder, another will consider to be justifiable homicide. For example, in one society in the Middle East, a woman can be beheaded for adultery. What American or Indian court would levy this sentence?

But there are some laws on the books that a large number of people don't recognise or pay any attention to. While Americans would consider it both a crime and a deviant act to murder someone, many don't think that a person should be arrested for smoking marijuana. (It's not the smoking that he or she will be arrested for, it's the possession of the illegal substance, itself). They don't consider it deviant. It doesn't violate norms, in their opinion. If the public no longer considers an act to be seriously deviant, chances are that it will be removed from the law books.

DIFFERENCE BETWEEN CRIME AND DEVIANCE

Deviance and crime violate the norms and the laws of societies, respectively. These two concepts are often used interchangeably but are basically distinct. In some cases, they can overlap. For instance, deviant behaviour can be regarded as criminal and the converse, although rare, can also be true. In a nutshell, crime is an act of contravening the laws of the society as enacted by the government, whereas deviance refers to an act of contravening the societal norms and standards.

As aforementioned, deviance refers to a behaviour that is in violation of societal norms. Such behaviour is considered to be immoral and abnormal in line with the agreed norms and standards of a certain culture. But, deviance can be a complex concept because it varies per societal group, place or time. It also differs from one belief system to the other. In order to form a harmonious living environment and contain the behaviour of people, societies opt to subscribe to certain codes of conduct. These have existed from the primitive societies and are still reinforced today.

[565] Rules of Sociological Method by Emile Durkheim.

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Unlike laws, societal norms are not written down. Instead, everyone is expected to be alert of their existence in a specific society.
Contravention of societal norms is seldom punishable by law unless it overlaps with criminal offences. For instance, in some countries prostitution is illegal and also deviant in the societies. The law can thus take its course. Where the behaviour is solely considered deviant, society leaders can put pressure on the perpetrator as a control of deviant behaviour but have no coercive power to punish. The fear of God's curse is also an agent of control of deviant behaviour.[566]

Examples of deviant behaviour include prostitution, walking naked in the streets, house breaking, cross-dressing, identifying as transsexual or transgender, and many more, depending on the society or the region where one resides. In a nudist environment, for example, it may be acceptable to walk on the streets nude, and may be seen as a strange attire if you walk wearing clothes in that environment.

Crime, on the other hand can be defined as an act of contravening the statues enacted by legislations after lengthy debates on what constitutes a criminal offence and what penalties to institute for certain crimes. The sociological discipline that concerns itself with criminal studies is termed criminology. The study can also cover the concepts of deviance that overlaps with criminal offences. It is relatively difficult to discern criminal studies from deviance studies.

Criminal laws are documented in constitutions of societies and anyone found contravening them shall be liable to a fine, imprisonment or death penalty. In a nutshell, criminal offences can be categorised into personal offences and property offences. Other categories include victimless crimes where there are no obvious complainants, organised crimes committed by organised groups in illegal dealings under legitimate enterprises, and white-collar crimes that are committed by individuals possessing a high social status. Victimless crimes may include prostitution and drug dealings, whereas white-collar crimes may include tax frauds, and organised crimes may include the shipment of illegal products.

Once the criminal contraventions have been documented, police and the justice system will be mandated to enforce them using their coercive power. The courts will determine the amount of penalty or punishment to issue to a perpetrator. In contrast, the society has no coercive power to penalise or punish any individual if they act in contravention of the societal norms.

Had there be no laws containing criminal activities, societies would be in havoc with people deliberately murdering other individuals, house-breaking or robbing financial institutions. The law enforcement officers and the judicial system play a pivotal role in ensuring that everyone is held accountable for the crimes committed. Likewise with criminal offences, they differ from one society to another.

[566] Richard Quinney, Is Criminal Behaviour Deviant Behaviour, 5 Brit. J. Criminology 132 (1965).

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Thus, the prime differences between Crime and Deviance can be summarised in the following points:

- Deviance entails the violation of social norms whereas crime entails the contravention of enacted laws of criminal offences.
- Deviance can be criminal or not, and crime is always punishable because, deviance is dictated by societal norms, it bears no coercive power to punish those violating it whereas criminal offences are punishable by law as determined by the judicial system.

Examples of deviance include walking nude in public places, offering or receiving the services of prostitutes, wearing red suits during funerals, underage marriage. The examples of crime include murder, rape, house-breaking, shoplifting, prostitution. As it already been reiterated, the deviant and criminal violations overlap and vary from one society to the other.

CONCLUSION

Man is a social animal and has been living in societies since the beginning of civilisation. Every society has its own culture, made up of social norms and values that ensure peace and order among the people. Compliance to these norms by the people is a feature of a society. However, there have always been people who defy norms and exhibit behaviour that is considered deviant or one that departs from the normal. To ensure compliance, there is also a written law to deal with criminal behaviour that comes within deviance.

All modern societies are governed by the rule of law which means that there are written and codified rules and regulations that are to be followed by all the people of the society. These laws are made by the elected legislators in the assembly. After much deliberation and debate, the legislations are passed and become laws of the land. These laws have the backing of the coercive power of the police and the law courts. People violating these laws can be punished using this coercive power. Any action or behaviour that violates these laws is considered as a crime punishable by a court of law.

There are many kinds of behaviour that were earlier strictly considered as crimes but with the passage of time and changes in the social perspectives of the society, many of those, are today, merely deviances. There are crimes of all sorts and a crime can be petty shoplifting to a serious embezzlement of huge sums of money from the exchequer or the system. There are social crimes like illicit relationships, theft, murder and rape. To deal with different types of crimes, various laws are made to empower courts and police to apprehend criminals and sentence them to prisons according to the provisions of the law.

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To have control over the actions and behaviour of individuals and groups in a society, there are systems of social norms that are as old as the civilisations themselves. These social norms got developed in place of taboos that were used in primitive societies, to keep people away from certain kinds of behaviour that were considered dangerous for the society on the whole. Social norms are mostly cultural and usually have religious sanctions though there are also social norms that form the basis of interaction and communication between the members of the society. Deviance is a concept that tells us about the behaviour that departs from the normal and is looked down upon by the society to make people desist from such behaviour.

Thus, deviance can be referred to as a violation of social norms whereas crime is a violation of laws of the land. Agents of control for deviance are societal pressure and fear of God whilst agents of control for crime are police and judiciary. Society has no coercive power to deal with deviance but governments have the power of punishment to tackle crime. Deviance can be criminal or non-criminal, but crime is always criminal in nature. Many kinds of behavior that were crimes earlier are today classified as just deviant behavior.

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REVISITING THE ESSENTIAL PRACTICES DEBATE: SECULARISM V. RIGHT TO RELIGION

- *John Sabu*[567]

ABSTRACT

In the context of the Indian Constitution, the individual's fundamental freedom of conscience and religion characterizes the secular nature of the State. The Constitution also empowers the State to intervene in matters of religion pertaining to regressive social practices shrouded in religion. Keeping in mind the deep-rooted nexus between religious and social life in the Indian social fabric, distinguishing a secular practice from a religious one is often a matter of fine margins. As the protector of the Fundamental Rights, the Supreme Court has often had to draw the line between religious freedom and state intervention by differentiating essentially religious practices from essentially secular ones. However, the evolution of the apex court's jurisprudence has witnessed the development of the essential practices doctrine which entails a substantive inquiry into the significance of a religious practice before providing constitutional protection to the same. This paper seeks to explore the origins and the development of the essential practices test since its genesis and provide a case for the need to re-examine the apex court's application of the same.

INTRODUCTION

India is an ancient land of religious pluralism and cultural diversity. This largest democracy on the globe is a federation of 35 constituents – 28 full-fledged States and seven Union Territories, two of which are self-governing and the rest ruled by the central government. The Hindu religion is predominant in as many as 29 of these constituents, its followers having a nearly 80 percent share in a country population of over a billion[568]. Other than the Hindus there are The 160 million Muslims of India – with a predominant Sunni majority – are the country's second largest community,[569] With a headcount of nearly 24 million, the Christians – with a predominant Catholic majority – are the country's third largest community[570] and several other religions like Buddhism, Jainism, Sikhism, Considering all this the Supreme Court of India progressively elaborated the "essential elements doctrine" to ascertain those practices that are essential to that

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[568] There is an official census in India now every ten years. The approximate population figures for all communities given here are based on the Census Report of 2001
[569] Among the minority Muslim groups are the Ithna Ashari Shi'as and the Isma'ilis
[570] The Census Reports mention Catholics and Protestants separately. Among the many other Christian groups are the Presbytarians, dominant in northeastern states.

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religion and require the protection of the law, and which may be purged, considered as mere superstition or non-essential to that religion, by the intervention of the State without infringing the principle of State neutrality in religious affairs. The essential practices test allows the Court to evaluate the importance of a religious practice irrespective of its religious significance to its followers. The fact that the Constitution does not discriminate between religious practices based on their significance, while providing the religious freedoms, forms the primary argument against the essential practices test. Further it has been argued that the test breaches the religious autonomy of the individual as it empowers the Court to decide what practices can and cannot be followed, therefore violating the principle of secularism embodied in the Constitution. In this context, this paper seeks to explore the origins and the development of the essential practices test since its genesis and provide a case for the need to re-examine the apex court's application of the same.

THE EVOLUTION OF THE DOCTRINE

The Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiyar of Sri Shirur Mutt*[571] extended the protection of Article 25 and 26 beyond mere doctrinal belief to also include practices and rituals that its adherents followed. The Court undertook the task of defining 'Religion' and while rejecting various definitions from other jurisdictions and the possible meaning of it as envisaged in the Constitution, the Court observed that, *Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause.*[572]

It observed that a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but that it would not be correct to say that religion is nothing else, but a doctrine or belief. The Court further added that the guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression " practice of religion " in article 25.[573]

In *Venkataramana Devaru v. State of Mysore*[574] the Supreme Court was required to assess the constitutionality of the Madras Temple Entry Authorisation Act 1947 which aimed to reform the practice of religious exclusion of Harijans from a specific denominational temple founded by the Gowda Saraswat Brahmins. The competing claims were, on one hand, the Brahmins' right to manage their own religious affairs under Article 26(b) and on the other, the State's constitutional mandate to throw open Hindu temples "to all classes and sections of Hindu's" under Article 25(2)(b). The Court delved into the traditional Hindu texts to find that, "under the ceremonial

[571] AIR 1954 SC 282
[572] Id
[573] Id.
[574] AIR 1958 SC 255

law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship… are all matters of religion".13 Having said so, the Court now faced, "two (constitutional) provisions of equal authority, neither of them being subject to the other." 14 To overcome this dilemma, the Court tactfully applied the rule of harmonious construction and pronounced that Article 26(b) was subject to 25(2)(b), in view of the broader scope of the latter. This, in the opinion of the Court, prevented either provision from being held entirely inoperative and hence was the harmonious interpretation of the two. In doing so the Court was setting a crucial precedent. In keeping with its past judgements, the Supreme Court had refrained from adopting a modernist, reformative position on a religious practice, instead restricted its inquiry to the scriptures.

In Ram *Prasad Seth v. State of UP and Others*[575] the Bench ruled against the practice of bigamy within the Hindu tradition. The petitioner had claimed that since certain rituals meant for the attainment of religious salvation could only be performed by a son, he had a right to a second marriage if his first wife failed to bear a male child. Having perused the scriptures however, the High Court dismissed the claim as it was not satisfied that polygamy could be considered an essential part of the Hindu religion.

SHIFT IN THE COURT'S VIEW OF "ESSENTIAL"

Previously the Courts were using the word essential to determine the nature of the practice, whether secular or religious, to ascertain the limits of State intervention. However the High Court's usage changed the dimensions of the word, which now qualified the importance of the belief to the religion. This minor shift in usage radically transformed the essential practices test, which now gave the Court the power to determine what religious practices could be followed and what could not, based on the Court's interpretation of its essentiality to the religion in question. In order to determine the secular or religious nature of the practice, the Supreme Court, like its colonial predecessor, was referring to the doctrines of the religion itself.[576]

In *Hanif Qureshi and Others v. The State of Bihar*[577] the Supreme Court used the same interpretation when faced with the question of cow slaughter on Id. The Court held that cow slaughter did not constitute an essential practice of Islam and hence dismissed the claims of the petitioners. The secular or religious nature of the practice no longer remained an important question. Four years later in *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*[578] the Court struck down a law against religious excommunications. Delivering the majority judgement, Justice Das Gupta stated, "what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion". In his concurring opinion, Justice Ayyangar held that Article 25(1) protected the essential and

[575] AIR 1957 All 411.
[576] RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, (2007)
[577] AIR 1958 SC 731
[578] AIR 1962 SC 853

integral practices of the religion, which were not subject to law providing social welfare under 25(2)(b).

Clearly, determining what constituted an essential part of a religion was central to the Supreme Court's analysis of religious practices. The role of the judiciary in the interpretation of religion was greatly expanded in *Durgah Committee, Ajmer And Another v. Syed Hussain Ali And Others*[579] , by Justice Gajendragadkar who having stated, "in order that the practices in question should be treated as a part of religion, they must be regarded by the said religion as its essential and integral part" proceeded to distinguish between religious and superstitious practices, "even practices though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself" suggesting that, in addition to identifying what practices qualified as religion, the Supreme Court was also "taking up the role of sifting superstition from 'real' religion". This bold assertion of the Court's active role in reforming religion clearly elucidated the fundamental change in the Court's approach towards matters regarding the same.

In *Shastri Yagnapurushdasji v. Muldas*[580], the Court affirmed that the claim of this Satsangis group to be recognized as an independent denomination following the teaching of Swaminarayan was "founded on superstition, ignorance and complete misunderstanding of the true teaching of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself"

THE SIGNIFICANCE OF THE DOCTRINE

In the case of Acharya Jagadiswaranand Avadhuta and Ors. v. Comm. Of Police Calcutta and Ors[581]., the question before the Court was whether Anand Margi was a separate religion and if the shiv tandava dance was an essential practice of the same. The Petitioners contended that it was an essential part of their religion and that the prohibitory orders issued under S. 144 of CrPC was violative of the right to religion enshrined under Articles 25 and 26 of the Indian Constitution. The Court held that the Anand Margi were not a separate religion but a sub-sect of the Hindu religion. The Court observing as to how the tandava dance was only a recent affirmation of worship as far as the Anand Margi were concerned, it did not constitute an essential part of the same.

Justice Bhagabati Prasad Banerjee of the Calcutta High Court warned against the doctrine being violative of religious autonomy, "*If the Courts started enquiring and deciding the rationality of a particular religious practice… the religious practice would become what the Courts wish the practice to be*", effectively asking the Supreme Court to reconsider its decision[582].

[579] AIR 1961 SC 1402
[580] 1966 SCR (3) 242
[581] AIR 1984 SC 512
[582] Acharya Jagadishwaranada v. Commissioner Of Police, Calcutta, AIR 1990 Cal 336.

The Supreme Court considered the matter once again and denied that the tandava dance was an essential practice of the Anand Margi. It is important to note Justice A. R. Lakshmanan's dissent which can be summed up in the following extract: "…*essential practices are those that are accepted by the followers as a method of achieving their spiritual upliftment and the fact that such a practice was recently introduced cannot make it any less a matter of religion"*[583]

The Essential practices doctrine has also resulted in greater state intervention into matters of faith. In *Bramachair Sidheswar Bhai*[584] , the Court stated that the establishment of educational institutions for the Ramakrishna Mission is not an essential practice of this religious denomination as well as the customary procedures to nominate the head of the said educational institutions, so that the State may intervene in the selection procedures without infringing the constitutional provision on freedom of religion. Similarly, in *A.S. Narayana Deekshitulu*[585] , the Court affirmed that the appointment of the head of a Hindu temple according to hereditary rules does not represent an essential part of the worship.

An enquiry into the essential practices doctrine becomes important in a post *Shayaro Bano* era[586] and where the Supreme Court has just finished arguments concerning the entry of women into the sri Sabarimala Temple where Justice Chandrachud had raised the question, "*Should the court assume a theological mantle?*" and answered it himself in a definitive "*no".*[587]

RELIGION AND AUTONOMY OF THE STATE

There is no law in the country placing any restrictions on mixing up religion with politics. Several religio-political organizations either directly contest general elections, or sponsor and promote parties of such a nature[588]

In 1993 to empower the State to ban such parties and enforce complete separation of religion and politics by means of amendments to the Constitution and the election law of the country several attempts were made. The move had to be abandoned due to stiff opposition from various political and religious quarters.[589] In the leading judgment delivered at the same time, the Supreme Court of India forcefully advocated complete separation of religion and politics, observing:

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583 (2004) 12 SCC 770

584 Bramachair Sidheswar Bhai vs State of West Bengal (1995 SCC (4) 646)

585 A.S. Narayana Deekshitulu v. State of A.P. (1996 SC 1765)

586 2017 SCC OnLine SC 963

587 'As Sabarimala Hearings Continue, SC Mulls Relevance of Essential Practices Doctrine', The Wire, July 27, 2018, available at: https://thewire.in/law/sabarimala-hearing-sc-essential-practices-doctrine last accessed on 06/09/2018 10:55

588 Among such political parties are the Hindu Mahasabha, Vishwa Hindu Parishad, Shiv Sena and Bajrang Dal (all Hindu), Muslim League and Ulama Council (Muslims), and the Church Council for Youth Movement of South India.

589 The Constitution (80th Amendment) Bill 1993 and Representation of the People (Amendment) Act 1993, both of which proved abortive.

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In a secular polity like ours mingling of religion with politics is unconstitutional, in other words, a flagrant breach of the constitutional features of secular democracy. It is therefore imperative that religion and caste should not be introduces into politics by any political party, association or individual, and it is imperative to prevent religious and caste pollution of politics...If a political party espousing a particular religion comes to power that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favorable position. This would be plainly antithetical to the entire constitutional scheme.[590] Although the members of bureaucracy and armed forces were not allowed to directly participate in general elections, a section of them were influenced by the ideology of the religio-political organizations operative in the country, and this is bound to adversely affect in practice the theoretical neutrality of the State to religion. No law has, however, been enacted to tackle this rather ticklish problem.

A social stratification called the "caste" system is part and parcel of the Indian society as a whole. Mistreating the so-called "lower" castes is declared to be an offense under the Constitution which also prohibits discrimination between citizens on the ground of caste, yet the State can make "any special provision" for what the Constitution calls the "Scheduled Castes."[591] Special provisions are given to this section for there upliftment and fair representation in all government departments and all other fields.

FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

The Indian Penal Code contains a separate chapter on "Offences against Religion, "besides some related provisions found in some of its other chapters[592].

Offenses punishable under this are:

1. Injuring or defiling a place of worship with an intention to insult the religion of any class of persons.
2. Deliberate and malicious act Intended to outrage religious feelings of any class of persons by insulting their religion or religious beliefs;
3. Disturbing a religious assembly lawfully engaged in the performance of religious worship or ceremonies;
4. trespassing in a place of worship or graveyard or disturbing an assembly for funeral with a view to wounding religious feelings of any person or persons.
5. uttering words or making a sound or gesture with an intention to wound religious feelings of any person or persons; The Code further provides punishments for making, publishing or circulating (in or outside a place of worship or religious assembly) any statement, rumor or report with an intent to incite or likely to incite one community to

[590] SR Bommai v. Union of India (1994) 3 SCC 1
[591] CONSTITUTION OF INDIA 1950, art. 15-17
[592] . Indian Penal Code 1860, Sections 153A, 153B, 295-298

commit an offense against another community or promote on grounds of religion or community feelings of enmity, hatred or ill-will between various religious groups or communities[593]

CONCLUSION

Early on the Supreme Court moved away from the religious autonomy provided in the S*hirur Mutt* case in the sense that instead of adjudicating upon the nature of the practice (religious or secular) it was now determining the importance of the practice to the religion. This resulted in the Court taking up the huge burden of determining what constituted an essential practice for a particular religion on its own, often without considering the views of those who follow it. The Court must revisit the essential practice doctrine and not blindly ascertain what is essential to a particular religion. To do so would be to ignore pertinent concerns of religious freedom from state intervention that would undermine principle of secularism embodied in the Constitution. India being a secular country yet preserving its spirituality using judicial pronouncements, legislations, policies. Maintaining a balance between religion and secularity and accommodating all the religions, prohibiting all sorts of discriminations between its citizens. The latest Sabarimala case which is considered as a great progress in our judiciary and opens doors towards equal opportunity disregarding the gender of the person adjoining secularism and religion hand in hand.

[593] Indian Penal Code 1860, Section 205

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LINGUISTIC DISCRIMINATION: LEGAL OVERVIEW

-Anish Khondo[594]

INTRODUCTION

Etymological separation also called as linguicism. It is separation in view of language or tongue. In May 2017, an election had occurred in which supporters of BJP i.e Ghorkha Janmukti Morcha (GJM) turned into the overwhelming party of the hills of Darjeeling India. Mumata Banarjee who is the Minister of West Bengal looking at the victory of the predominant party, offer to forcibly feed Bengali language in the hills of Darjeeling while their local language is Nepali. In the Darjeeling hills, where Gorkha patriotism has energized the improvement that finally winning the vote developing the Gorkhas as an alternate people, with a lingo, culture and different identity that was undeniably one of a kind and justifying an absolute different status, making Bengali an compulsory subject in schools has commonly instigated a kickback. The Gorkha Janamukti Morcha (GJM) has portrayed the decision as "language imperialism." The outbreak of organized protest by the GJM took a while to consolidate itself into direct action – of schools being shut, protest rallies and now, a 'no lights' night to convey the political as well as popular opposition to the decision of every child learning Bengali. Intriguingly, the idea of a black out or '*arandhan*' that is unlit cooking fires is a throwback to 1905 and the Swadeshi movement in Bengal. This maddened the tenants of the hills. This was disgraceful that in spite of Nepali being a nationally language of India, secured under the Schedule VII of the Indian constitution, even government boards and sign are not written in Nepali. [595]

DRAWBACKS

This paper contains a segment of the basic issues of the linguistic minorities and to analyze the sacrosanct what's more, and in what manner can a state enforce language in its own State.[596]

i. The privilege to guidance in their initial language,
ii. The Use of minority language in the respective schools
iii. The enlistment of minorities to state services.
iv. The constitutional provinces that gives right to instruct in own mother tongue.

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Shikha Mukerjee, Mamata Banerjee makes Bengali must in schools: Here's why Darjeeling is the battleground for BJP, TMC, Firstpost (2nd September, 12pm) [595] https://indianexpress.com/article/opinion/columns/mamata-banerjees-bid-to-force-feed-bengali-language-in-the-hills-fires-gorkhaland-demand-4695326/

[596] Kotsopoulos, Donna. "Researching Linguistic Discrimination." For the Learning of Mathematics, vol. 26, no. 3, 2006, pp. 21–22. JSTOR, JSTOR, www.jstor.org/stable/40248544.

v. Certain amendments and statues passed by the state authority regarding the use of its own mother tongue.

RIGHT TO INSTRUCTION IN MOTHER TONGUE

The constitution recognizes minorities as it is based on religion, culture, language, or script. The linguistic minorities derive its power from the constitution. Article 29 (1) states about guarantees to the minorities having distinct language, script or culture and has the right to conserve it. Article 30 also states about the minorities based on religion or language and the right to establish and administer this own educational institutions of its choice. In 1957 a bill was passed in 'The *Kerala Education Bill, 1957,* [597]which included religious minorities, the inquiry was acted like to what is considered as a minority. The minority was defined as a group as it was less than 50% of at least in a state or district. The court could not defer but later it was held less than 50% is minority for purpose of constitutional guarantee in relation to that statue. Later these statements have been approved in the judgment of the case *D.A.V Collage, Jullundur v. State of Punjab.*[598] This case Arya Samajis was the founders of the D.A.V Collage Trust where they managed the petitioner collages formed religious as well as linguistic minority in the State of Punjab. There the petitioner that contented inter alia, and that the statues framed under *Guru Nanak University, Amritsar, Act, 1969.*[599] In this case the institute had violated their fundamental right under article 30(1), earlier the court, in In *re The Kerala Education Bill* case held that linguistic minorities would be calculated after measuring the at least of the state, of people speaking same language. The court found that Arya Samaj is a sect of Hindus which are religious minorities in the State of Punjab and has entitled to article 30 of the constitution .The court gave certain principles to determine their separate language and held that it is not necessary that state should have a distinct script of their own but it should have a separate spoken language.

PRIVILEGE OF USING INITIAL LANGUAGE

Article 30 (1) of the constitution states that the minorities in light of religious or language have the privilege to set up and control its own educational organizations of their own, however the constitution neither characterizes the term 'minority' nor depicts the criteria for deciding a minority. Article 29(1) additionally states ideal to educate in native language and preserve the language and culture of the minorities. It additionally forbids segregation on the grounds of any religion, race, rank, language or any of them in the matter of admission to any education institution setup by the state. This arrangement does not elevate state to preserve their language and culture of linguistic minorities' gatherings yet rather it keeps the state from 'forcing' on a linguistic minority some other language.

[597] Kerelas 1st Ministry http://firstministry.kerala.gov.in/
[598]Enotes. https://www.enotes.com/homework-help/summary-d-v-college-vs-state-punjab-case-and-javed-495544
[599]Legal Crystal tm https://www.legalcrystal.com/act/136701/the-guru-nanak-dev-university-amritsar-act-1969-complete-act

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The Seventh Amendment Act, 1956, gives an attention on the minorities where it offer ideal to educate or train in their own mother tongue in the schools kept up by the state. The constitution additionally assurances to build up their own particular schools for the minorities, yet particularly in the rural regions the case may not be the same as in the urban territories, in the rustic areas might not have much information or need to make its own establishment of schools , this mindfulness was displayed to the state government and the central government in 1949.A Provincial Education Minister's Conference of 1949 which passed a goals prescribing the acquaintance of native language with be used at the underlying phase of instructing for the etymological minorities, in schools where youngsters at the very least 40%. The proposal was endorsed the central government however later it neglected to embrace a uniform arrangement in this respect.[600] The State Reorganization Commission subsequent looking at the circumstance gave protected acknowledgment. As stated under article 350- A it held that where primary language is not the same as the 'territorial language' at that point guidelines are to be organized by designating at least one teacher teaches at least 40% students, talking the same language.[601] According to article 350-B it created an agency for supervising safeguards for the linguistic minorities. The State Reorganization Commission should be used for enforcing the safeguards for the minorities but was not approved by the parliament, so the union government proposed an appointment for a commission for the minorities.

At the auxiliary phase of the commission planned to assemble a base for setting up advanced education so the method of guidance should to be the cutting edge Indian languages expressed in the Eight Schedule to the constitution and additionally English, with the exception of states like the hills of Assam and West Bengal. The Provincial Education Ministers' Conference of 1949 clarified that 33% of the youth in an administration school should to be taught in their mother tongue and the legislature should to furnish with such arrangements.

USING OF MINORITY LANGUAGE AS AN OFFICIAL LANGUAGE IN A STATE

The arrangement expressed under article 345 of the constitution clarifies that the states can receive its own language or languages as the official language or languages by the enactment. Numerous states have acted under this arrangement; in the meantime, article 347 empowers the President to coordinate in fitting cases the use of minority languages in the organization... The article 347 states that if the President is fulfilled that a lot of the number of inhabitants in the state wants to use a similar language talked by them then that language will be perceived by that state, and furthermore the president will coordinate that language will be authoritatively

[600] Report of the Stales Reorganization Commission 209-210 (1956)

[601] This recommendation of the Provincial Education Minister's Conference of 19019 was acknowledged by the Government of India in 1966. So far as the prerequisite of arrangement of an educator for giving guidance a minority dialect is concerned, it has been executed 'in the conditions of Uttar Pradesh, Assam, Bihar. Orissa, West Bengal, Kerala, Gujarat, Rajasthan •and Haryana, In Andhra Pradesh. Tamil Nadu and Mysore the imperative least has been Increased to 10 ,student.., in a class/area U1' 30 understudies in the entire school. Notwithstanding, in Nagaland, Punjab, Jammu and Kashmir and in all the Union Territories no requests have been made for the 'usage of this suggestion. ld, at 117-18.

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perceived all through that state. Article 350 additionally expresses that each individual to make a complain for the change of any language to any officer or specialist of the Union or a state in any of the languages used in the Union. It implies that the words used in the Union is the language that the solicitor does a bit much need to use the official language of the state and it could likewise use different languages in the state. The explanation for this is no individual will be hampered by the absence of learning of the official language of the state voicing his complaints previously the authoritative progressive system.

No formal mandate has been issued by the President under article 47 for the use of minority language for official purposes in the states. It has been pretty much left to the states through foundations, for example the South Zonal Councils and occasional meetings of the Chief Ministers to give certain protections. The States Reorganization Commission and the Union Government , the Southern Zonal Council had before prescribed a few safeguards. Accordingly, the Chief Ministers Conference of 1961 concurred on the accompanying safeguards for the use of minority languages for official purposes at various levels of organization.

(a) Where at least 60% for every penny of the at least of a region talks or uses a language other than the official language of the express, this language of the minority gathering should to be perceived as an official language in that area .Normally the Indian languages determined in the Eighth Schedule to the Constitution require be perceived for this reason. Special cases might be made for hills regions of Assam and the region of ‘Darjeeling’ in West Bengal when languages other than those in the Eighth Schedule might be used.

(b) The official languages of 'the state must be used for official purposes, for example, taking note of on records, and official correspondence. In any case, in issues where exposure is required or any official matter is to be imparted to the people having a place with the semantic minority gatherings, different languages in vogue in the state, should to be used. Additionally the organization should to get petitions and portrayals from people in general in minority languages and courses of action must be made for production of the interpretations of the imperative laws, rules, directions, and so on, in minority languages in states or locale or wherever an linguistic minority frames 15% to 20% for every penny of the at least. Towards this end an interpretation cell must be set up at the state home office.

STATE IMPLEMENTATION

A successful implementation of the above safeguard at first requires the outline of regions in each state where a linguistic minorities and the Law minority comprises 15% to 20% for each penny of the population. Most of the states have arranged arrangements of such areas.[602] Larger

[602] Among the states Madhya Pradesh, Uttar Pradesh, A.93am, West Bengal, Andhra Pradesh, Kerala, 'Tamil Nadu, Mysore Gujarat, Maharashtra, Haryana, Punjab, and Rajasthan have arranged the records. Of the Union Territories;, Andaman and Nicobar Islands and Manipur have arranged the rundowns. 011 the other hand Bihar, Nagaland, also, Orissa among the states and Chandigarh, Dara and Nagar Haveli, Delhi, Himachal Pradesh, Goa, Daman and Dieu,

part of the states have issued orders that answers to portrayals furthermore, petitions from the general at least in a minority language should to be given, wherever conceivable, in the language of the portrayal.

So far as the setting up of interpretation cells for reasons for interpreting the substance of essential laws, government notices, guidelines and controls in minority languages, the states of Andhra Pradesh, Kerala, Tamil Nadu, Mysore, Assam, West Bengal and Uttar Pradesh have made arrangements. The other states and union territories should not linger behind in the implementation of this critical. The semantic minorities will be additionally disabled by the nonappearance of interpretations of laws and government administers in their own particular language. The volume of laws and appointed enactment as tenets, controls, bye-laws, warnings radiating from the administration, grasping all parts of a person's life is vast and each exertion should to be made by the legislature to distribute them in the minority languages and the authority languages of the state.[603]

While the states have for the most part concurred that for recruitment to state services, language should not be a bar; the degree of implementation of the concurred safeguards referred to above isn't uniform in every one of the states and union territories. The States of Madhya Pradesh, Assam, Nagaland, West Bengal, Andhra Pradesh Kerala, Tamil Nadu, Mysore, Gujarat, Maharasthra, Rajasthan and the Union Territories of Dadra and Nagar Haveli, Andaman-Nicobar Islands, Pondicherry, Tripura, Laccadive, Minicoy and Amindivi Islands and Chandigarh don't require information of their separate authority languages as an essential for entry into state services. Be that as it may, the States of Bihar, Uttar Pradesh, Haryana, Orissa, Punjab, Manipur and Himachal Pradesh have not executed this safeguard. Despite statutory prohibition on domiciliary confinements on entry into state services, advertisements for arrangements to services do show up demanding habitation in a specific state as one of the states of qualification. Such advertisements are worded as: "from the bona fide resident of "X" state", "from the naives or people domiciled in the state" and so on. Correspondingly, the bar on the necessity of knowledge of official language for state services isn't constantly agreed to by the states. Advertisement with conditions, for example, "preference will be given to candidates with information of a specific language," show up in the newspaper thus violating the agreed safeguards on enlistment to state services.

STATE LANGUAGE AND ITS SERVICES

Enrollment to the services is another issue region of the Linguistic minorities. With the consistently increasing control of economic and, social life by the state, employment opportunities in the public services are also bound to increase. Consequently government service

Laccadive, Minicoy and Andaman Islands and Pondicherry among the Union Terrltor.es have not readied the Lsts, See Id. at 10.

[603] Uttar Pradesh, Assam, Bihar, West Bengal, Andhra Pradesh, Mysore, Kerela, Tamil Nadu, Rajasthan, Punjab and Haryana. Linguistic Minorities Report, supra note 9 at Chapter 2.

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offers an attractive and secure career for young men and women. The members of the linguistic minority have their aspirations in this regard. In order that their aspirations may find fulfillment as against the legitimate competition of the dominant language group members, certain safeguards may have to be made. When the Constitution came into force, many states had legislation restricting entry into their services to permanent residents of the state. The residence requirement prescribed by the states varied from three to fifteen years. But article 16(1) of the Constitution provides for equality of opportunity in matters of public employment. Clause (2) of article 16 provides, inter alia, that no citizen shall on grounds only of residence be ineligible for, or discriminated against in respect of any employment or office under the state. Parliament is, however, competent under clause (3) of article 16 to regulate the extent to which it would be permissible for a state to depart from the above principle. The States Reorganization Commission which considered the issue recommended that if any departure from the rule of non-discrimination on the ground of residence is to be approved by any stretch of imagination, it should be it ought to be; for example, to cause least hardship and that enactment ought to be embraced in such manner. Is The Government of India accepted the above recommendation and the Parliament enacted the Public Employment (Requirement as to Residence) Act, 1957, which canceled state laws limiting administration chances to changeless occupants inside a state. With the coming into force of the Parliamentary legislation, domicile tests in force in the aforementioned states which had operated to the disadvantage of minority groups ceased to have effect. Another form of discrimination against linguistic minority groups is the practice in certain states to prescribe a high standard of proficiency in official language of the state for entry into state services or by making this language the medium of various competitive examinations for state services. This practice tends to keep the state services a virtual monopoly of the dominant language group. It is necessary that the public servants should know the official language or languages of the state concerned. But the issue involved herein is whether members of one language class should have an initial advantage over those of the other language class.

CONCLUSION

The constitutional provisions safeguards and gives constitutional rights to those who have been deprived of their rights. The impose of certain language upon the state in regard of the use of minority languages in the organization what's more, enrollment to state services shows that the states have on a basic level consented to the usage of such protects. The safeguards are sensible and sound. In any case, it is the extent of implementation of such safeguards and occasional violation by the states of the spirit underlying such safeguards that give rise to complaints by the linguistic minority communities. It is in this regard the workplace of the Commissioner for linguistic Minorities shows an important discussion for the semantic minority gatherings to ventilate their complaints. The Commissioner looks for data from the Union Government, State Governments and the union territories, the Union regions and attempts broad visits everywhere throughout the nation to research the complaints and requests of the linguistic minority gatherings and prescribe safeguard activity by the legislatures concerned, also the Chief Minister

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conference of 1961 agreed on the following safeguards for the use of minority language for the official purpose at different levels of administration. Where at least 60% of the at least of the district speaks the same language the minority group should be recognized as official language.

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OBSCENITY LAW WITH SPECIAL FOCUS ON LGBTQ REPRESENTATION; SECTION 292 OF INDIAN PENAL CODE

- *Shreya Shrivastava*[604]

ABSTRACT

A provision introduced by the Britishers in India in 1860s has molded the thinking of the people which still persists in the 21st century. As rightly said by the famous Indian hagiographer of homosexuality, Ruth Vanita, "The British did not bring homosexuality into India, what they imported into our civilization was homophobia". Section 377 had created a whole new minority community of lesbians, gays, bisexuals, transgender and queers, invading their right to privacy and other fundamental rights. All the acts between them, even in private, were to be considered obscene. Interestingly, Section 292 of Indian Penal Code, 1860 which lays down the conditions to determine obscenity, was also added by the British. The two sections when taken together, it can be interpreted that the acts between the homosexuals are considered to be obscene. Cinema in India is the supreme source of molding people's perspective. But of what good is the cinema when the authority (CBFC) itself under the political pressure bans the movies of social importance. It is also important that we begin to ask for films that have characters included in the community, carrying on with a standard life, confronting typical societal or individual concerns and not unfair or mistreating ones. Last thing one would want is reinforcing the existing hatred against the community. The study attempts to rationalize the principles and morals of the society and the view of the same from a legal perspective. Also, how the films representing the LGBTQ community should be released in India and not banned under obscenity as just the depiction does not amount to arousal of prurient interests.

INTRODUCTION

"As the beauty lies in the beholder's eye, so does, obscenity."[605] That being said, the question arises that why movies with lesbian, gay, bisexual or transgender content not released in India. The latest development in India is declaration of Section 377 as unconstitutional which makes the acts between the LGBTQ community no longer "unnatural". But the doubt still remains as to depiction of sensual acts between heterosexuals are not considered obscene and eligible to be shown on big screens while the same among the homosexuals is not. India is a diverse country but the acceptance of diversity in sexes lacks. We have come a long way from *Naz Foundation*

[604] School of Law, Christ University, Bangalore
[605] Felix M.A. v. P.B. Gangadharan, (2018) W.P.(C) No. 7778

case[606] to the judgment in *Navtej Singh Johar v. Union of India*[607]. The perception of immorality attached to homosexuality has changed, hence the perspective of obscenity connected with LGBT community has to be shifted. The society's perspective of what is obscene should not depend on the age-old beliefs but rather on the existing community standards and so should the legal perspective. A ban on the films representing LGBT community is a big hindrance to development. Rather to decide on blanket bans or irregular cuts, India needs to discuss upon the difference between vulgarity and obscenity.

WHAT IS OBSCENITY?

The term 'obscenity' is nowhere defined and the scope of the term can be inferred from different cases. As such there is no Act enacted in India as in United Kingdom, namely, Obscene Publications Act, 1959, but only a provision in Indian Penal Code. Section 292 of IPC states that sale of a book, writing, representation, etc. shall be obscene if an average person would find the materials in question appeal to the *"prurient interest"* or are *"lascivious"* and when taken as a whole, tends to deprave or corrupt a person's mind. This definition is evolved through different cases in India, citing other cases of different countries. In *Ranjit D. Udeshi v. State of Maharashtra*[608], the court upheld the ban on Lady Chatterly's Lover, as it was considered obscene and had the tendency to deprave and corrupt the minds of the people. The fear of the Supreme Court in this case is clearly visible. The duty to protect its citizens and young minds from depraving influence and bringing a change in the society's regressive morals. The term is very vague to be included as a penal provision, but the court thinks otherwise, stating that "The word obscenity is really not vague because it is a word which is well understood even if persons differ in their attitudes to what is obscenity and what is not." It followed the Hicklin's Test laid down in *Regina v. Hicklin*[609] in which a publication is not taken as a whole but isolated passage of work to judge if it is obscene or not, as well as if it affect the "vulnerable" part of the society. Because of this the case was highly criticized and discredited. However, the judges indicated that with the passage of time the concept of obscenity would change and what is considered obscene today might not be so decades from now. Another case in 2014, *Aveek Sarkar v. State of West Bengal*[610], the test of community standards was applied doing away with Hicklin's Test. A magazine was being sold with a photograph of Boris Becker and his fiancee, in the nude, as its cover and was questioned to be of obscene nature. The court declared it as not obscene by applying the community standards test :

"A picture of a nude/seminude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is

[606] Suresh Kumar Kaushal v. Naz Foundation, (2014) 1 S.C.C. 1
[607] Navtej Singh Johar v. Union of India, (2018) 1 S.C.C. 791
[608] Ranjit D. Udeshi v. State of Maharashtra, (1965) A.I.R. 881
[609] Regina v. Hicklin, L.R. 3 Q.B. 360 (1868)
[610] Aveek Sarkar v. State of West Bengal, (2014) 4 S.C.C. 257

depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."[611] The community standards are dynamic. In a continuously evolving society, applying a fixed standard is wrong. This case cites the Canadian case of *R v. Butler*[612] which also supported the community standards test. *Roth v. United States*[613] laid down three-pronged test which included "community standards" as its first prong, material to be "patently offensive" as second and of "no redeeming social value" as third prong. Applying community standards, the court says that if a material "has a tendency to arouse feeling or reveal an overt sexual desire" it can be criminalized as obscene. It is highly vague and the question arises that on what grounds sexual arousal can be criminalized?

After establishing the definition of the term obscenity through all the above mentioned judgments, the terms "prurient interest" and "lascivious" should be focussed on. Prurient interest is defined as "marked by or arousing an immoderate or unwholesome interest or desire for sex or nudity" and lascivious as "feeling or revealing an overt sexual interest or desire". The importance of these terms will be discussed later in the article and will be compared with the LGBT representation.

WHAT, ACCORDING TO INDIA IS LEGAL SEX?

Now that Section 377 is decriminalized, the court and society are clear about the term "natural" and "unnatural offences". The judgment in *Navtej Singh Johar v. Union of India*[614] dealt with the same and the question of what according to India is legal sex is answered. Also, whether the social perspective differ from legal perspective? The appearing inconsistencies of Indians' state of mind towards sex can be best clarified through the setting of history. India being a multiethnic and multilingual country, the societies differed according to their socio-economic conditions. The word sexuality meant differently to different people. For some it meant the act of sex and for others it could mean sexual orientation or identity. In ancient era, the caves of Ajanta were carved of paintings and scriptures which depicted nudity and homosexuality. The three pillars of Hindu religion were "dharma", "artha" and "kama" representing religious duty, worldly welfare and sensual aspects of life respectively. This indicates that sex or sensual activities was part of the Indian life and personality. The thinking changed with the British rule in India which introduced Section 377 in 1860s, criminalizing the acts which were against nature, that is the sexual acts between homosexuals. Thus, the mindsets of people developed that way. The homosexuals were ostracized by the society and they were afraid to come out in the open. From that day the thinking of the Indian "civilized society" was concrete. Still after the declaration of section 377 as unconstitutional, a large part of the society is against it.

Navtej Singh Johar v. Union of India is a progressive verdict which discards societal prejudice. One of the main reasons to amend this section was that it was not based on intelligible

[611] Id. at 6
[612] R v. Butler, (1992) 1 S.C.R. 452
[613] Roth v. United States, 354 U.S. 476 (1957)
[614] Id. at 3

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differentia, despoiling Article 14 of the Constitution. It condemned the LGBT community which are very much a part of our society. The Bench introduced the *"Doctrine of progressive realization of rights"* which condemns to introduce any part of this section again in the future which would criminalize the community. It follows the principle of modern ethos, that is mandating the laws of the country to be sensible and easy to apply. The central theme of the decision was that to transform the society and not to settle with the pre-existing values of the society.

DIFFERENCE IN SOCIAL AND LEGAL PERSPECTIVES

Now comparing Section 292 with the representation of the LGBT community, the question as to why such movies are considered obscene and not released in India. Recently, the movie called *"Love, Simon"* was not released as the protagonist belonged to the LGBTs and the representation of the same is considered to be obscene in India. Taking other movies with LGBT representation in it, the cinema has portrayed them negatively, and which don't are not even screened on big screens. One such movie was *"Fire"* directed by Deepa Mehta in 1996, which revolves around the story of two sisters-in-law who fall in love with each other after having problems with their husbands resulting in a lesbian relationship. On what grounds was the movie reckoned to be obscene? The definition of 'obscenity' include prurient and lascivious interest, but many other movies in which sensual acts between heterosexuals are normal and are showed on big screens. Other such movies are *Aligarh, Mitrachi Gostha (A friend's story), Girlfriend* and *BOMgay*. The Central Board of Film Certification should now think out of the closet as not giving movies with LGBT content on it because it depraves the moral grounds of the society is not a logical argument. Certain sorts of pictures were blamed for being suggestive and profane and rebuked for debasing Indian culture and convention. Notwithstanding open nerves, portrayals of sex and sexuality kept on discovering space in various types of media, which conflicted with customary family esteems and now and again heteronormativity. But still the representation of the LGBT community is supposed to be of obscene nature. One of the exceptions to Section 292 of IPC is that the representation should be justified as being for public good. As long as the material is for making the society aware and further adding to their knowledge, it is not considered obscene. The need to make society aware of the position of LGBT community through cinemas is unquestionable but the politics of CBFC makes the current environment of ignorance prevail. What in your view should be considered obscene, two people kissing regardless of their gender or a man slapping a woman? It is difficult to contend for current cover restriction that is by all accounts in light of an obsolete view that is stripping us of our dignity and dialogue.

CONCLUSION

Times are changing and with that the sexual minorities are gradually finding a place in Hindi film. The Indian culture is changing and with it the mentality of the people. As the lawyer and former MP R.K. Anand defines obscenity as "offensive to modesty or decency; lewd, filthy and repulsive." He further says that "It depends on the factual circumstances of each case. Obscenity

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is a wide word. It changes with time. What was considered obscene 20 years ago, is not considered so now." But this is not the same in the case of representation of LGBT community. The law has been seeing its interest rather than people's interest in releasing a movie of social value. The society's morality and standards are used as the reason to avoid such matters. Central Board of Film Certification (CBFC) has been shooting its gun from the society's shoulder due to political reasons. The Courts essentially affirms the predominant views of the majority and neglects the view and way of thinking of marginalized and minority groups. Still against all the odds, the judgment of Navtej Singh Johar v. Union of India was passed by the Supreme Court, partially striking down Section 377 of Indian Penal Code, 1860. What has been considered "unnatural" all this time is no more so as Chief Justice Misra and Justice Malhotra held that the sexual orientation of a person is itself natural. This judgment is a big leap in India's societal views and morality, but a big challenge is the society's acceptance to it. There are already petitions being filed by some people and politicians, one of them being the BJP MP Subramanian Swamy, religion as their basis. They consider being one of LGBT community is against Hindutva and they need to be "cured". What people are not understanding is that it is not a disease which is curable but holds a scientific reason for the same. Comparing Section 292 with the LGBT community, representation of things which are unnatural are to be considered obscene and till now the acts between the people of the community are reckoned to be unnatural, including them in the purview of obscenity. Lesbians, gays, transgenders are portrayed in the movies as subjects of ridicule and just for entertainment purposes, and are freely given a certificate by the CBFC without any delay. But getting the film in light of LGBT issue passed by the certification board is the main hindrance since the substance of the film are lawfully restricted to what the nation acknowledges. The issues of getting the accounts required for the release, and the probability that the group of onlookers will timid away from the film are the huge restrictions. Can this age-old perception about homosexuals exist in 21st century?

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DUTY OF JUDICIARY IN PROTECTION OF CONVICTED PRISONERS IN INDIA

- *Ashreet Acharya*[615] *& Baishnabi Das*[616]

"Prison is a second-by-second assault on the soul, a day-to-day degradation of the self, an oppressive steel and brick umbrella that transforms seconds into hours and hours into days"

-Mumia Abul Jamal

According to historical records, a couple of centuries ago the behavior towards the prisoners and the punishment given to them was brutal and the recognition of basic rights of a convict was only accepted after a long, hard battle with the state. The socio-legal system governing the societies in India is strictly against violence and is based on human dignity and basic respect for a citizen. If an individual commits any crime and is convicted, he loses certain aspects of life which are provided to the free citizens but it does not mean that he quits being a human being and that he can be stripped from his basic human dignity. It is universally accepted that the convicted prisoners have access to certain human rights and that any sort of torture in a prison is not part of the inventory of judicature and is nothing but failure to provide justness. It is the duty of the judicial system in every society to implement measures for the protection for the law breakers just like it has methods to protect its law-abiding citizens. By interpretation of Article 21 of the Indian Constitution, the Supreme Court of India has refined and advanced apt jurisprudence related to human rights for the simple purpose of protection and growth of prisoner's rights. Any breach or infractions of these rights also violates Article 14 of the Constitution of India, which guarantees the right to equality and equal protection of law. Additionally, the Prison Act, 1894 and the Criminal Procedure Code (CRPC) also specifically deal with any matter relating to cruelty to prisoners. The police authorities, the legislature and also the judiciary are attentive towards any sort of cruelty committed on the prisoners. The Indian judiciary has been vigilant against any breach of the human rights of the prisoners. The unfortunate and wretched conditions inside the prisons have been frequently acknowledged by the Supreme Court and the High Courts, the negligence to the grievous and intolerable circumstances results in violation of prisoner's rights. These rights and their preservation strengthen the idea for prison reforms. This need for prison reforms has become a focal point in the last four decades. 'Prisoner' defines any person who is ceases to be a free man and is kept under custody in a prison because of his

[615] Madhusudan Law College, Cuttack
[616] Madhusudan Law College, Cuttack

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commitment of an illegitimate act. Any such person or an inmate is intentionally deprived of his liberty, against their will, for committing a crime. This idea is usually implemented by confinement or acts of restraint towards the prisoner. But even though the person is subjected to such confinement or imprisonment as a punishment to his crimes, such punishments do not affect the basic rights he is entitled to. An individual's rights do not diminish simply because of conviction or being under trial. These include:

- The right to food and water.
- Protection from torture, physical and mental as well as any other sort of harassment.
- The right to reach out to an attorney or having one's own attorney to defend himself.

HUMAN RIGHTS OF CONVICTED PRISONERS- CONTEMPORARY SITUATION & BREACH

The lack of restriction to the practice of torture in prison system has caused its imminent expansion and predominance in India since its inception. Such practices slowly became accepted and "legitimate" after being unnoticed and unregulated for such a long time. Individuals are often tortured by law enforcement agencies in the name of punishments, investigations and obtaining confessions. Often these individuals are not prisoners but also informants, petitioners, complainants and respondents. These individuals are subjected to barbaric and cruel treatment violating their basic rights. Such behavior is not only demeaning and disparaging but also uncomplimentary to the nobility of a person. Women are often tortured in custody in the form of rape, molestation and carious other forms of sexual torments. The Hon'ble Supreme Court of India has often addressed this expanding threat on various occasions. The Apex court specifically dealt with the issues of prison rights in the case of **Sunil Batra v Delhi Administration**[617] **where the Hon'ble** Court was asked whether prisoners are still considered to be persons and whether they still hold right to their fundamental rights while in custody, although they are depreciated from some of their fundamental rights. The court answered justly:

"Are 'prisoners' persons? Yes, of course. To answer in the negative is to convict the nation and the Constitution of dehumanization and to repudiate the world legal order, which now recognizes rights of prisoners in the International Covenant on Prisoners' Rights to which India has signed assent."

The Hon'ble Court in this case, shunned the hands-off doctrine and dismissed the idea that a person loses access to his fundamental rights as he enters the prison even though the incarceration necessarily deprives him of certain rights. The prisoners are entitled the freedom of movement under Article 19, which is often violated by the application of handcuffs, thus to

[617] Sunil Batra v Dellhi Adminsitration 1980 AIR 1579, 1980 SCR (2) 557

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handcuff a convict counts as a humiliating punishment. Handcuffs are only accepted as a last resort mean to ensure security.

FUNCTION OF THE INDIAN JUDICIARY

Committing a crime does not mean a person stops being a human, despite the gruesomeness or the gravity of the offence. Convicted for one definitely does not mean the person stops being a human being and can be purposefully bereaved of such aspects of life which establishes basic human stature. Judicial activism by the apex court has shed light on the alarming and distressing condition of the prison system in India. Such deplorable prison conditions are forged by gross violation of basic human rights in the form of custodial sexual torture, custodial death, physical and mental torment, police brutality, demeaning behavior towards the convicts, dreadful quality of food, atrocious living conditions including lack of proper water supply, awful health support system, unexplained prolonged imprisonment, forced labor and other problems. The prolonged confinement leads to overcrowded prisons which further causes the derogation of the already inhuman living system. The indifference and ignorance of the prison staff towards the atrocious condition of the prisoners has been repeatedly criticized for years. However things have barely changed. Despite being one of the more alarming issues, there has been little to no reforms regarding basic prison administration.

PRISONERS IN INDIA- CONCERN & ISSUES

The Hon'ble Supreme Court of India detailed 9 problems plaguing the prison system in the case of **Rama Murthy v State of Karnataka**[618] which are specified below: –

- 80% prisoners are under trials
- Delay in trial.
- Even though bail is granted, prisoners are not released.
- Lack or insufficient provision of medical aid to prisoners
- Callous and insensitive attitude of jail authorities
- Punishment carried out by jail authorities not coherent with punishment given by court.
- Harsh mental and physical torture
- Lack of proper legal aid
- Corruption and other malpractices.

HUMAN RIGHTS VIOLATION OF PRISONERS IN INDIA

In the last few years, the Hon'ble Supreme Court of India has been very attentive towards any violations of the Human Rights of the prisoners. The Constitution of India Article 21 provides that "No person shall be deprived of his life and Personal Liberty except according to procedure

[618] Rama Murthy v State of Karnataka ILR 1986 KAR 3037

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established by law" under Article 21. These enshrined rights to life and Personal Liberty are crucial and elemental to the Human Rights movement in India. The Indian judiciary has relentlessly provided efficient remedy against any encroachment on Human Rights through its inspiring approach and judicial activism. The courts have developed and entrenched various productive and persuasive rights by giving a liberal meaning to "life and personal liberty" and expanding its scope. The Supreme Court of India has consistently asserted that the protection under Article 21 will be provided to safeguard the rights of all the citizens of the nations, including the convicted prisoners. This has considerably widened the scope of Article 21 and supports the ideas for prison reforms. By developing jurisprudence for Human rights, the Apex Court guarantees the preservation of a prisoner's basic human respectability.

SOLITARY CONFINEMENT, PRISON BONDAGE & BAR FETTERS

Solitary Confinement and its intrusion and imposition on prisoners have been accepted as to have an adverse effect on an individual. The courts have frequently asserted solitary confinement as degrading and dehumanizing for the convicted prisoners. The courts held that solitary confinement should only be a worst case scenario for prisoners who are extremely dangerous and need to be separated from the other prisoners. The Supreme Court acknowledged the need and validity of solitary confinement in the case of Sunil Batra v Delhi Administration[619]. The Apex Court also has strong views against bar fetters to the prisoner noticing that continuous usage of bar fetters day and night against the prisoners reduced them to animals. Such inhuman behavior, cruel and unusual treatment and such treatment was against the spirit of the Constitution of India.

RIGHTS AGAINST BARBARIC BEHAVIOR TOWARDS PRISONERS

Human Rights guarantee basic human dignity and respect as an inherent part of it. The Hon'ble Supreme Court of India has commendably observed the barbaric treatment towards the convicted prisoners and has provided guidance and directions to the authorities and prison administrators for preserving the basic rights of the prisoners and persons in police custody in numerous cases. The Supreme Court widened the scope Articles 14 and 19 of the Indian Constitution and interpreted the right against torture from it. The court also asserted that "*the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14*". The Hon'ble Supreme Court in the case of Raghubir Singh v State of Bihar[620], the Supreme Court expressed conveyed its grief relating to the police brutality imposed upon convicted prisoners by upholding the life sentence awarded to an officer who was responsible for the death of a suspect because of torture in police custody. The Apex Court in Kishore Singh v State of Rajasthan[621] held that Article 21 is violated by usage of third degree method by the police or prison authorities.

[619] Sunil Batra v Delhi Administration 1980 AIR 1579, 1980 SCR (2) 557
[620] Raghubir Singh v State of Bihar 1987 AIR 149, 1986 SCR (3) 802
[621] Kishore Singh v State of Rajasthan 1981 AIR 625, 1981 SCR (1) 995

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RIGHT TO MEET FRIENDS, FAMILY & ADVOCATES

The field of Human Rights is a growing one and with passing time the scope of it is profoundly expanding. The acknowledgment of Prisoner's rights has the sole purpose of protecting the convicts from any sort of physical discomfort and mental torture. Article 21 of the Indian Constitution guarantees the Right to Life and Personal Liberty which cannot be limited to simple animal existence but it means more than just physical survival. Article 21 also clearly guarantees the basic right to meet the members of one's family and friends. The Indian Constitution also guarantees that a convicted prison shall have the right to consult and be represented by a legal practitioner of his choice as enshrined under Article 22 (I). The Code of Criminal Procedure (CRPC) also guarantees this particular right. The Hon'ble Supreme Court has acknowledged and improved the scope of Human Rights regarding convicted prisoners to ensure their interviews with family, friends and counsel. In Dharmbir v State of U.P[622] the court directed the state Government to allow family members to meet the prisoners under guarded conditions

RIGHT TO SPEEDY TRIAL & PROCEEDINGS

The criminal justice delivery system in this country promotes speedy trial of offences as one of its fundamental ambitions and objective. It asserts and insists that trial has to commence immediately after the cognizance of the accusation is taken by the court and should end in punishing the guilty and to absolving the innocent. The justice dispensing system believes in the innocence of an accused till proven guilty and such innocence of the accused has to be ascertained as fast as possible. The courts are obliged to regulate court proceedings and ensure that no guilty person escapes the law and it also must assure that justice is not delayed and the accused persons are not harassed for a prolonged period. The saying "delay in trail by itself constitute denial of justice" followed up by "justice delayed is justice denied" is absolutely relevant and is to be kept in mind. Speedy trials are an outright necessity in the case where bails are refused. In such scenarios, speedy trials will ensure that the accused doesn't have to face a prolonged detention. The Code of Criminal Procedure provides the right to speedy trial under section 309. Unfortunately these provisions are often overlooked by the prison administrators as well as other authorities; this violates the provisions of the code of criminal procedure. The Constitutional right of speedy trial guaranteed to its citizens including the convicted prisoners enshrined in Article 21 needs to be properly expressed in the code.

RIGHT TO LEGAL AID

Free Legal Aid was included in the 42nd Amendment Act, 1976 under Article 39A of the Indian Constitution as one of the Directive Principles of State Policy. The Constitution of India supports the idea of free legal aid to the poor prisoners specifically because of their lack of financial abutment consequentially not being able to engage any legal practitioner of their own choice. Article 39A is one of the most vital articles of the Constitution as it expressively and directly

[622] Dharambir v State of U.P. 1979 AIR 1595, 1980 SCR (1) 1

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speaks of Free Legal Aid. The Right to free Legal Aid has the position as one of the Directive Principles of State Policy in part-IV of the Indian Constitution under Article 39A. The Principle laid down in the abovementioned article is crucial to the proper governance of this country even though it cannot be enforced upon the citizens. The state is obliged to apply these principles while developing and implementing laws. Article 37 ensures such obligation on the state. Article 38 enforces the state to promote the welfare of the people by securing and preserving social order and ensure justice, social, economic and political. The enactment Legal Services Authorities Act, 1987 by the parliament guaranteed legal aid. This empowered various state governments to develop, form and establish legal aid and Advice Board and framed schemes for Free Legal Aid and thus giving effect to the Constitutional mandate of Article 39-A.

RIGHT AGAINST PROCEDURE OF NARCOANALYSIS, POLYGRAPH & BRAIN MAPPING

The Hon'ble Supreme Court asserted the process of Narcoanalysis, Polygraph test and Brain Mapping unconstitutional and violative of human rights in the matter of Selvi v State of Karnataka[623]. The decision was resented by many because of the supposed hindrances it would create for investigation and further aid in the escape of several criminals who will be free of conviction. The court however also declared that a person can be subjected to such tests if the person gives his assent to the authorities prior to any such test. The results of the tests will be only used for investigative purposes and shall not be admissible as evidence in the court of law. The techniques of Narcoanalysis, Polygraph test and Brain mapping are widely accepted as the most effective and favourite tools of most of the investigative authorities. These methods tied with advanced technology related to neurology have proven to be great aid while obtaining confessions and extracting information from the accused. After a while, the Human Rights Organization amongst other social services raised their voices against such tests. Any sort of mental or psychological probing is considered to be violating one's privacy, thus these tests were also characterized as a form of violation of the right to privacy of an individual. These tests were designated as an atrocity to the human mind. The Hon'ble Supreme Court admitted these tests violated Article 20 (3) of the Indian Constitution which asserts that no person shall be forced to give evidence against himself. The Apex Court also directed the investigation agencies that the guidelines by National Human Rights Commission have to be followed strictly while conducting the tests.

RIGHT TO REASONABLE WAGES

The State is obliged to pay a compensation or commission to any person who was asked to supply labour services. Such payment cannot be less than the minimum wages and has to be proportionate to the services provided. If such payment is not equivalent to the services then it will be considered as 'forced labour' within the meaning of Article 23 of the Indian Constitution.

[623] Selvi v State of Karnataka Criminal Appeal 1267 of; 2004 2010(7) SCC 263

The Prisoners providing labour within the prison walls are no different than the free man providing labour in the outside world. The prisoners are to paid wages at the reasonable rate if they are made to work in the prison during their imprisonment. In 1980 the Indian Government set up a committee under the chairmanship of Justice A.N. Mulla, a retired judge of High Court, Allahabad regarding reformative initiatives in the prison administration system. The report submitted, also dubbed as the "Mulla Committee Report"[624] provided invaluable suggestions which also contained pertinent advice regarding wages in prison:

"All prisoners under sentence should be required to work subject to their physical and mental fitness as determined medically. Work is not to be conceived as additional punishment but as a means of furthering the rehabilitation of the prisoners, there training for work, the forming of better work habits, and of preventing idleness and disorder. Punitive, repressive and afflictive work in any form should not be given to prisoners. Work should not become drudgery and a meaningless prison activity. Work and training programmes should be treated as important avenues of imparting useful values to inmates for their vocational and social adjustment and also for their ultimate rehabilitation in the free community.....Rates of Wages should be fair and equitable and not merely nominal or paltry. These rates should be standardized so as to achieve a broad uniformity in wage system in all the prisons in cash State and Union Territory."

THE RIGHT TO EXPRESS

The Court expanded the scope of the right of personal liberty in the matter of State of Maharashtra v Prabhakar**[625]** and declared that it also includes right to write a book and get it published and denial to the exercise of such right without the authority of law violated Article 21 of the Indian Constitution. In the case of R. Rajagopal alias R.R. Gopal and Another v State of Tamil Nadu and Others[626], the petition raises a question regarding the freedom of press vis-a-vis the right to privacy of the citizens of this country as well as relating to the parameters of the right of the press to provide constructive criticism and comments regarding the actions and behavior of public officials.

STANDARD SOLUTIONS TO THE ISSUES PLAGUING PRISONS

When a person is convicted of a crime and is consequentially sentenced to be imprisoned, he is merely devoid of his basic right to liberty. Imprisonment doesn't equate to him quitting being a human. There is absolutely no restriction on a convict's human rights except the ones which are naturally violated because of imprisonment. The other human rights however, are to be preserved

[624] https://www.scribd.com/doc/21248287/Mulla-Committee-on-Prisons
[625] State of Maharastra v Prabhakar 1966 AIR 424, 1966 SCR (1) 702

[626] R. Rajagopal alias R.R. Gopal and Another v State of Tamil Nadu Writ Petition (C) No. 422 of 1994.

and protected and there is a strict need of prison reforms which will ensure that the prison administration is adhering to the principles of human rights. Respecting a convict's basic human rights only improves the chances of social reintegration and character reformation. National legislation, norms, policies and practices are governed by the international standards focusing on preserving a prisoner's basic human rights. Prison torture is outlawed in all forms by

- The 1948 Universal Declaration of Human Rights (UDHR)
- The 1949 Geneva Conventions (signed 1949),
- The American Convention on Human Rights (signed 1977)
- The International Covenant on Civil and Political Rights (signed 1977)
- The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 1988).

The Prison authorities have an obligation to ensure the prisoners during their imprisonment period are treated within the rule of law and that there should be no violation of their human rights. This treatment is supposed to prepare these convicted individuals for life outside the prison upon their release. The legislation and regulations related to prison administration and management is archaic and antiquated. A proper update is an absolute necessity and such reformation is imminent but has to be made as soon as possible to secure the enforcement of human rights by several distinctive methods such as:

ADVANCEMENT IN THE PRISON WELFARE STRATEGY

Productivity from prisoners can only be ensured by promoting proper prison welfare schemes in every prison. Such schemes should make sure that the prisoners do not engage in derogatory activities during the duration of their imprisonment and use their time in productive and ardent activities. The Prison authorities need to actively participate in governing the behavior of the convicts and aid the prisoners to conduct themselves properly and help them develop a better lifestyle and lead a civilized and reformed life after their release. The environment presented by the prison authorities should be exacting yet nurturing. Such atmosphere should ensure that the convicts are using their time productively and are not getting diverted towards detestable desires to commit any act of mischief. Prison authorities can organize and regulate occasional sports competition like "Tihar Olympics" which is the popular name of the winter sports festival conducted in the prison. The idea behind such decision was to promote sportsmanship and healthy competition within the convicts. The prison administration can also promote rehabilitation centers for the prisoners with substance abuse problems preparing them for a dignified life outside prison. To incept and develop the necessity and importance of hard work and the value of honest labor, the prisoners can be made to work for several institutes, factories and industries. The convicts can also indulge in recreational activities like reading from the prison library, educational facilities, and computer courses. Physical activities like yoga,

meditation can also be crucial in improving their behavior and help them becoming better citizens. The prisoners can also be guided regarding employment to earn a proper place back in the society. The prisoners can also indulge in creative activities such as furniture making, woodwork, metal work, which can not only be sold outside but can also be used by the convicts themselves. These activities have to be promoted and enforced on all the inmates and it should not be categorized as optional. All the inmates have to participate in these programs as "an ideal mind is the devil's workshop." The participation will ensure that the inmates are spending their time productively as well motivates them to lead a better life outside the prison walls.

IMPROVEMENT IN HEALTHCARE AND ACCOMODATION

Every prisoner has the right to health and is entitled to receive adequate healthcare. All the citizens, both inside and outside the prison walls hold a right to receive proper medical care. Healthcare services in prison are in a desolate status since they are barely adequate at all. Prison health administrative system lacks the proper manpower, staff services and funds. The healthcare services provided by prisons are often non-existent otherwise severely deficient. The prisoners are entitled to receive curative, preventive and palliative services. The right to health also guarantees the underlying elements of a healthy lifestyle such as proper food, sanitation, nutrition, dental services, proper environment and healthy atmosphere. They are also entitled to receive proper health-related education. Prison administration needs fundamental improvement to develop sustainable health within the inmates. Prison health also directly related to public health. Thus, improving health of the prisoners within the prison walls is crucial for the proper implementation of public health policies.

CONCLUSION

"Jails and Prisons are designed to break human beings, to convert the population into specimens in a zoo – obedient to our keepers, but dangerous to each other"

-Angela Davis

In conclusion, the Indian Judiciary has protected the Human Rights of Prisoners when the executive and the legislative have failed to even acknowledge the grave situation posed by mismanagement in prison. The Hon'ble Supreme Court has taken a stance and provided commendable guidelines for corrective methods to be implemented in the prison system. These guidelines provide crucial instructions to the executive and the legislature. The Indian Judiciary has displayed humane concerns and sensitivity towards the protection of Human Rights of the people. The Apex court along with all the other institutions of jurisprudence have actively used judicial activism to develop new means and methods to provide new remedies to prevent gross violation of the precious Human Right to life and Personal Liberty. If such actions are not taken then all these violations of human rights, these instruments of abuse and terror will only result in the systematic devastation of the society itself. Recidivism in the name of rehabilitation should not be tolerated.

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SIMULTANEOUS ELECTIONS: A TOOL OF ARBITRARINESS IN LIGHT OF ARTICLE 14 OF THE INDIAN CONSTITUTION

- *Neha Das*[627]

Article 14 mandates that the State shall not deny equality before law and equal protection of laws to any person within the territory of India. The doctrine of rule of law propounded by Dicey and the clause of 14th Amendment of the U.S. Constitution which provides for "equal protection of law" was incorporated in Article 14 to infuse dynamism in the right to equality. The Supreme Court evolved a doctrine in the year 1974 which advanced Article 14 as a guarantor against arbitrariness.[628] According to the old doctrine, "equal protection of laws" prohibits class legislation but permits reasonable classification of persons or things.[629] Thus, the application of the classification test to evaluate the constitutionality of legislations or state administrative actions, is not a recent development and have been applied by the courts numerous times in the past.

The Central government has been persistent to hold simultaneous elections across the country which implies that there shall be synchronization in elections to state Assembly and the Parliament and it shall be conducted simultaneously. The proposal to conduct Lok Sabha and state Assembly elections simultaneously was reinvigorated by a January 2017 position paper published by NITI Aayog. Some of the claims in the position paper deserve a closer scrutiny, at the very least, if not large-scale testing against data and evidence.[630] The Law Commission released an official notification where in it highlighted the major constitutional issues involved in the proposal of simultaneous elections which would in turn violate the basic structure of the Constitution.

There is a need of major amendments to various constitutional provisions as well as statutes to transform the idea of holding simultaneous elections into reality. These include Article 83, Article 85, Article 172, Article 174, Article 356 and the Tenth schedule along with alteration of the Representation of People's Act, 1951. These provisions pertain to duration, session and dissolution of the state Assembly.

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627 School of Law, Christ University, Bangalore

628. E.P. Royappa v. State of Tamil Nadu, (l974) 4 SCC 3.

629. Cf. Prof. Willis, 'CONSTITUTIONAL LIMITATIONS', (Ist edn.) p. 579.

630. One Nation, One Poll proposal is completely blind to the forces that could impair federalism. (2018, July 17). Retrieved from https://www.firstpost.com/india/enforcing-one-nation-one-election-rule-will-amount-to-wilful-blindness-to-consequences-which-will-impair-federalism-4749901.html

A two-fold justification for simultaneous elections as given by NITI Aayog are the paralysis of policy when the Model Code of Conduct (MCC) is established in states undergoing elections, and the exorbitant expenditures incurred by political parties that is an off shoot of corruption. The Law Commission in its Draft Working Report has laid out ways to ensure concurrent terms for the Lok Sabha and Assemblies, and proposed election schedules. To implement simultaneous election, the Election Commission shall reduce or extend the term of State Legislative Assemblies to synchronize with either May 2019 or May 2024 General Elections. The Law Commission has failed to test the inherent lacuna and shortcomings in the flawed system of simultaneous election which is anti-democratic and has gone ahead to suggest amendment techniques to the provisions.

In order to pass the test of reasonable classification, two criterion must be met. *Firstly,* the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, *Secondly*, the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them.[631] Further, there should not exist disparity in the discrimination meted out beyond the reasons for the existent demands.[632] The proposed reduction of tenure of the states ruled by non-BJP and extension of tenure of states ruled by BJP government has no intelligible basis and is purely a planned politicized move. Further, the differentiation which in itself does not have a basis, has in no way a rational relation to the object to be achieved by the Representation of People's Act, which is to facilitate synchronization of general elections with legislative assembly. The arbitrary differentiation between states will not only affect the state legislative assemblies but such diminishing or increasing the worth of a specific state's citizen's vote is not justified. Forcing the states to comply with the Centre's schedule would grossly affect the federal democratic setup wherein states are not subservient to the Centre but their equal.

While there is a prerequisite for the application of the doctrine of 'reasonable classification', that is, there should be some comparative differential treatment between two classes of persons, there is no such conditional precedent for the doctrine of arbitrariness.[633] It is invoked for failure to rely an action on a proper rationale. Thus, the scope of Article 14 is widened to a great extent as there is no onus to prove discrimination of any sort[634] in a case of denial of equality. The result of the muti fold criticism of the nexus test was that an activist stance was adopted by the Supreme Court in E.P. Royappa v. State of Tamil Nadu[635] in which it was stated that equality is a dynamic concept with many aspects and it cannot be *'cribbed, cabined and confined*' within the traditional and doctrinaire limits.

631. State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75.
632. Kathi Raning Rawat vs The State Of Saurashtra, 1952 AIR 123, 1952 SCR 435.
633. Tarunabh Khaitan, "Legislative Review under Article 14" in Oxford Handbook of Indian Constitutional Law
634. A.L. Kalra v. Project and Equipment Corporation, (1984) 3 SCC 316, 328.
635. E.P. Royappa v. State of Tamil Nadu, (1974) 2 SCC 402.

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Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14.

Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Simultaneous elections call for an amendment to be brought out in the Representation of Citizens Act which would be arbitrary at the face of it as it would negate rule of law which is a basic principle under Article 14. This new activist theory was reiterated in Ajai Hasia v. Khalid Mujib[636], Maneka Gandhi v. Union of India[637], R.D. Shetty v. International Airport Authority[638] and thus the new doctrine of equality that "*Article 14 embodies a guarantee against arbitrariness*" became established.

It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not para-phrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. . . .Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.It is now settled law as a result of the decision of this Court in Maneka Gandhi's case (supra) that Article 14 enacts primarily a guarantee against arbitrariness and inhibits State action whether legislative or executive, which suffers from the vice of arbitrariness. This interpretation placed on Article 14 by the Court in Maneka Gandhi's case has opened up a new dimension of that article which transcends the classificatory principle. For a long time in the evolution of the constitutional law of our country, the courts had construed Article 14 to mean only this, namely, that you can classify persons and things for the application of a law but such classification must be based on intelligible differentia having rational relationship to the object sought to be achieved by the law. But the court pointed out in Maneka Gandhi's case that Article 14 was not to be equated with the principle of classification. It was primarily a guarantee against arbitrariness in State action and the doctrine of classification was evolved only as a subsidiary rule for testing or determining whether a particular State action was arbitrary or not.

636. Ajay Hasia Etc vs Khalid Mujib Sehravardi & Ors, 1981 AIR 487, 1981 SCR (2) 79.
637. Menaka Gandhi v. Union of India , [1978] 2 SCR 621.
638. Ramana Dayaram Shetty vs The International Airport Authority, 1979 SCR (3)1014.

Arbitrariness is the very negation of the rule of law. Rule of law contemplates governance by laws and not by humor, whims or caprices of the men to whom the governance is entrusted for the time being. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness.[639] What essentially would be the case in case the elections are synchronised is the reduction of tenure of the states ruled by non-BJP and extension of tenure of states ruled by BJP government which has no logic whatsoever. For the facilitation of synchronization of simultaneous elections, the arbitrary reduction of handpicked states ruled by non-BJP government would amount to a clear abuse of power by the legislature as it would have no discernible principle emerging from it and therefore in every sense be unreasonable and arbitrary. In a setup with rule of law in place, discretion should be in clear limits when handed over to the authority exercising executive power[640] and for the public good.[641] In case simultaneous election kicks in, terms of State Assemblies need to be adjusted on the basis of some agreeable principles which need to be within constitutional limits and should be accepted by and large to various stakeholders - political parties, Governments as well general public/voters which is not the present scenario with unmatched dissent from all ends of the spectrum.[642]

The doctrine of reasonableness is the cornerstone of the substantive due process. A *law may be struck down if is violative of Article 14 or any other fundamental right or is in any way arbitrary*.[643] In strict sense, all administrative actions are promulgated for an intelligible rationale, but what needs to be analyzed is whether they match up to the legal standard of reasonableness.[644] 'Irrational' most naturally means 'devoid of reasons' whereas 'unreasonable' means 'devoid of satisfactory reasons'.[645] In the instant case, proposal for synchronization of general elections with legislative assembly, may sought to have intelligible reasons but is not reasonable according to legal standard. Any exercise of legislative or administrative power if it involves arbitrary abuse of power should be set aside.[646] If a statute is challenged to be violative

[639]. Shrilekha Vidyarthi v. State of U.P. (1991) 1 SCC 212.
[640]. Aeltemesh Rein, Advocate, Supreme Court Of India Vs Union Of India And Others (AIR 1988 SC 1768)
[641]. Kasturi Lal Lakshmi Reddy vs State Of Jammu And Kashmir, 1980 AIR 1992, 1980 SCR (3)133.
[642]. Simultaneous elections: After Law Commission meet, four parties support and nine oppose 'one nation, one poll' concept. (2018, July 09). Retrieved from https://www.firstpost.com/politics/simultaneous-elections-after-law-commission-meet-four-parties-support-and-nine-oppose-one-nation-one-poll-concept-4697721.html
[643]. Independent Thought v. Union of India, [Writ Petition (Civil) No. 382 of 2013].
[644]. William Wade and Christopher Forsyth, Administrative Law 295 (Oxford, United Kingdom, 11th edn., 2009).
[645]. See, R v. Secretary of State for the Environment ex p Nottinghamshire CC, [1986] AC 240 at 249, and in R v. Home Secretary ex p Brind, [1991] 1 AC 696. See also Minister for Immigration and Citizenship v. Li [2013] HCA 18, (2013) 87 ALJR 618 at para. 30 (recognising distinction between rational and reasonable).
[646]. State of U.P. v. Renusagar Power Co., 1988 AIR 1737, 1988 SCR Supl. (1) 627.

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of Article 14, it is necessary for the judiciary to determine the extent of arbitrariness and unreasonableness in the legislation in question.[647]

In **Re Special Courts Bill**, the Supreme Court has however warned against over-emphasis on classification. The Court has explained that 'the doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality, over-emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Art. 14 of the Constitution. The over-emphasis of classification would inevitably result in the substitution of the doctrine of classification for the doctrine of equality.

If there are two laws covering a situation, one more drastic than the other, there is the danger of discrimination if the Administration has the discretion to apply any of these laws in a given case. Of the two persons placed in a similar situation, one may be dealt with under the drastic law and the other under the softer law. To minimize any chance of such discrimination, the court insists that the drastic law should lay down some rational and reasonable principle or policy to regulate administrative discretion as to its application. If the drastic law fails to do so, then it will be void under Art. 14.

This proposition was applied by the Supreme Court in **Northern India Caterers V. State of Punjab,** to evict a person from the unauthorized occupation of public premises, a Punjab Act provided for a Summary procedure. The collector had two choices; he could either himself order eviction under the special law, or could file an ordinary suit in a court for eviction under the general law. The Punjab law was declared void under Art. 14 because being a drastic law it laid down no policy to guide the collector's choice as to which law to follow in what cases; the matter was left to his unguided discretion and so there could be discrimination within the same class inter se, viz., unauthorized occupants of public premises.

In **Maganlal Chhagganlal V. Greater Municipality**, the validity of certain provisions of Bombay Municipal Corporation Act, which conferred powers on the authorities to initiate special eviction proceedings against unauthorized occupants of Corporation and government premises, was challenged. Following the **N.I. Caterers case**, it was argued that the availability of two procedures, one under the CPC and other under the two Acts of which the former was onerous and harsher than the latter, the former was hit by Article 14 in the absence of any guidelines as to which procedure might be adopted. The majority did not agree with the N.I. Caterers case.

Analysing the whole line of cases on the subject he drew a distinction between the statutes which themselves make a classification and those which authorize the executive to make the

[647]. State of Tamil Nadu v. Ananthi Ammal,1995 AIR 2114, 1995 SCC (1) 519.

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classification. While in the first case the statute will be invalid if it fails to satisfy the requirements of Article 14 (reasonable classification), in the second case the statute is valid so as it provides guidance to the executive about the exercise of its discretion in making the classification. Such guidance need not be provided expressly and specifically in the provisions of the statute; it may be gathered either from the preamble and other surrounding circumstances and facts which necessitated the enactment of the statute or from the general object or policy or the statute gathered from other operative provisions applicable to analogous or of the statue gathered from other operative provisions applicable to analogous or comparable situations. If such guidance is missing then only the statute will be invalid. Otherwise only the act of classification by the executive will be examined. In that case, if the classification fails to satisfy the requirements of Article 14 it will be ultra vires not only the Constitution but also the statute under which it is undertaken.

The Court observed that it was inevitable that when a special procedure is prescribed for a defined class of persons, such as occupiers of municipal or government premises, discretion which is guided and controlled by the underlying policy and purpose of the legislation has necessarily to be vested in the administrative authority to select occupiers of municipal or government premises for bringing them within the operation of the special procedure.

For the ideal and true interpretation of all legislations, penal or beneficial, restrictive or enlarging of the common law; four things are to be considered.[648] *Firstly*, what was the common law before the passing of the Act? *Secondly*, what was the mischief and defect for which the common law did not provide? *Thirdly*, what remedy the Parliament hath resolved and appointed to cure the *"disease of the Commonwealth*"? And *fourthly*, the true reasons for the remedy. Further, there ought to be independency in the manner of discharge of functions by the legislature which is the essence of the doctrine of separation of powers. This notwithstanding in the case of simultaneous elections, the independence would be tested by the proposed reduction of tenure of certain state assemblies which is arbitrary and unreasonable, and therefore, violative of Article 14 of the Constitution.

[648]. Heydon's Case, [1854] EWHC Exch.

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CRIMINALITY IN COUNTERFEITING PRODUCTS AND FASHION LAW

- *Yashi Jain*[649]

ABSTRACT

Style and fashion are dynamic in nature and so is the laws adopted in and by the Constitution of India. It slowly evolves and reflects in people's life. This paper mainly focuses on how, though Intellectual Property Rights govern on grounds of private law in Fashion Industry, yet are able to and can criminal sanction which is a sanction against the individual as well as the community in large. Frequent fashion changes drastically to shorten the period during which a style prevails, hence, it is parasitic in nature. And the general public craves for this sameness in their life, whether affordable, or not. That's where the concept of the counterfeiting arose. And this paper would like to focus how monopolistic competition, generated by the government must act in favour of the people but IPR regulations tend to backfire the same. In the conclusion, through this paper the author would like to make suggestions regarding the mentioned issues in the morality reflected by the quote: 'Use, though it may be small, must be substantial and made in good faith

INTELLECTUAL PROPERTY AS PUBLIC POLICY

Post eighteenth century, due to the advent of social utilitarianism which challenged the subjectivist notions of universal natural rights in intellectual creations. The utilitarian concept focused on the social and collective process of invention, ownership and authorship. This principles emphasise on the continuing tensions embodied in intellectual property rights between individuals and community models. In relation with public policy, the utilitarian notion are designed to appreciate creation and diffusion and natural rights on the other hand focus on the managerial rights provided to one and his/her property after it has been created.

EX-ANTE AND EX-POST AND ITS APPLICATION IN FASHION LAW

The maxims ex ante literally means 'based on forecasts rather than actual results' and ex post on the other hand refers to the future events or after the facts, like, potential returns of a particular security. Mark Lemley contrasted ex ante In the case of utilitarian/public goods justification. This is in relation with Jeremy Bentham's utilitarian theory which explains the "greatest good for the greatest number" in simple words holds that actions are right in proportionate as they tend to promote happiness, wrong as they tend to produce reverse of happiness. Ex post- conceptualises romantic/private reward justification.[650] Patent and copy rights were dangerous devices which

[649] Christ University, Bangalore
[650] Cumbow, Robert, and Intellectual Property LAW: Use is the new protect ability, American Bar Association.

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pointed out incentive justification like monopoly should be diploid only when absolutely necessary in relation with public interest only.

Advocates, conversely, on behalf of private justification argued that the extension of intellectual property rights was necessary to give the existing copy rights owners were incentive to preserve any artistic or literary work which they have already created. Lemley then identified that even as the development of modern capitalism started to expand its logical marketization. Hence intellectual property has intentionally or unintentionally always being related to one or the other form of public policy.

In 1781, in the first infringement case related to patent for methodology of spinning cotton, the court invalidated the patent because of the non-disclosing of his invention as the petitioner has decided to hide and secret it from others. He then sued his neighbour for alleged patent infringement. In the neighbours defence questioning whether a competent person could built the machine based on the patents specification and the case tilted in favour of the petitioner with the original patent right. This judgement reflected the continuing assumptions of that rights must be granted of privileges but also with recognised rules against monopoly.

INTELLLECTUAL PROPERTY: JUSTIFICATION

Property In real sense is a codification of social relation between owners and non-owners considered as a bundle of owners' rights. It also is a "commodity fiction" used in transformation from feudalism to capitalism. To justify the above, we need to understand with the "Dawn Donut rule" arising from the Dawn Donut Company[651] deriving ownership rights sufficiently that the person or business adopts a mark to utilise during promotion, distribution and other administrative function of for sale of its good or service. These identification marks help in perceiving, capable of functioning and bridging the gap between the manufacturer and consumer as these marks act as reserves which help in distinguishing it from other competitive products in the market. Hence this branding helps in reaching the competitive edge.

COUNTERFEITING PRODUCTS

Amongst various most common shopping hotspots around the world, Canal Street in New York City, Chinatown is an attraction for tourists as well as localities for its purchase and sale of fake merchandise. Since, selling of imitations is illegal, most vendors whisper brand names like Louis Viton, Prada etc., close to the customers and wait for them to respond to the same. On a positive respond, the customers are taken to back rooms where all the merchandises are displayed. Despite the secret operations and missions taken up by the New York Police Department, which indicates the seriousness of this crime, "this centre of down-and-dirty capitalist grit cannot be completely cleaned."

[651] Dawn Donut Company, Inc. v. Hart's Food Stores, Inc., 267F.2d 358.

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This manufacturing and selling counterfeit product is illegal because it is a violation of Trademark and Copyright protection. A Trademark protection is a company's logo, symbol, design or anything which enables the public to differentiate and identify the source or brand and quality of the merchandise. Also, helps in providing a competitive edge and unique recognition amongst the other competitive products.

Copyright protection on the other hand, is right vested on original owner or the industrial owner. The difference between the two is mentioned in Section 17 of the Indian Copyrights Act, focuses and differentiates between original owner and industrial owner. On interpretation, the Section explains the concept of industrial owner which comes into existence when more numbers of humans= beings are actually included, evolved and contributed in, then ne industrial owner will be considered as an owner for the entire intellectual property. It is this person who has to bear the financial burdens and further legal proceedings related to the registration, renewal and so on.

FASHION AND DIFFERENTIATION

The main purpose of differentiation from the rival goods in a competitive market by means for brands, trademarks, distinctive styles etc., so that sellers try to sell more than their rivals. An exclusivity of product by the economic means of brand; distinguished a particular product in the minds of the buyers and helps in creates loyalty in the producers as well as generates a speciality which is relatively free from the comparative judgement of the quantity, quality, durability and price. Hence, fashion is a monopoly element.

A firm is considered as a monopoly if it is the sole seller of its and its products and the products don't have any close substitutes. The characteristics of a monopoly market that: they have strict barriers for entry and hence can raise the price value according to their vims and fancies. This helps the company/ firm to gulp maximum profits and are considered as price makers of the market.

Monopolistic competition is a hybrid of monopoly and competition.[652] It is a strategy accepted and applied by almost all countries irrespective of the ideology they have been adapted and been following. In these governments, the monopolies arise because the government delegates the power and authority to a particular public or private entity with an exclusive right manufacture and sell the good or service. The same is applied in Intellectual Property Rights. In the fashion industry, when Raj Jewellers in their new season arrival register their original and unique design under the Designs Act, which gives the company the exclusive right to manufacture and sell that style for assigned years. Likewise, when an author finishes and publishes his book, she can copyright it. This is government guaranteed that no one can print and sell the same without the author's permission. Because these laws give one producer a monopoly, they lead to higher prices than would occur under competition. But by allowing monopolistic competition, the producer receives monopoly profits and as long as the new fashion remains exclusive, its seller

[652] Gregory Mankiw, Principles of Economics, 19TH Edition.

can obtain profits of innovation. To enjoy the same, the price, also called monopoly price is shot as a high as possible. Which gradually are diluted to imitations and counterfeiting products in the market. It is this "creation" which has been exploited and when the government does regulate the same property rights provided to individuals for protecting intellect, the public policy is exploited.

Initially, the fashion changes imply absence of genuine or workable competition. If there were with stable competition. then would take the form of price cuts or improved quality or both; sellers would charge less for the same product or would sell a better or more durable version of the products for the same price and all the selling rivalry would be reduced to a price competition. 'PRICE COMPETITION' also known as quality completion in the fashion industry, the goods are really to attempt to stimulate sales without reducing prices and without improving the product. “NEW" in fashion is minimal change in the existing or previously styled products, which can change the mind of the buyer. One of the tricks used in fashion are the designers, is bringing seldom changes in the style, making the customer dissatisfied with her existing wardrobe, and therefore, prematurely obsolete. As previously mentioned, to create a specialty which will not have a host of competition to share in the profits of monopoly or share in the profits of the monopoly or profits on innovation.

WHY DESIGNERS PREFER ENJOING MONOPOLY ON A SHORT-RUN ONLY?

The reason behind why designers mostly do not utilize the Monopoly market in the market under copyrights and designs is because fashion is why dynamic in nature. It changes from season to season, related to oligopoly, for when the producers are in fear that their rivals' retaliation will cause a price war, hence, the style rivalry replaces the price-cutting, thus fashion is employing to avoid price competition. Which is also a variant of monopolistic competition and oligopoly. This occurs due to the stringent policy and laws established by the State. Ironically, the State solely must work for the welfare of the people.

For the enjoyment of the said rights provided by the government, one must follow the said procedure for registration. Which takes about 6 months initial months of inspection in copyright and designs mentioned in their respective Acts and for the rest it is uncertain. Since, fashion is extremely dynamic in nature the style cannot be awaited, and once the Right is provided to individual by the government to enjoy the monopolistic competition, it is too late. [653]

REGULATORY SYSTEM OF CURRENCIES IN INDIA

The Department of Currency Management is given the powers and duties regarding the administration and functioning of currency management which is the core function of the Reserve Bank of India. It mainly emphasises on issuing notes and coins and retrieval of unfit notes from circulation. The currency management infrastructure follows the hub-and-spoke rule

[653] P.M. Gregory, “The Theory of Purposeful Obsolescence, ’Southern Economics Journal, XIV, 4-55.

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for distribution of bank notes across the country. This rule processes fresh notes to the highly recognised and identified hubs in the country, and these chests further act like spokes in the distribution plan. Currency chest was incorporate for easy and simple management of currency. And because of their stringent rules and inception, currency chests have been managed by public sector banks as well as private sector banks. Institutions like- HDFC Banks, other Foreign Banks, etc, have been a part of the currency chest.

Section 489 (B) of the Indian Penal Code, 1860, provides that-

Using a genuine, forged or counterfeit currency-notes or bank notes:

''Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.''

The Punishment for the same is mentioned in Schedule 1 of CrPC with imprisonment for life or 10 years with or without fine which is cognisable and non-bailable.

Compared to that of the punishments claimed under the IPR regulations

Section 55 of Indian Copyright Act, 2012, provides for civil remedies against counterfeiting in copyright by the way of either damages compensating the loss due to infringement and /or injunction prohibiting person infringement from continuing to infringe the copyright.

Apart from this, Section 64 empowers police to seize all counterfeit copies and imprisonment for the same is mentioned in Section 63- for three years imprisonment and up to 2 lakh rupees fine only.

Trademark on the other hand, provides protection not only for trademarks but for passing off as well and the punishment for the same is three years of imprisonment and up to two lakhs rupees fine.

Section 135- provides for civil remedies in case of either infringement or' or passing off which included injunction, damages, delivery up and rendition of accounts.

Section 103 empowers punishment for using terms which are "falsification" and "false application" of trademark and the punishment for the same is not more than three years and fine up to two lakh rupees only.

Hence, a clear reason for an unaccomplished and not-so-looked-up-to legislative and administrative framework of IPR in India. The seriousness and punishment degree explains the problem for itself.

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CONCLUSION

Second-hand goods have been a threat to the prevailing automobile industry from the early eras of its advent. Similar to the practice of fake currency notes and the counterfeiting products in the fashion industry. The two main recommendations which can be derived from the issues raised are firstly, to curb the monopolistic competition graph and put a cap or calculate the maximum monopoly price these companies enjoying the Intellectual property Rights. As this can only be one of the effective measures taken by the government which would have a nudging effect on the fashion Industry and economy as a whole. These calculations must be made on the basis of the costs and expenses incurred by the company in manufacturing the products individualizing.

Secondly, by applying the Marginal deterrence theory in the offences and punishments, the crime rates increase is because of the degree of punishment offered by the government or the judiciary under the statue. Since, the punishment is very minimal as compared to the benefit derived from the offence, the offenders are benefitted out of the same and now have an incentive to commit the offence rather than the fear of getting punished for the same.

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CIRCUMCISION OF MALE AND FEMALE GENITAL MUTILATION – VIOLATION OF FUNDAMENTAL RIGHTS

- *Mahima Chhabria*[654]

ABSTRACT

Male circumcision and female feticide have been controversial topics since a long time as it touches on cultural and religious convictions. These practices have been followed and are still being followed in many places of the world. Male circumcision has been a controversial topic because it touches on strong cultural, religious, theological, and philosophical convictions. It is probably the most commonly performed surgical procedure worldwide. Male circumcision is basically to cut the protecting loose skin off a boy's penis, for medical, traditional, or religious reasons.[655] Each year around 13.3 million boys are circumcised. There are many reasons why this practice is followed. Reasons to perform male circumcision are of a medical therapeutic, hygienic-preventive, religious, or cultural nature. Especially, the practices of hygienic preventive and religious male circumcision are subjects of debate. In various countries, there are ongoing discussions about the medical and religious legitimization and moral acceptability of male circumcision. Critics even plea for a ban on nontherapeutic circumcisions. The bioethical dimension is complex.

Female genital mutilation (FGM) comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. The practice is mostly carried out by traditional circumcisers, who often play other central roles in communities, such as attending childbirths. In many settings, health care providers perform female genital mutilation due to the erroneous belief that the procedure is safer when medicalized.[656]

Global efforts to end female genital mutilation (FGM) have intensified in recent decades because of the rising awareness that such a practice is an act of extreme violence against women and

[654] School of Law, Christ University, Bangalore
[655] https://dictionary.cambridge.org/dictionary/english/circumcise
[656] http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

girls.[657] More than 200 million women and girls alive today have been victims of female genital mutilation (FGM) in Africa, the Middle East, and Asia.[658]

LITERACTURE REVIEW

- The medical benefits of male circumcision[659]- This article provides an analysis of male circumcision as a violation of a man's fundamental rights. It focuses on the medical benefits of male circumcision and states about the risks of HIV. It also talks about the different procedures and trials followed in different countries around the world. Opponents of male circumcision argue that the procedure constitutes genital mutilation performed with parental consent but not the infant's assent and recommend that male circumcision be delayed until 18 years of age when the man can provide individual informed consent to the procedure.

- Circumcision: a surgeon's perspective[660]- This article endeavors to answer questions based on the ethical aspect of male circumcision. The article explains what circumcision is and the logic behind the performance of this act. It states that this procedure has been followed for medical and religious practices. The most fundamental principle of surgery is that no operation should be done if there is no disease, as it cannot be justified if the risk of the procedure is not balanced by the risk of a disease.

- Male Circumcision and the Rights of the Child[661]- This article provides information on female genital mutilation as a very harmful process and also talks about the UN Convention on the rights of the child. It revolves around the history, prevalence and the religious and non- religious reasons for circumcision. The article states about the rights of the child in general as it is against the fundamental rights of a person to be forced into doing something they don't want to.

- Female Genital Cutting: A Persisting Practice[662]- More than 130 million women worldwide have undergone female genital cutting (FGC). FGC occurs in parts of Africa and Asia, in societies with various cultures and religions. Reasons for the continuing practice of FGC include rite of passage, preserving chastity, ensuring marriageability, and religion, hygiene, improving fertility, and enhancing sexual pleasure for men. The article gives us the statistics of the practice and the countries where they are followed and the procedure.

[657] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5052514/
[658] UNICEF. Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change. New York: UNICEF; 2013.
[659] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684945/
[660] https://jme.bmj.com/content/30/3/238
[661] http://www.cirp.org/library/legal/smith/
[662] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582648/

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- Circumcision: a surgeon's perspective : [663]Female genital cutting (FGC), also known as female circumcision or female genital mutilation, is an ancient practice that predates the Abrahamic religions. Fraught with medical, legal, and bioethical debates, FGC is practiced in 28 African countries and some countries in Asia. In 1997, the World Health Organization (WHO), United Nations Children's Fund, and United Nations Population Fund issued a joint statement that defined FGC as "all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons

- On the research and training aspects, journals, such as the BJOG: An International Journal of Obstetrics and Gynaecology amongst others, have substantially contributed to the publication of FGM-related articles. Many of these articles are aimed at medical professionals and provide recommendations on how to manage victims of the practice. The UN has also developed a special program of research, development, and research training in human reproduction (HRP), first established in 1972, that addresses priorities for research to improve sexual and reproductive health[664]

RESEARCH QUESTION

- What is male circumcision and what are its religious aspects?
- Why is there a need for female genital mutilation when there are no health benefits?
- How are they violating our fundamental rights?

RESEARCH METHODOLOGY

The author has used the Doctrinal method of research as there was enough information available in books and articles that empirical type of research was not needed. The empirical research methodology would create awareness among people and the author could get a statistics about how much the people know on the topic but due to paucity of time, it was not possible and so the doctrinal method was followed. The author has put in efforts and has done the best in writing the paper using the doctrinal method of research.

FINDINGS

Religious male circumcision generally occurs shortly after birth, during childhood or around puberty as part of a rite of passage. Circumcision is most prevalent in the religions of Judaism, Islam, Coptic Christianity, Ethiopian Orthodox Church and Eritrean Orthodox Church. While the

[663] https://jme.bmj.com/content/30/3/238
[664] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5052514/

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Catholic Church has condemned religious circumcision for its members, and currently maintains a neutral position on the practice of non-religious circumcision, Coptic Christianity and Ethiopian Orthodoxy and Eritrean Orthodoxy still observe male circumcision and practice circumcision as a rite of passage.[665]It is practiced within the Muslim population in India. Hodges argues that in Ancient Greece the foreskin was valued and that Greek and Roman attempts to abolish ritual circumcision were prompted by humanitarian concerns.

Male circumcision practiced as a religious rite is found in texts of the Hebrew Bible, as part of the Abrahamic covenant, such as in Genesis 17, and is therefore practiced by Jews, Muslims, and some Christians, who constitute the Abrahamic religions. Some rabbinical sources indicate that even before the covenant of Abraham, the aposthia of Shem may have been an inspiration for circumcision; although the aposthia of Shem is not specifically mentioned in the Genesis text.

IN THE HEBREW BIBLE

There are numerous references to circumcision in the Hebrew Bible. Circumcision was enjoined upon the biblical patriarch Abraham, his descendants and their slaves as "a token of the covenant" concluded with him by God for all generations, an "everlasting covenant" (Genesis 17:13), thus it is commonly observed by two ,Judaism and Islam of the Abrahamic religions.

The penalty of non-observance was kareth, spiritual excision from the people (Genesis 17:10-14, 21:4; Lev 12:3). Non-Israelites had to undergo circumcision before they could be allowed to take part in the feast of Passover (Exodus 12:48). Mosaic Law directed at non-Jews and Conversion to Judaism.

The Bible contains several narratives in which circumcision is mentioned. There is the circumcision and massacre of the Shechemites (Genesis 34:1-35:5), the hundred foreskin dowry (1 Samuel 18:25-27) and the story of the Lord threatening to kill Moses, and being placated by Zipporah's circumcision of their son (Exodus 4:24-26), and the circumcision at Gilgal of Joshua.

There is another sense in which the term "circumcise" is used in the Bible. Deut 10:16 says: "Circumcise the foreskin of your heart," (also quoted in Jer 4:4, New JPS translates as: "Cut away, therefore, the thickening about your hearts") along with Jer 6:10: To whom shall I speak, and give warning, that they may hear? Behold their ear is uncircumcised, and they cannot hearken: . Jer 9:25-26 says that circumcised and uncircumcised will be punished alike by the Lord; for "all the nations are uncircumcised, and all the house of Israel are uncircumcised in heart." The New JPS translation adds the note: "uncircumcised of heart: I.e., their minds are blocked to God's commandments." Non-Jewish tribes that practiced circumcision were described as being "circumcised in un-circumcision."(Jeremiah 9:24)

IN RABBINIC LITERATURE

[665] Van Doorn-Harder, Nelly (2006). "Christianity: Coptic Christianity". Worldmark Encyclopedia of Religious Practices.

During the Babylonian exile, Sabbath and circumcision became the characteristic symbols of the Jewish people. However, the Talmud orders that a boy must not be circumcised if he had two brothers, from the same mother as him, who have died as a result of their circumcisions, this may be due to a concern about hemophilia.[666]

Around 140 CE Rabbinic Judaism made its circumcision requirements stricter. Jewish circumcision includes the removal of the inner prenuptial epithelium, in a procedure that is called priah, which means: 'uncovering'. This epithelium is also removed on modern medical circumcisions, to prevent post-operative penile adhesion and its complications. According to rabbinic interpretation of the traditional Jewish sources, the priah has been performed, as part of Jewish circumcision, since the Israelites first inhabited the Land of Israel, and without it the mitzvah isn't performed at all. However, the editors of the Oxford Dictionary of the Jewish Religion, note that priah was probably added by the rabbis, in order to "prevent the possibility of obliterating the traces of circumcision". Jewish law states that circumcision is a mitzva aseh ("positive commandment" to perform an act) and is obligatory for Jewish-born males and for non-circumcised Jewish male converts. It is only postponed or abrogated in the case of threat to the life or health of the child.

Subject to overriding medical considerations, the circumcision must take place eight days after the birth of the child, even when this falls on Shabbat.The child must be medically fit for a circumcision to be performed, and Jewish law prohibits parents having their son circumcised if medical doctors hold that the procedure may unduly threaten the child's health (e.g. because of hemophilia). If by reason of the child's debility or sickness the ceremony is postponed, it cannot take place on Shabbat.

It is the duty of the father to have his child circumcised; and if he fails in this, the beth din of the city must see that the rite is performed. According to traditional Jewish law, in the absence of a grown free Jewish male expert, a woman, a slave, or a child, that has the required skills, is also authorized to perform the circumcision, provided that she or he is Jewish.

However important it may be, circumcision is not a sacrament, unlike a Christian baptism. Circumcision does not affect a Jew's Jewish status. A Jew by birth is a full Jew, even if not circumcised. Even so, the punishment for not being circumcised in rabbinic Judaism is believed to be "Karet", being cut off; meaning premature death at the hand of G-d and a severe spiritual punishment, the "soul's being cut off," and not being granted a share in the world to come[667]

FEMALE GENITAL MUTILATION

[666] This article incorporates text from a publication now in the public domain: Singer, Isidore; et al., eds. (1901–1906). "Morbidity". Jewish Encyclopedia. New York: Funk & Wagnalls Company.
[667] https://www.myjewishlearning.com/article/rabbinic-sources-on-circumcision/

Female Genital Mutilation (FGM) comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.

The practice is mostly carried out by traditional circumcisers, who often play other central roles in communities, such as attending childbirths. In many settings, health care providers perform FGM due to the erroneous belief that the procedure is safer when medicalized1. WHO strongly urges health professionals not to perform such procedures.

FGM is recognized internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women. It is nearly always carried out on minors and is a violation of the rights of children. The practice also violates a person's rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death.[668]

Types of female genital mutilation

Female genital mutilation is classified into 4 major types.

Type 1: Often referred to as clitoridectomy, this is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).

Type 2: Often referred to as excision, this is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).

Type 3: Often referred to as infibulations, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy).

Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

Deinfibulation refers to the practice of cutting open the sealed vaginal opening in a woman who has been infibulated, which is often necessary for improving health and well-being as well as to allow intercourse or to facilitate childbirth.

FGM has no health benefits, and it harms girls and women in many ways. It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions

[668] http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

of girls' and women's bodies. Generally speaking, risks increase with increasing severity of the procedure. Immediate complications can include: severe pain, excessive bleeding (hemorrhage), genital tissue swelling, fever, infections e.g., tetanus, urinary problems, death. It has long time effects too which are not good for the health of females. There is no necessity of performing this practice. It is only followed due to cultural reasons.

The reasons why female genital mutilations are performed vary from one region to another as well as over time, and include a mix of sociocultural factors within families and communities. The most commonly cited reasons are:

- Where FGM is a social convention (social norm), the social pressure to conform to what others do and have been doing, as well as the need to be accepted socially and the fear of being rejected by the community, are strong motivations to perpetuate the practice. In some communities, FGM is almost universally performed and unquestioned.
- FGM is often considered a necessary part of raising a girl, and a way to prepare her for adulthood and marriage.
- FGM is often motivated by beliefs about what is considered acceptable sexual behavior. It aims to ensure premarital virginity and marital fidelity. FGM is in many communities believed to reduce a woman's libido and therefore believed to help her resist extramarital sexual acts.
- In some societies, recent adoption of the practice is linked to copying the traditions of neighboring groups. Sometimes it has started as part of a wider religious or traditional revival movement.[669]

Circumcision, whether male or female is a violation of the fundamental rights of a person. No one should be forced to get circumcised if they don't want to. The consent has to be taken no matter what. These are religious practices that have been practiced since time immemorial and the people who follow this are so staunch that can't take a ban on it.

These practices are in violation of the golden triangle i.e. Article 14, 19 and 21.

Article 14 of the Constitution of India provides for equality before the law or equal protection within the territory of India. The State shall not deny to any person equality before the law or equal protection of law within the territory of India

Article 19 provides everyone the freedom of speech. It provides that everyone has the right to express how they feel and they have a right to raise their own opinion.

Article 21 is the right to life. Every person has the right to live his life with dignity. Now, these rights are violated when someone is forced to be circumcised. Consent is one major element. Female Genital Mutilation doesn't have health benefits what so ever and male circumcision

[669] https://www.ippf.org/blogs/female-genital-mutilation-fgm-human-rights-violation

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doesn't too. In 2008, the World Health Assembly passed resolution WHA61.16 on the elimination of FGM, emphasizing the need for concerted action in all sectors - health, education, finance, justice and women's affairs.

WHO efforts to eliminate female genital mutilation focus on:

- strengthening the health sector response: guidelines, tools, training and policy to ensure that health professionals can provide medical care and counselling to girls and women living with FGM;
- building evidence: generating knowledge about the causes and consequences of the practice, including why health care professionals carry out procedures, how to eliminate it, and how to care for those who have experienced FGM;
- Increasing advocacy: developing publications and advocacy tools for international, regional and local efforts to end FGM within a generation.

CONCLUSION

Male circumcision and female genital mutilation are controversial subjects. The debate about the medical, moral, theological, legal, and cultural justifications for circumcision is still going on. In this debate, there appears to be a tension between (1) general abstract principles such as individual autonomy, self-determination, the child's right on an open future, and bodily integrity, (2) evidence based medicine that inspired scientific findings about harms and benefits, (3) cultural considerations, and (4) practical and individual circumstances such as conscientious objection in a clinical context. In the current debate about the pros and cons of RNC, proponents focus on medical-scientific arguments and considerations about evidence based medicine, while opponents base their view predominantly on moral notions and principles such as children's and parents' rights and bodily integrity. It is important to realize, however, that scientific arguments are also based on moral arguments and that moral arguments cannot be considered separately from scientific reasoning. The practice is also encountered in Europe and North America mostly in immigrant communities from countries where the prevalence is high. The battle against this phenomenon has been enhanced by two complementary movements: first, the development of human, child, and women's rights (with the Convention on the Right of the Child, Convention on All Forms of Discrimination against Women, and the Declaration on the Elimination of Violence against Women); and second, the growing interest in reproductive health, and maternal and neonatal mortality.[670]

[670] World Health Organization. Sexual and reproductive health. Available from: http://www.who.int/reproductivehealth/about_us/en/ [cited 6 May 2014]

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CASE COMMENT ON SHAYARA BANO V. UNION OF INDIA[671]

- *Krishankant Sharma[672] & Shraddha Saxena[673]*

"Obscurity in thought inexorably leads to obscurity in language."

- *Lord Denning*

Talaq the urdu terminology from which every individual is aware of, its meaning in lay man term can be defined as 'separation between husband and wife after which their matrimonial relationship cease to be exist'. The divorce are present in every religious sect of India talking from Hindu, Muslim to Parsi , Jews . Each sect has their own law to govern the marriages and its rights and duties. Muslim sect too have their own Shariat law to govern marriage in their community. 'talaq-e-biddat' is the word present in Muslim marriage law 'the shariat act' which provides divorce to wife by his husband . there are many cases happened which dealt with above mentioned provision but first time in the history of india a challenging case come to supreme court of our nation and that was known as Shayara Bano v. Union of India.

THE BRIEF FACTS OF THE CASE

The petitioner-Shayara Bano, has approached Supreme Court of India for assailing the divorce pronounced by her husband – Rizwan Ahmad on 10.10.2015, wherein he affirmed "…in the presence of witnesses saying that I gave 'talak, talak, talak', hence like this I divorce from you from my wife. From this date there is no relation of husband and wife. From today I am 'haraam', and I have become 'naamharram'. In future you are free for using your life …". The aforesaid divorce was pronounced before Mohammed Yaseen (son of Abdul Majeed) and Ayaaz Ahmad (son of Ityaz Hussain) – the two witnesses.

The petitioner has sought a declaration, that the 'talaq-e-biddat' pronounced by her husband on 10.10.2015 be declared as void ab initio. It is also her contention, that such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as, the Shariat Act), be declared 4 unconstitutional.

[671] (2017) 9 SCC 1, 22-08-2017
[672] 2nd Year BA.LL.B (H); Jagarn Lakecity University, Bhopal
[673] 2nd Year BA.LL.B (H); Jagarn Lakecity University, Bhopal

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The 'talaq-e-biddat' (-triple talaq), pronounced by her husband is not valid, as it is not a part of 'Shariat' (Muslim 'personal law'). It is also the petitioner's case, that divorce of the instant nature, cannot be treated as "rule of decision" under the Shariat Act. It was also submitted, that the practice of 'talaq-e-biddat' is violative of the fundamental rights guaranteed to citizens in India, under Articles 14, 15 and 21 of the Constitution. It is also the petitioner's case, that the practice of 'talaq-e-biddat' cannot be protected under the rights granted to religious denominations (-or any sections thereof) under Articles 25(1), 26(b) and 29 of the Constitution. That the practice of 'talaq-e-biddat' is denounced internationally, and further, a large number of Muslim theocratic countries have forbidden the practice of 'talaq-e-biddat', and as such, the same cannot be considered sacrosanct to the tenets of the Muslim religion.

It is the case of the respondent–husband that the petitioner-wife, left her matrimonial home on 9.4.2015 in the company of her children – Mohammed Irfan and Umaira Naaz, to live in her parental home. The respondent claims, that he continued to visit the petitioner, for giving her maintenance, and for enquiring about her well being. When the husband met the wife at her parental home in May and June 2015, she refused to accompany him, and therefore, refused to return to the matrimonial home. Rizwan Ahmad, asked the father of Shayara Bano to send her back to her matrimonial home. He was informed by her father, after a few days, that the petitioner was not inclined to live with the respondent.

On 07.07.2015 the father of the petitioner, brought the two children – Mohammed Irfan and Umaira Naaz to Allahabad. The husband submits, that both the children have thereafter been in his care and custody, at Allahabad. It is the assertion of the husband, that the petitioner's father had given him the impression, that the petitioner would be inclined to return to Allahabad, consequent upon the husband's care and custody of both children, at the matrimonial home.

It is claimed by the respondent-husband, that he made another attempt to bring back the petitioner-wife from her parental home, but Shayara Bano refused to accompany him. Rizwan Ahmad was opposed in the above endeavour, both by the petitioner's father and her maternal uncle. Finding himself in the above predicament, Rizwan Ahmad approached the Court of the Principal Judge, Family Court at Allahabad, Uttar Pradesh, by preferring Matrimonial Case with a prayer for restitution of conjugal rights. It is the case of the respondent-Rizwan Ahmad, that in view of the above averments of the petitioner-Shayara Bano, he felt that his wife was not ready for reconciliation, and therefore, he withdrew the suit (-for restitution of conjugal rights), preferred by him at Allahabad, and divorced the petitioner-Shayara Bano, by serving upon her a 'talaq-nama' (deed of divorce).

Based on the above, the case of the respondent-husband is, that he had pronounced 'talaq' in consonance with the prevalent and valid mode of dissolution of Muslim marriages.

the pronouncement of divorce by him, fulfils all the requirements of a valid divorce, under the Hanafi sect of Sunni Muslims, and is in consonance with 'Shariat' (Muslim 'personal law'). 9. It

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is also the submission of the respondent-husband, that the present writ petition filed by the petitioner-wife under 11 Article 32 of the Constitution of India, is not maintainable, as the questions raised in the petition are not justifiable under Article 32 of the Constitution.

Keeping in view the factual aspect in the present case, as also, the complicated questions that arise for consideration in this case (and, in the other connected cases), at the very outset, it was decided to limit the instant consideration, to 'talaq-e-biddat' – triple talaq. Other questions raised in the connected writ petitions, such as, polygamy and 'halala' (-and other allied matters), would be dealt with separately. The determination of the present controversy may however, coincidentally render an answer even to the connected issues.

The Supreme Court set aside the practice of instant triple talaq followed by Muslim community from very past, by a majority of 3:2. The main focus of the decision was on struggling fight for the status of women and gender equality in India from the time immemorial.

Muslim marriage (Niqah) is one of the few wedding ceremonies which is shorn of any religious prerequisite, and is in true sense Muslim marriage is a contract on comparing it with other religion in India it is unique. Uniqueness can be of any sense like from marrying to getting divorce.

Muslim community has three different ways to get separate. Every kind has given certain powers to men to lead the battle, whether pronouncing talaq-talaq-talaq or maintenance period.

Supreme court only set aside the instant triple talaq that is talaq-e-biddat :It is the most disapproved type of talaq, and before the pronouncement of judgment in Triple Talaq Case it is was viewed as Bad in religious philosophy, yet good in law.

It is a Talaq by development. It involves single permanent pronouncement of talaq, which rules out compromise and in this way is disapproved. This sort of separation left the wife totally helpless before the husband. This gave a one-sided power of divorce to Muslim male which could be practiced at his whims and fancies. The only plan of action accessible to resume marital relationship is Halala which includes marriage of the divorced wife with another and its consummation followed by divorce.

The inquiry as to legitimacy of Nikah Halala was additionally raised before the Supreme Court; however, it was not entertained by it. The Supreme Court in Triple Talaq Case concerned itself legitimacy of Instant Triple Talaq i.e. Talaq–e–biddat. The law of divorce whatever its utility during the past, was so interpreted at least in Hanafi School that it had become one sided engine of oppression in the hands of the husband.

The issues examined by the Apex Court in achieving the decision included:

- Does the act of Triple Talaq forms the part of personal law?

- Did the Muslim Personal Law (Shariat) Application Act, 1937 (Shariat Act) gives statutory status to the subjects managed by it?
- Whether Instant Triple Talaq was bad in religious philosophy and good in law?
- Regardless of whether Triple Talaq involved matter of faith and thus protected under Article 25 of the Constitution?

Answering these above mentioned questions, To freely profess, practice and propagate religion is one's choice is fundamental right which is only subject to public policy, health, morality and other provisions of part 3 dealing with fundamental rights hence "Justice Kurian Joseph point out that the Constitution also says to leave personal laws and customs alone. Yes, the Constitution says we will preserve your religion, whatever it is." In this context it is important to remind ourselves of some previous rulings of the Hon"ble Supreme Court. "In a decision of the case Krishna Singh vs Mathura Ahir[674], SC held "Part III of the Indian Constitution does not touch upon the personal laws of the parties."

The Court analyzed and tested the complex connection between the Constitution and Religion and find out following answers. The inquiry in the matter of whether personal law will be law within the meaning of Article 13 could have been managed in more noteworthy detail.

This question opened the closed chapters of books, there were some interesting judgments which held; that personal law are uncodified, at least not to be 'law' within the ambit of Article 13 and succession , excluded from constitutional inspection. Thus the issues turns out to be very vital in the light of the fact that regardless of regardless of one's personal thinking about Personal laws as fundamental rights as enshrined and guaranteed under Article 257 of the Constitution the same is subject to different provisions of part III of the Constitution.

As things stand today Shariat Act does not control Talaq in India, thus Shariat Act has not codified the practices governed by it rather Shariat Act is rule of decision in contentious issues in Muslim Law including matter of Talaq. It is an act to nullify, inhuman practices and traditions against Muslim women.

Emphasizing the importance of plural cultures, the Hon'ble Judge said, "For India to thrive as a vibrant multicultural society, cultures must be preserved for that is the very essence of India."

The Supreme Court examined and referred to plenty of cases to decide the legibility and sanctity of Instant Triple Talaq; the two most involved judgments which set forward the combative view point are that of The Privy Council in Rashid Ahmed v. Anisa Khatun[675] , In this case the husband divorced his wife via talaq e biddat under undue influence, but then after sometime resumed cohabitation without marrying her again. After his death the wife and child claimed the

[674] 1980 AIR 707, 1980 SCR (2) 660
[675] (1932) 34 BOMLR 475.

property but the court clearly held the practice of Instant Triple Talaq in Muslim personal law to be legitimate. For this particular case the Privy Council held the triple talaq to be final and irrevocable even after the couple had lived together for a long time after pronouncement of talaq. Hence Supreme Court considered this case as a major precedent and analyzed that there the right of her widowed wife was infringed.

For the even- odd condition the supreme court for the opposite view in connection to triple talaq's legitimacy considered the case of Jiauddin Ahmed v. Anwara Begum (Jiauddin)[676] in this case the wife left her husband alleging torture, was granted maintenance by magistrate court .the husband appealed in the high court alleging that he has divorced her earlier, the Guwahati High Court held that the perception made in previous cases in regards to Instant Triple Talaq, that is, bad in philosophy, good in law depended on wrong ground the same being regarding women as chattel having a place with husband.

The question arises now Whether Instant Triple Talaq was bad in religious philosophy and good in law?

It is true that customary practices divergent from values and principles of Quran have emerged and triple talaq is one of them. Though practiced it is supposed to be sinful by the Hanafi School of Islamic thought. The practice is manifestly arbitrary since it breaks the marital bond capriciously and whimsically without any attempt at reconciliation. Running against the spirit of the institution of marriage, the practice of triple-talaq is also violative of the very sanctity of the original concept of talaq in Islam. Therefore, what is bad in the Scriptures cannot be good in Sharia and in that sense what is bad in theology is bad in law as well. Justice Nariman in his judgment had said, “this form of talaq must, therefore, be held to be violative of the fundamental rights contained under Article 14 of the Indian Constitution.

If personal laws are brought under scrutiny under Article 13 of the Indian Constitution then Article 25 (Right to freedom of Religion) of the same would be rendered redundant

ANALYSIS

After a deep study of this judgment we would like to quote Flavia Agnes words on triple talaq a “low hanging fruit”.

Shayara Bano’s case was important not just for how the Court decided her immediate claims, but also because it offered an opportunity for a five-judge bench of the Supreme Court to clarify the constitutional status of personal law.

The Supreme Courts‟ verdict on this issue of triple-talaq clearly exposes the need for social reforms within the community. It should be borne in mind that Islam is not responsible for the fact that the concept of triple talaq is abused or misused by members of the Muslim community.

[676] LNIND 2007 Bom 61.

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We, The People of India, exist as a collective because of faith. Without this faith, there is no fidelity to the Constitution. And faith depends on the redemption of the constitutional project, the inherent belief that our laws will govern equally, will defend the people of this republic from the state, and above all make justice a possibility no matter what gods we pray to, whom we choose to love and how. In pursuit of that redemption, we have a long road ahead.

The problem of justice is primordial and its search for equality and freedom remain elusive.

CONCLUSION

The decision came by Supreme Court on 22nd august 2017 in case of Shayara Bano v. Union of India was welcomed in whole nation. the Five male judges analyzing arcane questions of constitutional law had an opportunity to rise above the politics and religion and to speak with one voice in a way that would provide true justice for Muslim women and finally it happened the song of justice flown in every corner of nation especially in our Muslim community women , the wives of relief can be seen in the face of our Muslim women which shows that now they can protect themselves from the simple three terms talaq-talaq-talaq which are usually spoken by their husband without seeing the consequences after that utterance.

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AN ECONOMIC ANALYSIS OF THE EFFICIENCY AND FUNCTIONING OF JUDICIAL ACTIVISM (PILs) IN INDIA

- ***Sonali Sachdeva***[677]
-

INTRODUCTION

"A little incursion into law-making interstitially, as Holmes put it, may be permissible."[678]

It is from this concept that judicial activism emanated and found expression through judgments of 'activist' judges. The Indian judges have taken upon themselves the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the legislature to work for public good.[679] One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but also to mould it according to the passion for social justice.[680]

It has been argued that 'Judicial Activism', by the Hon'ble Supreme Court in particular, has been substituted for the improper functioning of the executive and the legislature. The matters include environmental protection, human rights, fundamental rights, public welfare rights, compensation for the victims, etc. Such a 'Constitutional coup' where one institution (judiciary) replaces the other (the legislative and the executive), is arguably against the doctrine of separation of powers or minimization of the 'transaction costs'.

The researcher will discuss how the judiciary in India has played an active role in guaranteeing various welfare rights to the public at large. Judicial activism in the form of Public Interest Litigation (PIL) has made easy-accessibility to justice in every corner of the society. It will show how the judiciary has stepped in whenever the legislative and the executive failed or lacked in ensuring the public welfare rights in the society. This constitutional entrenchment of public welfare rights through the process of judicial activism is a success. However, the integrity of the separation of powers along with a proper, balanced spending of the State funds has to be

[677] B.A. LL.B
[678] Justice BN Srikrishna, 'Highways and Bye-Lanes of Justice' (2005) 8 SCC (J) 3
[679] Arpita Saha, 'Judicial Activism In India: A Necessary Evil' (2008) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979&http:%3E/)
[680] Sukh Dass v Union Territory of Arunachal Pradesh AIR 1986 SC 991; Sheela Barse v Union of India AIR 1986 SC 1773.

maintained and justified in an economic framework, especially in a developing country like India.

TOOLS USED FOR ECONOMIC ANALYSIS OF JUDICIAL ACTIVISM

TRANSACTION COSTS

The Transaction Costs approach was first designed by economist, Ronald Coase as part of the theory of the institutional structure (firm) and functioning of the economy. According to him, transaction cost is the mandatory consideration for the basic understanding of the working of an economic system and a fundamental basis for establishing an economic policy.[681] Transaction is whenever there is a transfer of any kind of goods and services between provider and user and the "cost of using the price mechanism" of such transaction to that transfer comprises transaction cost as per Coase, which is not only monetary but also in the form of resources, time, energy and other similar factors used by either party in the transaction.[682] As observed by Coase, transaction costs can be three types, viz. (a) search and information costs, (b) bargaining and decision costs, and (c) policing and enforcement costs.[683] Thus, all kinds of cost, not only monetary but also in terms of resources and other factors required in a particular transaction would comprise transaction costs. There is no singular definite definition of transaction costs but what is important to understand is that the transaction costs are dependent on the governance or structure of the transaction i.e. on how the transaction is conducted. Similarly, in the context of judicial activism, transaction costs are calculated on the cost of the price mechanism necessary for the processes. Transaction costs can be either internal to the organisation i.e. when it occurs within an organisation, costs include managing and monitoring personnel and procuring inputs; or transaction costs can be external to an organisation i.e. while buying from an external provider, costs will consist of source selection, contract management, and performance monitoring.[684] Judicial activism consists of both internal and external transaction costs.

PUBLIC GOODS AND EXTERNALITIES

At the microeconomic level, the two most important and controversial roles of the Government are: (a) providing public goods and (b) dealing with the market failure due to externalities.[685] Government interference is driven by the idea of the failure of marketplace to provide public

[681] Ronald H Coase, 'The Concise Encyclopaedia of Economics' (2008). http://www.econlib.org/library/Enc/bios/Coase.html>
[682] ibid.
[683] ibid (n 4).
[684] 'Transaction Cost Economics' http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR865/MR865.chap2.pdf>
[685] 'Public Goods' http://www2.pitt.edu/~upjecon/MCG/MICRO/GOVT/Pubgood.html>.

goods or handle externalities.[686] PIL, a mechanism by the judiciary to enforce public welfare rights can be said to be a pure public good. Pure public goods have two distinct characteristics:

1. 'Non- excludability' i.e. when goods are consumed by non-payers, they cannot be excluded from the benefits of the good of service and

2. 'Non-rivalrous consumption, that is, where goods may be consumed by many at the same time with no additional cost.[687] In the present scenario, the question arises whether the Government's mechanism of PILs in the judiciary to guarantee public welfare rights is a public good, rather public service or not? As already discussed above, PILs deal with issues that impact the public at large. The Government provides it in the service of the public. However, that alone doesn't mean that it becomes a public good in an economic context. To understand the same, one should analyse it with respect to the above-mentioned intrinsic features of public goods. It cannot be privately provided because if the Government attempted charging individuals for the enforcement of regulations and policies passed by the judiciary in PILs, thereby giving it the non-excludability angle, it gives rise to a free-rider problem. A free-rider problem is one where each person will seek to "free-ride" by allowing others to pay for the enforcement of the policies and regulations devised by the Courts in PILs, meant for the public at large. Similarly, charging certain individual or groups of individual for the effective implementation of those policies and excluding the ones who are unwilling to pay from the impact of such welfare policies, would not lead to maximization of the cost utility because the impact is so large that such exclusion is inefficient in the way that the non-payers could enjoy the welfare-impact without increasing the cost or reducing anyone's enjoyment resulting in non-rivalrous consumption. Thus, PILs can qualify as Public Goods. One classic example is the codification of rules and regulations on safety of women at workplace through the Sexual Harassment Act and Rules, 2013 laid down by the Indian Judiciary in the landmark judgment of Vishakha v. State of Rajasthan, [688] which was filed as a public interest litigation. So, in this case all the women at the work place benefit from the legislation, though they might not have made any kind contribution towards the codification of it.

Externalities exist whenever the benefit or cost of consuming goods impact individuals who are not actually consuming it and the relevant costs and benefits are not reflected in the market prices.[689] Externalities can be of two types: (a) Positive Externality[690] where one person gets benefit from the other person's actions, viz. benefits of cleaning up a polluted lake by its owner will be enjoyed by the people living in its vicinity and none of them can be charged for such

[686] Tyler Cowen, 'Public Goods and Externalities' http://www.econlib.org/library/Enc1/PublicGoodsandExternalities.html>
[687] ibid.

[688] Vishakha v State of Rajasthan AIR 1997 SC 3011
[689] Nick Sanders, 'A Brief Discussion of Public Goods and Externalities: Selected Topics from Chapter 15' http://njsanders.people.wm.edu/1A/Public_Goods.pdf>
[690] ibid

benefits while, (b) Negative Externality[691] is when one person's action causes harm to the other person, as in the Delhi Air Pollution case, which was again a PIL, where the factory owners did not consider the cost of harms caused due to pollution in the process of production which was much more than the tax they were paying for the pollution caused by the production. Positive Externality and Free-Rider Problem can be said to be the two different sides of the same coin.[692]

ANALYSIS OF JUDICIAL ACTIVISM IN INDIA

The transaction costs that arise while the Government implements the policies and decisions of the Judiciary in PILs to enforce certain rights of the public at large are utilized for the purpose of efficient functioning of the society. Thus, this leads to the presumption that in the absence of such transaction costs, the Government's act of implementing the policies will be redundant. In a system with separation of powers, the legislature has the role of creating the law and policy, while the executive executes them and the judiciary takes an interpretational approach to look into the validity of those laws and policies, and the loopholes and at the same time, assign liability if certain rights have not been attended or have been violated partially or fully. [693] But, very often, Governments rely on various power bodies like the bureaucracy while implementing the welfare policies and regulations that have come through judicial activism and have weak incentives to serve the consumers. Moreover, politicians may supply these "public services" guaranteed by such judicial activism to serve their own interests over the interests of the public when the government makes unnecessary expenses in the name of giving effect to a welfare policy given by a judiciary in a PIL matter and then, by compelling people to support projects they don't wish to, leading to the problem of "forced riders". All these put a huge question mark on the social as well as the economic (cost-effectiveness) impact of judicial activism through PILs in India.

SOCIOLOGICAL IMPACT OF PILs

A question that arises is whether judicial activism in the form of PIL and the actions of the Indian Judiciary in the arena of public welfare rights have effectively guaranteed these rights in the cases where the court intervened. The evidence in that respect is not overwhelming.

On the one hand, the possibility of a court to intervene in these cases is of course inherently limited by the fact that the court acts in individual cases only and does not have the same authority as the legislature or administrative authority to regulate the public welfare rights more generally. Therefore, the court cannot stop entirely the infringement of these rights or government lawlessness. Its actions in these areas are bound to be symbolic. There is some empirical evidence that the orders by the Hon'ble Supreme Court have led to a substantial

[691] Ibid
[692] ibid
[693] 'Doctrine of Separation Of Powers, Introduction' http://www.legalquest.in/index.php/students/law-study-materials/45-administrative-law/407-doctrine-of-separation-of-powers.html>

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guarantee of public welfare rights. As already discussed before, the decisions of the Hon'ble Supreme Court in the landmark cases, have led to substantial improvements in the status of the public welfare rights conferred to the society. The decisions of the Hon'ble Supreme Court like recognition of free primary education as a fundamental right, in Unni Krishnan v. State of Andhra Pradesh, [694] or the introduction of mid-day meal schemes in all public schools in People's Union for Civil liberties v. Union of India[695] have brought renaissance in the society. Thus, in the form of judicial activism, the judiciary has brought to light various dormant, but immensely important issues that have been ignored till date without being raised. However, at the same time, there are various factors that work against proper functioning of the judicial activism, viz. delays in the implementation of the court's decisions, insufficient investigation into matters leading to gross miscalculations in deciding the risks and the externalities that can affect the process. Further, it has been argued that such an encroachment by the judiciary onto the territory of the executive and the legislature is an absolute violation of the Constitutional Doctrine of the Separation of Powers. The Legislature and the Executive branches of the government are bodies responsible for the allocation of money into the schemes that they either legislate or implement.

COST-EFFECTIVENESS OF JUDICIAL ACTIVISM

The costs associated with judicial activism via PIL, as they are modeled in economic analyses, can be either private or collective. The latter are those that result from the consequences of a legal decision on society.

From an economic perspective it is especially important to ask the question whether the PIL was cost-effective in the sense that the results were also reached at the lowest costs possible. This question has two separate aspects. On one hand the question arises whether the measures imposed as a result of the PILs were cost-effective, in the sense that the contents of the public welfare rights ordered by the court gave incentives to operators to reach the aspired level of enjoyment of public welfare rights by the members of the society, at the lowest cost possible. On the other hand, whether PIL is the lowest cost alternative to reach this particular goal. To start with the latter question, information on the transaction costs of PIL is not known. One could argue that these costs could be substantial, given that the judiciary has in some cases ordered several rulings, involved many committees, and followed-up a case over many years. The administrative costs for the functioning of the judiciary can, thus, be substantial. However, the essence of PIL is precisely that a plaintiff can start the proceedings at relatively low costs (writing of a letter). Moreover, these (administrative) costs of PILs should, therefore, not necessarily be larger than the costs of the functioning of a regulatory system. In the latter case,

[694] Unni Krishnan v State of Andhra Pradesh AIR 1993 SC 217.
[695] People's Union for Civil liberties v Union of India 2004 9 SCC 580; Paul O' Connell, 'Vindicating Public Welfare Rights, International Standards and Comparative Experiences' (Routledge Taylor and Francis Group, London and New York) 94.

an administrative agency needs to intervene to formulate regulatory standards for the entire set up, install a monitoring, enforcement and compliance committees, etc.

PIL is an example of positive externality where the Government spends resources which is enjoyed by people at large without incurring any expenses and that is exactly the precise way of defining efficient production of a good i.e. greater production of a good when the added benefits are more than the added costs.[696] However, simultaneously, we must stop when the added costs exceed the added benefits. Summary of conditions for efficient production (1) all units of the good are produced for which the value to consumers is greater than the costs of production, and (2) no unit of the good is produced that costs more to produce than the value it has for the consumers of that good.[697]

While, at the same time, the idea of judicial activism is a huge expense to the State funds, firstly, in the way that often these cases are funded by the Government with the tax payers' money and thereafter, the expenses used up in the process of litigation and the expensive implementation of the same. Efficient functioning of the three separate tiers under the doctrine of Separation of Powers requires its own transaction costs, not only in monetary terms but also in terms of resources and other similar additional factors. It has been argued that, the transaction costs involved in the functioning of judiciary to step out of its territory and look over the performance over the other two tiers can be considered a drain of the economy. Judicial Activism not only affects the economy, but also minimizes the effective functioning of the legislature and the executive, also known as "unprincipled judicial activism"[698] which thereby, hinders maximisation of profits from the transaction costs spent by the Government on the other two tiers. While often the situation can be that the transaction costs used in the functioning of the legislative and the executive are minimized with a rise in the transaction costs for the judiciary, to overlook the performance of the former two bodies in case of judicial activism.[699]

Moreover, there are other factors that have to be taken into consideration that might hinder the profit-maximisation process and one of them being insufficient information regarding the risks and externalities.[700] Further, the judiciary has, in many cases, taken expert opinion from various officials of the other two branches of the government while dealing with decisions that would normally be made by one of the other respective tiers, thereby, adding more to the transaction costs in the implementation process of the policies drafted in PILs.

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[696] 'Explain Externalities and Public Goods and How They Affect Efficiency of Market Outcomes' http://www.csun.edu/sites/default/files/micro9.pdf

[697] ibid

[698] David Lewis Schaffer, 'When it comes to Judges, 'Pragmatic' Means Unprincipled' The Wall Street Journal (New York, 9 May 2009) http://online.wsj.com/news/articles/SB124182908227302619>

[699] TCA Anant and Jaivir Singh , 'An Economic Analysis of Judicial Activism' Economic and Political Weekly (Mumbai, 26 October 2002) Vol XXXVII No 43 http://www.epw.in/special-articles/economic-analysis-judicial-activism.html?ip_login_no_cache=00f940d297ffce3c645e6e9bd4ea14d6>

[700] ibid

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EFFICIENCY

It is clear, by now, that even if one were to find some evidence that judicial activism in the form of PIL guarantees all the rights, one cannot be certain that they are guaranteed at their maximum efficiency. Indeed, we did not make any analysis whether the PIL is the ideal instrument to reach that goal of guaranteeing the rights at its apex. It is probably impossible to test in practice its efficiency in the sense that one could not test whether this is the legal instrument that optimally contributes to maximizing social welfare. What one can, at best, test is whether it has had any effectiveness in the sense that the rights were actually guaranteed. However, even if one were to find that there is such effectiveness, this does not say too much from an economic perspective for the simple reason that the price to guarantee those rights may have been much too high compared to alternative solutions. Hence, in addition to addressing the effectiveness of judicial activism, one should also pay some attention to its costeffectiveness by addressing whether the goal set by the legislature of guaranteeing certain rights been reached at the lowest possible costs. Though contractual agreements have been observed as an alternative to overcome such public goods and externality problems, they fail at times. The costs of bargaining and striking a public contract in PIL matters may be very high which can drain the State funds. The agreement may collapse in cases where some parties to the agreement may seek to hold out for a better deal while in other cases it is simply, too costly to contact contract and deal with all the potential beneficiaries of an agreement.[701] In cases such as the Delhi air pollution case, factory owners might find it impossible to negotiate directly with each affected citizen to decrease pollution.

JUSTIFYING JUDICIAL ACTIVISM IN INDIAN SCENARIO

The particular Indian experience combined with the framework addressed above shows that some indicators can be provided to the circumstances under which PIL may be effective; at the same time some indicators can also be given on how to increase the effectiveness of this PIL. First, given the still-presumed superior informational advantage of regulatory and administrative authorities to guarantee public welfare rights in a cost-effective way, a standard setting through the judiciary should only take place as a second-best option when (inter alia, as a result of capacity or corruption problems) a standard setting through the regulation fails or is not enforced.

Secondly, the case of the Supreme Court of India shows that when standard-setting through the judiciary takes place as an alternative for regulation by the executive, guarantees should be provided that the judiciary has the necessary information to set cost-effective standards. One way to do this is to make use of committees that can advise the court. One should, however, be careful that the judiciary does not intervene through its decisions in the functioning of the market, for example, by fixing prices for specific commodities like medicines, food commodities, stationery, construction materials etc.

[701] ibid

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Thirdly, in order to obtain both the guarantee of cost-effective standard setting and the guarantee of effective compliance and enforcement, a high stakeholder involvement in the decision-making by the court is needed, either by having the stakeholders involved in the committees or allowing them to provide information (e.g., status of people enjoying the rights, sections deprived of the enjoyment of those rights) on various alternative options to reach the goals desired by the court at different costs.

Fourthly, reliance on the court and judicial activism via PIL only makes sense in cases where it is clear that problems that occur at the level of the legislator or the executive do not occur in the same way with the judiciary. Hence, when PIL is used as a method for ensuring public welfare rights and eradicating corruption problems with the executive, judicial independence should guarantee that better results can be achieved by standard-setting through the judiciary. Fifthly, given the fact that a court only reacts in one particular case and in a reactive manner, standard setting as a result of PIL can only be a temporary solution to intervene when the political and legislative system (temporarily) fails. Ideally, the result of judicial activism should be to move the regulatory and administrative authorities to fulfil their task of setting costeffective standards in the PIL and enforcing them in an adequate way as well. Indeed, in the long run only via standard setting through regulatory authorities' sustainable solutions can be achieved.

Economists Laffont and Meleu[702] have modelled the separation of powers as an instrument against corruption and have shown that the value of such separation is higher in developing countries.[703] Similarly, in a developing country like ours, the question then arises as to whether it is possible to solve the conflicts arising out of judicial activism. Though, there are various opposing theories, in the researcher's opinion, judicial activism in the form of PILs is an efficient and cost-effective method to deal with various important issues of public welfare in a developing country like India. While, at the same time, the question of the process being cost effective should be answered on a context basis, that is each case should be thoroughly analysed by a committee or a group of personnel qualified to man the job and decide whether or not the case would be for the benefit of the public as a whole.

[702] J Laffont and M Meleu, 'Separation of Powers and Development' Journal of Development Economics' Vol 64, No 1 February 2001, pp 129-145.
[703] ibid.

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THE INTERSTATE WATER DISPUTE: AN ATTEMPT TO MAP A BETTER PREVENTIVE AND DISPUTE RESOLUTION SCHEMES

- *Kushal Gowda*[704]

ABSTRACT

India currently faces many problems and choses, for which laws are trying to come up with possible solutions and resolve the issue. The interstate water dispute is foremost, subtle and divisive issue in India. The problem is tried to addressed by the means of law. There are satisfactory number of legislations to curd the issue and promote the peace and harmony among the state. The paper examines the currents legislations on interstate water dispute and tries to critically analyze them. But before that the author claims that, the interstate water dispute Laws in India are inefficacious in both preventing the interstate water disputes and resolving the disputes.

The paper revolves around the central claim statement. The paper has two folds, one examining the he current laws regarding the interstate water dispute and perceive the dispute resolution mechanism of the laws and secondly to examine the embraced by law to preclude the and limit the issue beforehand the issue is arisen. The author is going to prove or disprove the claim statement by providing the effective arguments for and against the claim statement. The inefficacious laws may lead to more chose and disorder in the society. The inefficient laws may give rise to other problems rather than solving the current problem in hand. Hence, it is very imperative to inspect the current laws in hand and discover the possible resolutions in laws. The objective of the paper is to analyze the current laws regarding the interstate water disputes and come up with proper legal solutions with respect to the mentioned problems in the paper. The author gives the transitory arguments and counter arguments on the problems of interstate water dispute in Indian and also come up with the conceivable solutions for the same problems mentioned in the paper.

INTRODUCTION

The autonomy of making laws on water as a subject is principally given to states in India. Even though they have exclusive supremacy in making laws pertaining to water supply, irrigations, canals, drainage, and embarkments[705], the power are only subjected to the states. Whether this

[704] School of Law, Christ University, Bangalore
[705] Indian Constitution, Sch.7, List 2, Entries 13 and 17

establishment is justified one or not is the debate for another day. In this paper interstate water dispute means, the disputes arising between two states, with regarding to the sharing of river water, with in the territory of India. This paper does not cover the disputes arising out of sharing of river waters between two individuals, sovereign, territory or nation. However, the Interstate water dispute is defined in Interstater dispute Act as " water dispute" means any dispute or difference between two or more State Governments with respect to--

(i) the use, distribution or control of the waters of, or in, any inter- State river or river valley; or

(ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or

(iii) the levy of any water rate in contravention of the prohibition contained in section 7[706].

Water being a scarce resource, is often a subject of dispute in India. When it comes to sharing of a common river between two or more sates the dispute is fueled by political agendas. Any dispute has its own solution. Law, being a means to achieve an objective, is also a means to settle a dispute. This paper claims that, the various mechanisms that the law has to deal with inter state water dispute is inefficacious, both in resolving the dispute and in preventing the water dispute. Further, the author goes forward to give some suggestions regarding the problems mentioned in the paper.

INTERSTATE WATER DISPUTE AND INDIA'S WAYS TO SOLVE IT

Broadly there are three mechanisms in Indian law to deal with Interstate water dispute, The Indian Constitution, various legislations enacted by the parliament of India and the agreements created among the states.[707]

1. THE INDIAN CONSTITUTION

The Constitution has given various provision to deal with Interstate water disputes. Constitution gives power to central government to make laws on interstate rivers and river valleys to regulate and develop the intestate rivers and river valleys to the extent which such regulations and development is for the public interest[708]. The interstate river water is also a subject of state government, "Water, that is to say, water supplies, irrigation and canals, drainage an embankment, water storage and water power subject to the provisions of List I[709]. Constitution of India gives the power to parliament to make laws on adjudication of interstate water dispute and bares the supreme court's jurisdiction in the matters of interstate water dispute[710].

[706] Interstate Water Disputes Act, 1956, Section 2(c), No. 33, Acts of Parliament, 1956
[707] P. Ishawar Bhat, Inter-State & International Water Disputes, 275-289 (Eastern Book Company, 1st Ed 2013)
[708] Indian Constitution, Sch.7, list 1, Entry 17
[709] Indian Constitution, Sch.7, list 2, Entry 13
[710] Indian constitution, Article 262

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2. **LEGISLATIONS ENACTED BY THE PARLIAMENT**

There are mainly two Acts enacted by the parliament, to regulate interstate water disputes, The River board Act of 1956 and The Interstate water dispute Act of 1956. The objective of the River Board Act is to establish River Board for the purpose of provide regulation and development of Inter-State Rivers and Rivers valleys[711]. And on the other had the objective of the Interstate water dispute act is adjudication of disputes relating to waters of inter-State rivers and river valleys[712].

3. **AGREEMENTS AMONG THE DISPUTED STATES**

This is common, yet significant way to deal with interstate water disputes. This way has been practiced in India since pre-constitutional era, for an instance the use development and regulation of Cauvery water has been regulated by the agreement contracted between the Mysore presidency and the Madras presidency[713]. But Indian constitution is silent on the validity of such agreements unlike the united states of America[714]. States try and negotiate among themselves through these agreements.

INEFFICACIOUS DISPUTE RESOLVING MECHANISM

The interstate water disputes being a major problem in this country, is a greater challenge to the policy makers to make laws which are highly comprehensible and effective in solving the dispute without any delay in the litigation. Yet, any human made institution, be it a law can reach to that perfection, though not fully perfect in whole sense. When the author makes the argument, that laws to resolve the interstate water disputes are inefficacious, the argument is based on the fact that the many cases of interstate dispute dealt in the tribunal[715] has either taken prolonged litigation or the final award is not at all delivered or the award given is dissatisfactory to one or more parties to the dispute. Author makes the above argument based on the cases decided, Krishna first dispute started at year 1969 while the final award was only given in the year 1976, Narmada dispute which started in the year 1969, got its judgement in the year 1979, Cauvery issue which started in the year 1990, received its final award in the year 2007[716]. But the authors argument may be false because some of the tribunals have given the effective and satisfactory judgment on the interstate water disputes. The Narmada Water Disputes Tribunal award came in 1979, the Godavari Krishna Disputes Tribunal award was proclaimed in July 1980 and the Krishna Water Disputes Tribunal award was given in Dec 2010. These tribunals no longer exist.

[711] The River Board Act, 1956, Ch. 1, No. 49 Acts of Parliament, 1956
[712] Interstate Water Disputes Act, 1956, Ch 1, No. 33, Acts of Parliament, 1956
[713]Sandeep Singh, The Cauvery Water Dispute, Outlook India, 06 Feb., 2007, https://www.outlookindia.com/website/story/the-cauvery-water-dispute/233817
[714] Supra, 3
[715] Interstate Water Disputes Act, 1956, Sec. 2(b), No. 33, Acts of Parliament, 1956,
[716] Supra, 3

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However, in case of the Krishna Water Disputes Tribunal, after the division of Andhra Pradesh and Telangana, the water sharing issue between these two states has been referred to it, so it is functioning again[717]. So, the argument could be a vague because the tribunal has successfully settled the above-mentioned disputes.

The dispute resolving mechanism also fails because of the very fact that the constitution of the tribunal. As per provisions of the Inter-State River Water Disputes (ISRWD) Act, 1956, the Tribunal shall consist of a Chairman and two other Members nominated by the Chief Justice of India from amongst the Judges of the Supreme Court or High Court. Further, services of two Assessors who are water resources experts having experience in handling sensitive water-related issues will be provided to advise the Tribunal in its proceedings[718]. The members of the tribunal are constituted by the judges of Supreme Court and high court, who might lack the expertise need to decide such matters. Even though they are advised by the water policy experts, their role is just an advisory role and need not be binding upon the judges in the tribunal. And the such decisions many live one or more parties to the dispute with the sense of injustice. Thus, violating the Principles of Natural Justice.

The Indian way of adjudicating the Interstate water dispute is vague, also because of the fact that the channels of resolution directly jumps from negotiation to adjudication[719]. There is no Intermediate steps of mediation and conciliation. Speedy way of resolving any dispute is also key and essential objective that the policy makers should emphasis on. Immediately after negotiation the law offers the means of adjudication of the dispute, to the parties, thus directing the issue towards prolonged litigation, which could have been resolved quickly. However, the same argument is viewed critically, additional steps between negotiation and adjudication will still add to the prolonged litigation, if the issue is not sorted in any of the mentioned intermediate means (mediation and Conciliation). But it is better to give the option on mediation or conciliation to the parties to the dispute, as there might be less chances of dissatisfaction to the parties and there might be affecting distribution of river water.

The section 8 of Interstate water dispute Act bares the jurisdiction of Supreme Court from the matters of interstate water dispute. This section derives its validity from article 262 of the Indian constitution. But the parties to the dispute are constantly approaching the Higher court for directions for farming a tribunal[720], for the reviewing of the relief given by the tribunal[721], or for

[717] Harsh Vardhan, NBWL pushes Lower Demwe HEP on Lohit River in Arunachal Pradesh based on fudged WII report, South Asia Network on Dams, Rivers and People, (26 Sept. 2018) https://sandrp.in/2018/09/27/nbwl-pushes-lower-demwe-hep-on-lohit-river-in-arunachal-pradesh-based-on-fudged-wii-report/

[718] Cabinet approves proposal for Mahanadi Water Disputes, PIB Delhi, (20 Feb. 2018) http://pib.nic.in/PressReleaseIframePage.aspx?PRID=1521034

[719] Ramaswamy R. Iyer, Water Disputes Act 1956: Difficulties and Solutions, Economic and Political Weekly, (Vol. 37, 13 Jul. 2002)

[720] State of Tamil Nadu V. State of Karnataka 1991 Supp (1) SCC 240

[721] Cauvery Water Dispute Tribunal in re AIR 1992 SC 522

obstructing the tribunal award. The author argues that it would be better if the Supreme Court is given the jurisdiction to deal with the interstate water dispute for the below mentioned reasons:

- The judgment of the Supreme Court is final and non-appealable.
- It's better for the parties in dispute to directly appealing to the Supreme Court instead of waiting for the tribunals award.
- Supreme Court being the higher authority than the tribunal can implement the judgement for efficiently and effectively.
- The Interstate water dispute Act says that the award given by the tribunal has the same effect as the Supreme Court's judgment. It is not in the hands of the legislation to give such a status to a tribunal or any other authority[722].

  The National Commission for Reviewing the Working of Constitution (NCRWC) is also of the opinion that the Interstate water dispute Act should be repealed and the Supreme Court should be given original jurisdiction.

Interstate compacts are proved to be a very effective method of resolving the disputes. But in India no prior approval is need by any of the sates by the government of India of the any other authority functioning under the government of India[723]. While if we look at the United States of American's stand on this point its mandatory for every state to seek prior congressional approval[724]. One can argue that India being a federal state cannot adopt the US ways, author also agree that, states in India should be given their own autonomy in their internal affairs as India is a federal nation. But it is very important to look into the seek the approval of some higher authority, authorized by the center for the same purpose, because there are many instances where a dispute has arisen out of such compacts, the dispute between Kerala and Tamil Nadu is born out of one such compact with respect built in 1886. The center water commission, legal Instruments of Rivers in India says that today there are 125 such agreements between the state in India[725]. So, it's necessary to have a prior approval from the union government or any other authority designated by the central government for the same purpose.

INEFFICACIOUS PREVENTION MECHANISMS

India law on interstate water disputes seems to concentrate more on resolving the disputes ones it has raised. But has done inadequate efforts to prevent the disputes before things get elevated. When the author makes this argument, he intends to say that law has made less efforts to manage the water, avoidance of the waste local conservation of rain water conjunctive use of surface water and ground water, Changing the pattern cropping according to the current availability of

[722] Supra, 15
[723] Supra, 3
[724] P. Ishawar Bhat, Inter-State & International Water Disputes, 59-80 (Eastern Book Company, 1st Ed 2013)
[725] Guidelines for Planning and Design of Piped Irrigation Network, Central Water Commission Ministry of Water Resources, River Development & Ganga Rejuvenation, Jul., 2017

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water. Under the River Boards Act, 1956. Whose objective is to provide for the establishment of River Boards for the regulation and development of inter- State rivers and river valleys[726].

This act has provisions to conserve, control and ideal use of water resources, water supply, drainage, hydroelectric power, flood control, navigation, reforestation, soil erosion and pollution[727]. There are no efforts made the state of central government to implement these provisions[728], through which the conditions of the river basins, river valleys, and inter- state river. Even though the River Board has the provisions to set up a Board to regulate and develop the river basin, no such board have been set up till date[729] . In the authors opinion the law should have provisions to prevent the interstate water disputes. Because preventing a dispute in turn prevent all the further steps of resolving the disputes like setting up the tribunal, prolonged litigation, and further promotes harmony between the states, above all saves the vulnerable resource. Prevention also decreases the burden of costs of resolving the water disputes on the state.

Even though national water policy of 1987 enshrines the principles for basin or sub-basin project planning, plans to avoid ground water exploitation, social equity integrated use of water, Conjunctive use surface water and ground water, but make no specific reference to River basin commissions or authorities, because of hesitation on the part of state governments that their powers might be eroded by the formation of such bodies[730].

SUGGESTIONS

The author humbly submits that the Supreme Court should be given the original jurisdiction to try the matters for interstate water dispute, as it is the only single and non-appealable court in India. And no other tribunals and courts should be given this power. This type of arrangement already exists the countries like United States of America. The Supreme may take the help of any other authority appointed for the purpose to find the facts and help the court in deciding the matter, these types of authorities or any other bodies are known as “courts friend” or “amicus curiae”[731] because this system would help the Supreme Court in finding the facts and overcoming the technical short comings. The idea of the author is that the dispute directly taken to the supreme court instead of following all the steps of mediation, cancelation or approaching any other tribunal would decrease the time for litigation and supreme court’s decisions are more imposing and binding on the part of parties to the dispute.

[726] The River Boards Act, 1956, Ch I, No.49, Acts of Parliament, 1956
[727] The River Boards Act, 1956, Sec. 13, No.49, Acts of Parliament, 1956
[728] Supra, 3
[729] Inter State Relations, Ch. 16, http://upscfever.com/upsc-fever/en/polity/preliminary-exam/en-poli-chp16.html
[730] Ramaswamy R. Iyer, Water: Perspectives, Issues, Concerns, (Sage Journal, Ed. 1), 1 Mar. 2004
[731] The Editors of Encyclopedia Britannica, Encyclopedia Britannica, Amicus Curie

The second suggestion of author is that, it would be better to apply Berlin Rule[732] than to use Helsinki Rule[733]. The latter provides the fundamental principle of reasonable and equitable share of water taking into the account the relevant factors like geography, hydrology of each basin, past utilization of water, economic and the social need of the basin state on the other hand the farmer has included the principles of integrated management, suitability and the minimization of the environment harm in the process of managing the water[734]. No doubt that both the principles are exceptionally good in their own ways, but why author prefers the Belin Rule to the Helsinki is because of the fact that the farmer seems to aims on better management of water, not only for the present use but also for the future use of water. And also appears to prevent the dispute as it has the principle like sustainability and integrated water management.

Thirdly, in the author's opinion the state should encourage the parties in dispute to enter into co-operative agreements like interstate compacts, which help in reducing the dispute, associated litigation and is also recommended for the better economy of the country. But it is advised that such compacts shall have the prior approval from any central appointed authority.

It is important to point out that the disputing parties under the Inter-State Water Disputes Act, 1956 are the state governments concerned and not the people. The Tribunal does not hear the farmers and the other water users in the basin. It seems very desirable that any reform of the present system of resolution of Inter-State water disputes should bring in the people as the interested parties. It is submitted that the tribunals under the Inter-State Water Disputes Act, 1956 need not follow court-like procedures. Instead they could adopt a constructive, consultative, participatory, committee-style of functioning, something which the negotiated interstate compacts of the US have been able to achieve. While retaining the power of judicial decision at the end, they could also function as conciliation agency.

We envisage a national level water institution as incorporating the tasks of dispute resolution, perspective planning, and information gathering and maintenance. These tasks are currently scattered among tribunals, the NWRC (National Water source Council) and the NWDA (National Water Development Agency). The last of these organizations seems to be particularly isolated and relatively unsupported. The advantages of integrating information collection and storage with long-range planning and dispute resolution seem manifest. One stumbling block will, of course, be the reluctance of ministries, including 30 politicians and bureaucrats, to give up power over decision-making. It is here, perhaps, that ultimately goodwill, emphasized by several analysts of Indian river water disputes, will have to come into play. The possibility of significant, potentially positive institutional change in India is illustrated by recent legislation strengthening local governments. The allocation of water is another aspect of India's Federation institution that can be improved.

[732] Dellapenna. Joseph, Sources of the Berlin Rules on Water Resources, (2004)
[733] The Helsinki Rules on the Uses of the Waters of International Rivers, Ch II, London International Law Association, 1967
[734] P. Ishawar Bhat, Inter-State & International Water Disputes, 149-165 (Eastern Book Company, 1st Ed 2013)

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CONCLUSION

As the research paper claims that, the laws regarding interstate water disputes are inefficacious both in terms of resolving the water disputes and preventing them seems to be exaggerated. This is because as we look at the arguments and counter arguments on the first claim, i.e. laws for resolving the interstate water dispute proves to be over stated, As the laws are solely drafted for the sake of resolving the dispute as fast as possible and for providing proper justice for the parties in disputes. On 9th June of 1983, Indian government constituted a committee for reviewing the working of existing arrangements between the state and the central government in the changing socio-economic scenario. The committee was constituted with the Ministry of Home Affairs under the Stewardship of R.S. Sarkaria, B. Shivraman and Dr S.R. Sen as its members. The committee after surveying and studying the available data gave the report in the year 1988 with 247 recommendation contained in 19 chapters in the report[735]. The committee gave a report saying that present constitution methods and law mechanisms are the best possible ways to resolve the dispute[736]. So, looking at the arguments, counter- arguments, reports and opinions of various scholars on the matter, it is a very vouge statement to make that the current laws on resolving the interstate water dispute are inefficacious. However, the author thinks that there is still a scope of betterment of existing laws for effectively dealing with the issue in hand. The suggestions on the same will be given, further in the paper.

The second part of the paper that is the, laws are inefficacious in preventing the water disputes seems to be proved to its best because firstly, from the argument we know that the current system acks the laws on preventing the interstate water dispute, as there is only one highlighted legislation which seems to be for preventing interstate water disputes, that is the River Board Act of 1956, Secondly, even the exiting legislations have poor implementation schemes, thirdly even the legislation makes are seemed to be more focused on resolving the dispute rather than to prevent the dispute. The author further gives the suggestions as to prevent the dispute.

[735] Report, Ch I, Sarkaria Commission, 1983, http://interstatecouncil.nic.in/sarkaria-commission/
[736] Supra, 20

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AN UNDERSTANDING OF COLLECTIVE BARGAINING IN INDIA

- *Antara Bordoloi*

ABSTRACT

Industrial harmony is essential for economic progress and the concept of Industrial harmony wants the existence of undertaking, cooperation and sense of partnership between employers and employees. There may be conflicting interests between employer and workmen, but this attitude leads to an understanding for achieving common goals, such as production and prosperity. Collective Bargaining is one such key mechanism through which such disputes can be solved amicably. In India, the right to collective bargaining has been conferred through various legislations, however, its applicability and its effectiveness is a bit complicated given the limitations of the various legislations and various other factors.

INTRODUCTION

Collective bargaining is a key means and is the most prudent process by which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more.[737] It also provides the basis for sound labour relations and a way to solve workplace problems.

According to Harbisonl, collective bargaining "is a process of accommodation between two institutions which have both common and conflicting interests". Its aim is not to seek industrial peace at any price. Constructive bargaining should seek "to promote the attainment of the commonly held goals of a free society."

Before the materialisation of 'collective bargaining' as a means to solve labour problems and industrial disputes, the labour force was at a great disadvantage in obtaining reasonable terms for its contract of service from its employer. However, as trade unions developed in the country and collective bargaining became the rule, the employers found it necessary and convenient to deal with the representatives of the workmen, instead of the individual workmen, not only for the making or modification of the contracts, but also in the matter of taking disciplinary action against one or more workmen and as regards all other disputes. Hence, having regard to the modern conditions of the society where capital and labour have organized themselves into

[737] https://aflcio.org/what-unions-do/empower-workers/collective-bargaining, accessed on 3 August, 2018

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groups for the purpose of fighting their disputes and settling them is done on the basis of the theory that 'unity is strength'.[738] Collective bargaining can be considered as the most suitable form of negotiation in democratic social welfare state as issues are represented and discussed by legitimate trade union activities, which must shun all kinds of physical threats, coercion or violence, must march with a spirit of tolerance, understanding and grace in its dealings with the employer.

Typical issues that are dealt with in collective bargaining agenda includes- wages, working time, training, occupational health and safety and equal treatment. The objective of these negotiations is to arrive at a collective agreement that regulates terms and conditions of employment. Such an inclusive methods is key in reducing inequalities and extending labour protection. This leads towards ensuring harmonious and productive industries and workplaces

COLLECTIVE BARGAINING: DEFINED

The International Labour Organisation defines collective bargaining as follows:

"As negotiations about working conditions and terms of employment between an employer, or a group of employers, or one or more employers' organisations, on the one hand, and one or more representative workers' organisation on the other with a view to reaching agreement."

Prerequisites for Collective Bargaining:

1. Freedom of Association
2. Strong and Stable Trade Unions
3. Recognition of Trade Unions
4. Willingness to Give and Take

Historical Perspective

The origin of an institution often throws light upon its role and nature. Collective bargaining is a very important principle, however a little is known about its early history. Its pedigree needs to be traced if we are to fully understand the institutional role collective bargaining.

The expression "collective bargaining" was coined by Sydney and Beatrice. This was widely accepted as an ideal method of settling disputes in industrial establishments and thus America is considered as the mother land of collective bargaining. However, the concept of collective bargaining as a method of settling industrial disputes is relatively new.

[738]O.P.Malhotra, The law of Industrial Disputes, Vol.1, (2004) p.202

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Even though we owe it to Sidney and Beatrice for coining the term and establishing it in literature, the practice of collective bargaining is rather old in its practice then the advent of the terminology.

The origins of practice can be seen in England. Before the use of the term collective bargaining, the term arbitration had a more general meaning than it carries now. Prior to the turn of century the term arbitration was used in a generic and all encompassing sense and was inclusive of present day practice of collective bargaining. The term conciliation was also sometimes loosely used to refer to collective bargaining.

Some of the earliest development of collective bargaining took place in England. One of the major developments which has a later parallel in the United States, was the espousal of British arbitration under governmental auspices. The British labour used the term "arbitration" and looked to the government to help establish the practice they had in mind, i.e. collective bargaining.[739] This method of arbitration sponsored by the government was designed to secure recognition of the rights of the labours and voice their working conditions as under the legal restraints the workers were relatively powerless to secure these alone. Such agitations by labour for governmentally sponsored arbitration ended with the enactment of Trade Unions Act of 1871-1875.

As in England, the rise of labour union in United States was met with mixed reactions, and the development of peaceful labour and management relations was not achieved easily. Many experiments, often sporadic and many ideas about the proper relationship of employers and workers fall into the history of such development.

In the late 1870s and the early 1880s, the American labour entered into more vigorous organizing phase. Many employers at this time feared organised labour and thought labour unions had no legitimate place in the society. At the same time labour confronted with an unfriendly legal system and with meager resources. Parallel to this earlier situation in England, American labour advocated arbitration, whereas employers opposed it. In 1885 two significant investigations of labour unrest were made in the United States, one by the Commissioner of Labour Statistics of the State of New York conducted a three-month investigation during which hearings were held in several of the major communities of their state. Hundreds of workers and many employers were interviewed and, among other things, were asked for their opinion on remedies for industrial unrest. The obstacles identified were - the hostile and contemptuous attitude of the employers towards the needs of the employees. And lack of practice knowledge because of dearth of

[739]Vermon H. Jensen, Notes on the Beginnings of Collective Bargaining, Sage Publications, Vol. 9, 1956, pp. 225-234

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experimentation. It was suggested that initial steps of arbitration should be taken by the trade unions.[740]

Although a name had not yet been found for union management negotiation, the practice of collective bargaining was already evident by the middle of the 19th century.

Presently, in the United States, the National Labor Relations Act (1935) covers most collective agreements in the private sector. This act makes it illegal for employers to discriminate, spy on, harass, or terminate the employment of workers because of their union membership or to retaliate against them for engaging in organizing campaigns or other "concerted activities," to form company unions, or to refuse to engage in collective bargaining with the union that represents their employees. It is also illegal to require any employee to join a union as a condition of employment.

History of Collective Bargaining in India

The concept of Collective Bargaining as a method to resolve industrial dispute was always present. Attention was paid to adopt collective bargaining since the dawn of planning era in India; however, received increasing emphasis since the days of the National Commission of Labour. Collective Bargaining was introduced in India for the first time in 1952 and it gradually acquired importance in the years following.

The First Five-Year Plan duly recognized the need for collective bargaining to resolve labour disputes and maintain peaceful industrial relations in the country. It clearly stated that collective bargaining can derive reality only from the organised strength of workers on the one hand, and a genuine desire on the part of the employer to co-operate with employee's representatives

In India, as also in many other counties, collective bargaining got some impetus from statutory provisions which laid down general principles of negotiation, procedures for collective agreements and the character of representation of the parties negotiating disputes. Of late, the Code of Discipline which came into force in 1958 by voluntary agreement between workers and employers aimed at avoiding work-stoppages as well as litigation, securing settlement of disputes and grievances by negotiation, conciliation and arbitration facilitating free growth of trade unions. While the Code attempted to establish faith of the parties in the voluntary approach, it provided a suitable climate for the growth of collective bargaining in India.[741]

The emergence of the National Commission on Labour in 1966 was epoch-making in the history of collective bargaining in India. The commission conducted comprehensive investigations and looked into all the problems related to labour. Collective Bargaining as a method of resolving

[740]Vermon H. Jensen, Notes on the Beginnings of Collective Bargaining, Sage Publications, Vol. 9, 1956, pp. 225-234
[741] http://shodhganga.inflibnet.ac.in/bitstream/10603/8118/13/13_chapter%205.pdf, accessed on 2 August, 2018

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disputes was duly appreciate and the commission made a series of recommendations to make collective bargaining more effective in future. The was stated in the report that the notion of collective bargaining as it developed in the West may not be quite suitable for India given its different socio-industrial background. There is a need to evolve satisfactory arrangements for union recognition by statute as also to create favourable condition to make such arrangements succeed.

Some of the important recommendations and the reasons collective bargaining in India could not make much headway due to various reasons made:[742]

1. There has been lack of strong trade unions and employers' organisations to represent the national interests.

2. There has been increasing inclination to compulsory adjudication for the settlement of industrial disputes.

3. Multiplicity of trade unions has resulted in union-rivalry in solving labour problems.

4. The Government has shown its lukewarm attitude towards promotion of collective bargaining culture in the country.

5. The Governments initiatives to encourage collective bargaining are only in letters, not in spirit and practice.

COLLECTIVE BARGAINING IN INDIA

Collective bargaining has been defined by the Supreme Court as "the technique by which dispute as to conditions of employment is resolved amicably by agreement rather than coercion".[743] It is a process of discussion and negotiation between employer and workers regarding terms of employment and working conditions. Workers are generally represented by trade unions with respect to expressing their grievance concerning service conditions and wages before the employer and the management. Refusing to bargain collectively in good faith with the employer is considered to be an unfair labour practice as per the provisions of the Industrial Disputes Act, 1947. This is generally an effective system as it usually results in employers undertaking actions to resolve the issues of the workers. However, the legal procedure for pursuing collective bargaining in India is complicated.

PROVISIONS AS TO COLLECTIVE BARGAINING IN INDIA

[742] http://www.yourarticlelibrary.com/hrm/collective-bargaining-in-india-an-overview/35470/, accessed on 2 August, 2018
[743] Karol Leather Karamchari Sangathan v. Liberty Footwear Company, (1989) 4 SCC 448

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Article 19(1)(c) of the Indian Constitution guarantees freedom of associations and unions as a fundamental right. This was recognized in the Trade Unions Act, 1926, Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1948. India has also ratified ILO Convention NO.11 concerning the Right of Association for Agricultural Workers during British rule in 1923.

The growth of collective bargaining is closely associated with growth of trade unionism. The trade union movement revolves around collective bargaining. The important trend in collective bargaining, however, is the expansion in the number and the type of subjects which it covers. Of the reasons for the increase in the subject-matter of collective bargaining, the growth and development of the trade unions which are organized stronger may be stated to be one factor, the other significant factors in the extension of subjects for collective bargaining being the influence of recent legislation and the liberal attitude taken by the State.[744]In Ram Prasad Viswakarma v. Industrial Tribunal[745] the Court observed that, "It is well known how before the days of 'collective bargaining', labour was at a great disadvantage in obtaining reasonable terms for contracts of service from its employer. As trade unions developed in the country and Collective bargaining became the rule, the employers found it necessary and convenient to deal with the representatives of workmen, instead of individual workmen, not only for the making or modification of contracts but in the matter of taking disciplinary action against one or more workmen and as regards of other disputes."

"A trade union is a combination of persons. Whether temporary or permanent, primarily for the purpose of regulating the relations between workers and employers or between workers for imposing restrictive conditions on the conduct of any trade or business and includes the federations of two or more trade unions."[746]

The freedom to form and join a union is core to the U.N. Universal Declaration on Human Rights and is an "enabling" right—a fundamental right that ensures the ability to protect other rights.[747]

The objective of the Industrial Disputes Act 1947 is to secure industrial peace and harmony by providing machinery and procedure for the investigation and settlement of industrial disputes by negotiations. According to Section 2A, where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

[744] http://shodhganga.inflibnet.ac.in/bitstream/10603/8118/13/13_chapter%205.pdf, 2 August, 2018
[745]1961 AIR 857
[746]Sec. 2(6) Trade Unions Act
[747] h https://aflcio.org/what-unions-do/empower-workers/collective-bargaining, accessed on 3 August, 2018

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Industrial Disputes have adverse effects on industrial production, efficiency, costs, quality, human satisfaction, discipline, technological and economic progress and finally on the welfare of the society. A discontent labour force, nursing in its heart mute grievances and resentments, cannot be efficient and will not possess a high degree of industrial morale. Hence, the Industrial Dispute Act of 1947, was passed as a preventive and curative measure.

The Industrial Dispute Act of 1947 aims to protect the workmen against victimization by the employers and to ensure social justice to both employers and employees. The unique object of the Act is to promote collective bargaining and to maintain a peaceful atmosphere in industries by avoiding illegal strikes and lock outs. The Act also provides for regulation of lay off and retrenchment. The objective of the Industrial Disputes Act is to secure industrial peace and harmony by providing machinery and procedure for the investigation and settlement of industrial disputes by negotiations.[748]

Some of the relevant sections under Industrial Disputes Act are as follows:

Section 2(p) states - *"settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorized in this behalf by] the appropriate government and the conciliation officer.*

Section 18 goes as following-

> *18.Persons on whom settlements and awards are binding.- [(1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.*
>
> *(2) [Subject to the provisions of sub-section (3), an arbitration award] which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.]*
>
> *(3) A settlement arrived at in the course of conciliation proceedings under this Act 5[or an arbitration award in a case where a notification has been issued under sub-section (3A) of Section 10A] or 6[an award 7[of a Labour Court, Tribunal or National Tribunal] which has become enforceable] shall be binding on-*
>
> *(a) all parties to the industrial dispute;*

[748] http://www.whatishumanresource.com/the-industrial-disputes-act-1947, accessed on 5 August, 2018

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(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, 1[arbitrator,] 2[Labour Court, Tribunal or National Tribunal], as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part

Thus, under Section 2(p) of the Industrial Disputes Act, 1947 collective agreements to settle disputes can be reached with or without the involvement of the conciliation machinery established by legislation. A settlement (written agreement between the employer and the workmen) arrived at in the course of conciliation proceedings is binding, under Section 18(3) of the Act, not only on the actual parties to the industrial dispute but also on the heirs, successors or assignees of the employer on one hand and all the workmen in the establishment, present or future, on the other. The conciliation officer is duty-bound to promote a right settlement and to do everything he can to induce the parties to act towards a fair and amicable settlement of the dispute.[749]

Section 36(1) of the Industrial Disputes Act deals with representation of workmen. Any collective agreement would be binding on the workmen who negotiated and individually signed the settlement.

36. Representation of parties.- (1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by- (a) 3[any member of the executive or other office bearer] of a registered trade union of which he is a member;

(b) [any member of the executive or other office bearer] of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by 5[any member of the executive or other office bearer] of any trade union connected with, or by any other workman employed in the industry in which the worker is.

However, this section does not bind a workman who did not sign the settlement or authorize any other workman to sign on his behalf. By amending the definition of 'settlement' in s 2(p) of the Industrial Disputes Act 194712 . The pertinent purpose of collective bargaining is that the workers must be involved in it.

[749]http://shodhganga.inflibnet.ac.in/bitstream/10603/8118/13/13_chapter%205.pdf, 2 August, 2018

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Stages of Collective Bargaining in India

A. Charter of Demands

The trade union notifies the employer of a call for collective bargaining negotiations. However, in certain cases the employer may also initiate the collective bargaining process by notifying the union(s). The representatives of the trade union draft a "charter of demands" through various discussions and consultations with union members.[750] This charter of demands contains various particulars such as issues relating to wages, bonuses, working hours, benefits, allowances, terms of employment, holidays, etc. Some establishments might have multiple unions, even though the employer generally prefers a common charter of demands, but in principle, all unions may submit different charters.

B. Negotiation

After the submission of the Charter of Demands, the process of negotiations by the representatives of the trade union starts. Prior to such negotiations, both the employer and the trade unions prepare for such negotiations by ensuring collection of data, policy formulation and deciding the strategy in the negotiations.[751]The negotiations then take place wherein the trade unions and the employer engage in debates and discussions pertaining to the demands made by the trade unions.[752]The process of collective bargaining is a lengthy process wherein the employers listen to the demands and engage with multiple unions. In the public sector, it may take months or even years. If after the deliberations the demands are rejected, the trade union may decide to engage in strikes. For example, the Joint Wage Negotiating Committee for the Steel Industry, covering workers in four large unions, took more than three years from the date of the submission of the charter of demands to the Steel Authority of India Ltd.[753]

C. Collective Bargaining Agreement

If the demands are accepted, a collective bargaining agreement is drawn up and entered into between the employer and workmen represented by trade unions. These may be structured as bipartite agreements, memorandum of settlements or consent awards

[750]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/India-Trade-Unions-and-Collective-Bargaining.pdf, accessed on 5 August, 2018
[751]R. Sivarethinamohan, Industrial Relations and Labour Welfare: Text and Cases, page 286, Available at https://books.google.co.in/books?id=OBuLapJUAcC&printsec=frontcover, accessed on 5 August, 2018
[752] Ibid
[753] P.D. Shenoy, Voluntary bipartite approaches towards industrial peace: Indian experience, (Bangkok, ILO, 1991), pp. 17-26

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D. Strikes

If both parties fail to reach a collective agreement, the union(s) may go on strike. However, as per the Industrial Dispute Act, 1947, public utility sector employees must provide six weeks' notice of a strike, and may strike fourteen days after providing such notice (a 'cooling off period').[754] Furthermore, under the Industrial Dispute Act, neither side may take any industrial action while the conciliation proceeding is pending, and not until seven days after the conclusion of conciliation or two months after the conclusion of legal proceedings.[755]

E. Conciliation

The trade must give a six week's notice of strike or lay-off. A conciliation proceeding begins once the conciliation officer receives a notice of strike or lockout. During the 'cooling off period', the state government may appoint a conciliation officer to investigate the disputes, mediate and promote settlement.[756] On the other hand, it may also appoint a Board of Conciliation which shall be appointed in equal numbers on the recommendation of both parties, and shall be composed of a chairman and either two or four members.[757] Section 22 and 23 of the IDA states that no strikes may be conducted during the course of the conciliation proceeding. Conciliation proceedings are concluded with one of the following recommendations: (i) a settlement, (ii) no settlement or (iii) reference to a labour court or an industrial tribunal.[758]

F. Compulsory Arbitration or Adjudication by Labour Courts, Industrial Tribunals and National Tribunals

When the process of conciliation and mediation fails, the parties may either go for voluntary or compulsory arbitration. In the case of voluntary arbitration, either the state or central government appoints a Board of Arbitrators, which consists of a representative from the trade union and a representative from the employer. In the case of compulsory arbitration, both parties submit the dispute to a mutually-agreed third party for arbitration, which is typically a government officer. Arbitration may be compulsory because the arbitrator makes recommendations to the parties without their consent, and both parties must accept the conditions recommended by the arbitrator.[759]

Section 7A of the IDA provides for a labour court or industrial tribunal within each state government consisting of one person appointed to adjudicate prolonged industrial disputes, such as strikes and lockouts. Section 7B provides for the constitution of national tribunals by the

[754]Sec 22 of the Industrial Dispute Act
[755]Sec 23 of the Industrial Dispute Act
[756]Section 4 of the Industrial Dispute Act
[757]Section 5 of the Industrial Dispute Act
[758]Section 20 of the Industrial Dispute Act
[759]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/India-Trade-Unions-and-Collective-Bargaining.pdf, accessed on 5 August 2018

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central government for the adjudication of industrial disputes that involve questions of national interest or issues related to more than two states. In such a case, the Government appoints one person to the national tribunal and can appoint two other advisers. If a labour dispute cannot be resolved via conciliation and mediation, the employer and the workers can refer the case by a written agreement to a labour court, industrial tribunal or national tribunal for adjudication or compulsory arbitration. A final ruling on the industrial dispute must be made within six months from the commencement of the inquiry.[760] A copy of the arbitration agreement signed by all parties is then forwarded to the appropriate government office and conciliation officer pursuant to which the government must publish the ruling in the Official Gazette within one month from receipt of the copy.

Levels and Types of Collective Bargaining in India

In India, collective bargaining typically takes place at three levels:

I. National-level industry bargaining is common in core industries such as banks, coal, steel, ports and docks, and oil where the central government plays a major role as the employer.

II. Industry-cum regional bargaining is peculiar to industries where the private sector dominates, such as cotton, jute, textiles, engineering, tea plantation, ports and docks. Bargaining generally occurs in two stages: company-wide agreements are formed, which are then supplemented with regional (i.e. plant-level) agreements.

III. Enterprise or plant-level bargaining practices differ from case to case because there is no uniform collective bargaining procedure. Typically, the bargaining council (or negotiating committee) is constituted by a proportional representation of many unions in an establishment. It is therefore easier for the management to negotiate with one bargaining agent if multiple unions at the company can form such a single entity.

In India, collective bargaining agreements are divided into three classes:

i. Bipartite (or voluntary) agreements are drawn up in voluntary negotiations between the employer and the trade union. As per the IDA Sec. 31, such agreements are binding. Implementation is generally non-problematic because both parties reached the agreement voluntarily.

ii. Settlements are tripartite in nature, as they involve the employer, trade union and conciliation officer. They arise from a specific dispute, which is then referred to an officer for reconciliation. If during the reconciliation process, the officer feels that the parties' viewpoints have indeed been reconciled, and that an agreement is possible, he may withdraw himself. If the parties finalize an agreement after the officer's withdrawal, it is reported back to the officer within a

[760]Section 36 of the Industrial Dispute Act, 1947

specified time and the matter is settled. However, it should be noted that the forms of settlement are more limited in nature than bipartite agreements, because they must relate to the specific issues referred to the conciliation officer.

iii. Consent awards are agreements reached while a dispute is pending before a compulsory adjudicatory authority, and incorporated into the authority's award. Even though the agreement is reached voluntarily, it becomes part of the binding award pronounced.

CONCERNS AND CRITICISM

Collective bargaining in India is a key means of solving industrial disputes however it has remained limited in its scope and restricted in its coverage by a well defined legal structure. Even the labour laws strive to protect the workers, it has also systematically promoted and keep in existence a duality of labour-formal sector workers enjoying better space for collective bargaining and informal ones with no scope for collective bargaining.

Certain loopholes in the labour legislations are as followed:[761]

- *The Factories Act, 1948* provides for the health, safety, welfare and other aspects of workers while at work in the factories. Under this Act, an establishment where the manufacturing process is carried on with the help of power and employs 10 workers or an establishment where the manufacturing process runs without power and employs 20 workers is considered to be a factory. However, the following provisions of the Act are not applicable to all factories; provision of a rest room will be applicable only if there are 150 or more workers. Provision of canteen will be applicable only if there are 250 or more workers; provisions for ambulance, dispensary, and medical and para-medical staff: applicable only if there are 500 or more workers.

- *Employees Provident and Miscellaneous Provisions Act*, *Maternity Benefit Act* and *Payment of Gratuity Act* apply to all establishments with 10 or more workers. Though *Employees State Insurance Act* applies to only those establishments with 20 or more workers. *Minimum Wages Act* applies to all establishments and all workers, but the *Payment of Wages Act* applies only to those establishments with 10 or more workers, and also only to those workers getting wages less than Rs. 1600 per month. On the other hand, the *Payment of Bonus Act* is applicable to only those enterprises employing 20 or more workers and only to those workers getting wages less than Rs 3500 per month.

- *Industrial Disputes Act, 1947* lays down the procedures for the settlement of industrial disputes. Its procedural aspects are applicable to all enterprises for the settlement of industrial disputes. However, actually protective clauses for the workers pertaining to

[761] https://blog.ipleaders.in/collective-bargaining-in-india-laws-and-realities/

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closures, layoffs and retrenchment are contained in Chapter VA and Chapter VB, having limited applicability. Chapter VB does not apply to any establishment employing less than one hundred workers, and Chapter VA does not apply to any establishment employing less than 50 workers. *Industrial Employment (Standing Orders) Act* makes it compulsory to have Standing Orders in each enterprise to describe misconducts and other service conditions, and also entails that for any misconduct no worker will be punished without due process of law using the principles of natural justice. But this law does not apply to those enterprises employing less than 100 workers (only in few states like Uttar Pradesh, it is made applicable to all factories (i.e. employing 10 or more workers). *Trade Union Act* applies to all establishments with 7 or more workers, since a minimum of 7 members are necessary in order to register a trade union.

- Trade Union Act of India provides right to association only with a very limited scope and limited coverage. The Trade Union Act 1926 was amended in 2001 and subsequent to the amendment it became more difficult to form the trade unions. In the Act of 1926, only seven members were required to register a trade union, but after amendment at least 10% or 100, whichever is less, subject to a minimum of 7 workmen engaged or employed in the establishment are required to be the members of the union prior to its registration. The amendment moreover introduces a limitation on the number of outsiders among the office bearers.

Furthermore, only when the unions are recognized by the management then only they get the full-fledged rights as bargaining agent on behalf of workers. But there is no legal obligation on employers to recognize a union or engage in collective bargaining.

Thus if we focus at the general picture, there is precisely only a small section of workforce is protected by the labour laws and has assured space for collective bargaining in well defined legal boundaries. The advantages of collective bargaining is still to reach the highly exploited workers especially in the informal sector.

Another issue curtailing the effectiveness of the process of collective bargaining is that of politicization of Trade-Union Movement in India. It is well known that the trade-union movement in India is divided on political lines and exists on patronage of various political parties as most trade-union organizations align themselves with parties with whom they find themselves philosophically close. This sort of political patronage of trade-unions has given a new direction to the movement in a way that the centre of gravity is no longer the employees or workmen, and has shifted towards it leadership whose effectiveness is determined by the extent of political patronage and the consequent capacity to obtain the benefit.

There are also not many collective bargaining agreements which have tried to link wages with productivity. Therefore, it seems that the basic idea of 'sharing the prosperity' which developed

because of our commitment to the cause of 'social justice' is no longer current and the expected end product of the process of ' social justice ' is no longer expected.[762]

List of Disadvantages of Collective Bargaining:[763]

1. It is prone to inequality.
Critics of collective agreement say that this can lead to either the employers or employees getting less of what they deserve. If representation is weak on the side of employers, chances are, the business will lose a substantial amount of money from over-compensation or excessive benefits. On the other hand, if representation for employees is weak, they might not get employment benefits they should be enjoying.

2. It can be biased to employers.
Some groups not in favour of collective bargaining argue that this process gives too much power to employees and leave the employers with tied hands when it comes to running their businesses. Since trade unions can demand from employers and ask for collective bargaining negotiations, critics are worried that this practice may become a habit even if in truth, there is nothing irregular with how these employers run their businesses.

3. It takes a long period of time.
Another disadvantage claimed by anti-collective bargaining is the time it takes for the negotiations to finish and materialize. They talk about bureaucracy and what it does to the people involved in the process. Negotiations can take months and even years to finish, excluding the time it will take to execute the stipulations in the agreement contracts.

4. It can be unfair to senior employees and member employees.
If the issue is about salaries and benefits, say equality in wages, employees who have been working for long years for an organization are taken advantage of since they will be getting the same benefits with that of their junior and newer colleagues. For critics, this is not appropriate. Also, they contend that since that all the benefits included in the collective bargaining agreement will be handed down even to non-member of the trade union, for example, this is not fair to members who pay for their dues.

5. It can widen the gap between employers and employees.
Although collective bargaining is aimed to come up with solutions beneficial to both the management and employees, there are cases where nothing is agreed upon. When talks become futile, the situation might aggravate instead of mitigate. For the opposing group, this can, at times, create a barrier between employers and employees instead of a healthier relationship.

[762]Justice Gulab Gupta, Our Industrial Jurisprudence, 1987, p. 133.
[763] https://futureofworking.com/10-advantages-and-disadvantages-of-collective-bargaining/, accessed on 3 August, 2018

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New Trends in Collective Bargaining:

1. Decentralized and Individualized Bargaining

The collective bargaining in India remained mostly decentralized, i.e. company or unit level bargaining rather than industry level bargaining. But in few sectors (mainly public sector industries) the industry level bargaining was dominant. However, privatization of public sector changed the industry level bargaining to company level bargaining. On the other hand, due to severe infomalisation of workforce and downsizing in the industries, the strength and power of the trade unions have been heavily reduced. The trade unions mainly represented the interests of formal workers. Increasing number of informal workers in the companies soon changed the structure of the workforce in such a way that the formal workers became a minority. As a result of various reasons informal workers could not form their own trade unions, and on the other hand they are not represented by the trade unions of the formal workers. These situations resulted in spurt of individualized bargaining.

Advancing of informalisation of workforce combined with the individualized bargaining in fact changed the character of the trade unions also. In related sectors and industrial regions, it converted many trade unions (particularly in sector dominated by informal workers) in to legal consultants (pursuing individual cases and charging fees for their services) rather than collective bargaining agents.

2. Declining Wage Share

Declining strength of collective bargaining is also reflected in sharply increasing share of profit and considerably declining the wage share (since 2001-02), resulting in depressing purchasing power.

In Indian labour arena we see, multiplicity of unions and inter-union rivalry. Statutory provisions for recognizing unions as bargaining agents are absent. It is believed that the institution of collective bargaining is still in its preliminary and organisational stage. It is also to be put forward that in deciding industrial disputes the adjudicator is free to apply the principle of equity and good conscience. However, it is said that the impact of the romantic attitude of the judiciary towards workers has not proved conducive to the peaceful industrial relations. It is accepted that the end of judicial proceeding is pain and penalties. It cannot solve the problems of industries.[764]Moreover, advocates of adjudication contend that as the collective bargaining procedure might end in a strike or lockout, which implies a great loss to the parties concerned and the country, so for the sake of industrial peace, the adjudication becomes necessary. Industrial peace can be established by the adjudication for the time being. But the conflicts are

[764]http://leadershiptrainingtutorials.com/leadershiptraining/problem-solving/collective-bargaining-process-in-india-a-critique/#.WQ-CMfmGO00

driven deeper and it will retard industrial production. In the absence of effective collective bargaining the anti-productivity tendencies are bound to appear.

The Second National Commission on Labour, while recognizing that adjudication continues to be the prevailing mode in the area of determination of industrial disputes in our country, expressed the hope that, over time, collective bargaining and inbuilt arbitration would result in the bulk of the disputes between parties being settled expeditiously[765]

But the Supreme Court in *Dunlop India Ltd. v. Workmen*[766] has held "that where the employer enters into an agreement with one of the labour unions which represent only one section of the employees such an agreement will bind only such of employees as are members of the labour union which is a party to the agreement. Settlement has to be accepted or rejected as a whole. It is not possible to accept a settlement in pieces". Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained, the court will be slow to hold a settlement as unfair."

The Karnataka High Court has gone to the extent to say that even if the settlement is technically not in accordance with the law, it should not be interfered with in judicial review, where it is between the management and the majority of the workmen, who have taken benefit under the settlement and thereafter, resumed normal production and industrial peace, unless it is shown that the terms of the settlement are onerous and against the interests of the majority of the workmen. It is well-settled that the extraordinary jurisdiction of the writ court or judicial review should not be exercised, even if the aggrieved party has made out a case on a question of law, unless a substantial injustice has been caused to it.[767]The court also apprehended that the interference with the settlement was likely to disturb industrial peace, as there was likelihood of an eruption of violence between the two groups of workmen.

But a settlement obtained by fraud vitiated on account of its being involuntary, will be no settlement in the eye of law[768]

This bargaining strength would be considerably reduced if it is not permitted to demonstrate by adopting agitation methods, such as work to rule, go-slow, and absenteeism, sit-down strike and strike This right has been recognized by almost all democratic countries.[769]

Trade Unions and Industrial Disputes (Amendment), Bill, 1988 which was later withdrawn mentioned the provision for bargaining council. The Bill seeks to provide for the constitution of a "bargaining council to negotiate and settle industrial disputes with the employer." Thus, under

[765]Titagarh Jute Co Ltd v Sriram Tiwari, 1979 Lab IC 513 (Cal)
[766]AIR 1960 SC 207
[767]Micro Employees' Assn v State of Karnataka, (1987) 1 LLJ 300, 322 (Kanr)
[768]Tata Engineering & Locomotive Co Ltd v Their Workmen , (1981) 2 LLJ 429
[769]BR Singh v Union of India, 1990 Lab IC 389, 396 (SC)

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Chapter II-D every employer is required to establish a bargaining council, for the industrial establishment for which he is the employer consisting of representatives of all the trade unions having membership among the workmen employed in the establishment not being trade unions formed on the basis of craft or occupation, each trade union being called a bargaining agent.

CONCLUSION

In India, as also in many other counties, collective bargaining got some impetus from statutory provisions which laid down general principles of negotiation, procedures for collective agreements and the character of representation of the parties negotiating disputes. Collective bargaining has been defined by the Supreme Court as "the technique by which dispute as to conditions of employment is resolved amicably by agreement rather than coercion".[770]It is a process of discussion and negotiation between employer and workers regarding terms of employment and working conditions. Workers are generally represented by trade unions with respect to expressing their grievance concerning service conditions and wages before the employer and the management. Refusing to bargain collectively in good faith with the employer is considered to be an unfair labour practice as per the provisions of the Industrial Disputes Act, 1947. This is generally an effective system as it usually results in employers undertaking actions to resolve the issues of the workers. However, the legal procedure for pursuing collective bargaining in India is complicated.

The protective labour laws apply to very low percentage of the enterprises; and most of the other enterprises only Industrial Disputes Act (minus its protective sections like section V-A, V-B), Minimum Wages Act, the Workmen's Compensation Act, Equal remuneration Act, and the Shops and Establishments Act (enacted by each state separately) and some pieces of labour legislation enacted for specific occupations are applicable.

[770]Karol Leather Karamchari Sangathan v. Liberty Footwear Company, (1989) 4 SCC 448

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AUTONOMOUS CARS: A SOCIO-LEGAL PERSPECTIVE

- ***Marc Martin***[771]

ABSTRACT

Self-driving cars have been pegged as one of the fastest growing car markets in the world. These cars are currently undergoing a lot of training in controlled environments. In fact, if researchers and car companies are to be believed, live testing in city streets, albeit in a controlled manner are likely to take place in the near future. As driverless cars or more formally, autonomous vehicles continue to attract growing interest and investment, the associated liability issues are also getting increased attention. Often, this attention comes in the form of suggestions that liability concerns will slow or even completely prevent consumer access to advanced autonomous vehicle technology. The purpose of this research article is to analyse firstly, the social acceptance of such autonomous cars around the world and further to look into the liability perspectives in case of an accident occurring concerning autonomous cars.

"There are always those who argue that government should stay out of free enterprise entirely, but I think most Americans would agree we still need rules to keep our air and water clean, and our food and medicine safe. That's the general principle here. What's more, the quickest way to slam the brakes on innovation is for the public to lose confidence in the safety of new technologies." – Barack Obama

THE FUNCTIONING OF AUTONOMOUS VEHICLES

A vehicle that travels from point A to point B without any human input for a particular duration of time is classified as an autonomous vehicle. Such vehicles employ sensory, control and navigation technologies that respond to the environment accordingly, thereby eliminating the need for human interference[772]. A host of sophisticated, high end technology provides the autonomous vehicle with an elaborate level of connectivity. The U.S. Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") has classified autonomous vehicles as belonging to one of five levels: The Society for Automotive Engineers, India ("SAE") also has similar classifications for automated vehicles. These are as follows;

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[771] School of Law, Christ University, Bangalore

[772] Hyunjoo Jin, GLOBAL PATENTS REFLECT ADVANCES IN CONNECTED AND SELF-DRIVING CARSREUTERS(2015), https://www.reuters.com/article/us-autos-patents-innovation/global-patents-reflect-advances-in-connected-and-self-driving-cars-idUSKBN0KS1TU20150119 (last visited Sep 6, 2018).

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i. Level 0 (No Automation): The human driver is in constant and complete control of the car.
ii. Level 1 (Assisted Automation): Only one function can be automated at a time such as either electronic stability control or pre-charged brakes, wherein the vehicle automatically assists with braking, enabling the driver to regain control of the vehicle or stop faster than it would be possible if the driver had acted on his own volition. Cruise control, lane keeping and parking assist are other such commonplace features found in autonomous cars of this level.
iii. Level 2 (Partial Automation): More than one function is automated at the same time such as a combination of adaptive cruise control and lane centering. However, the driver must still remain constantly attentive.
iv. Level 3 (High Automation): The functions are sufficiently automated, enabling the driver to safely engage in other work or activities. The driver is expected to be available for occasional control, but will have comfortable transition time. The Google car is an example.
v. Level 4 (Full Automation): The car can completely drive itself without a human operator. The vehicle is designed to perform all driving functions and monitor roadway conditions for an entire trip. Such a design anticipates that the driver will only have to provide the destination or navigation input, but is not required to be available for control at any time during the trip[773].

THE SOCIAL ACCEPTANCE OF AUTONOMOUS VEHICLES

Autonomous cars are a developing technology which may prove to be the next big evolution in personal transportation. As of now, several major companies including Toyota, Lexus, Audi, and Google are developing and testing their own prototype vehicles with plans to eventually release the technology to market. Autonomous cars are no longer just a fanciful staple element of futuristic science-fiction writing; they are real and they are coming. The question that arises is how much do people want them.

Public interest in autonomous driving has grown appreciably of late—in surveys, a majority now speak of already having "heard of" autonomous driving[774]. In mass media news coverage, driving's automation is often portrayed as the solution to many of our automobile-related

[773] U.S. Department of Transportation Releases Policy on Automated Vehicle Development, , https://www.nhtsa.gov/press-releases (last visited Sep 15, 2018).

[774] Anderson et al., SELF-DRIVING VEHICLES OFFER POTENTIAL BENEFITS, POLICY CHALLENGES FOR LAWMAKERSRAND CORPORATION(2016), https://www.rand.org/pubs/research_reports/RR443-2.html (last visited Sep 6, 2018).

transport problems[775]. It is further expected that it will bring about a revolution in car usage and ownership. The term "autonomous driving," however, is even less clearly defined in the public discourse: sometimes the talk is of automated driving and self-driving or driverless cars, sometimes partly- or fully-automated driving. Frequently, it is not clear which of the potential transport options is being discussed, what concrete options, potential, and risks are involved, or what challenges still need to be overcome on the path to autonomous driving. The perspectives of road users and potential future users are paid little attention in this, even if it is constantly stressed that a user and usage-oriented view can make an essential contribution to acceptance, and thus also to autonomous vehicles' success. Acceptance must be brought into the discourse surrounding autonomous driving at an early stage, even if the realization of road traffic with fully automated vehicles is not currently conceivable at all[776]. Introducing the technology will potentially bring changes across the entire sphere of mobility, impacting many levels of society. At the same time, it could trigger a fundamental transformation in the way we get around. In order to know in good time what the essential issues are, and to control the transformation where necessary, it is important to identify the significant influencing factors and understand their dynamics. One of these factors is the acceptance of technology.

SAFETY

One of the major incentives for developing autonomous vehicles is the potential impact on vehicle safety. In 2009, there were 10.8 million motor vehicle accidents in the US alone, resulting in 35,900 deaths[777]. It's estimated that over 90% of all accidents are due to human error or bad driving behaviour, whether it be reckless driving or driving while intoxicated[778]. One goal of developing autonomous vehicles is to render these types of accidents a thing of the past. An autonomous car's computer cannot be intoxicated and it cannot be reckless – it will do only what it is programmed to do, and that is to get the passenger safely from point A to point B. With a constant view of everything around the car through radar and sensors, the car's computer already has access to more information than a human driver could have. However, the computer needs to make sense of all of that information. Consumer cars already do this today to some extent. Collision avoidance systems, for example, can sense when the driver is in danger by checking if any objects (like other cars) are too close. If needed, the car can even intervene. These safety systems can be extremely effective. According to a study conducted by the National Highway Traffic Safety Administration in the US, Electronic Stability Control systems have reduced fatal rollovers in light trucks and vans by 88% (NHTSA, 2007). A fully autonomous vehicle is just the

[775] Sean V. Casley, Adam S. Jardim & Alex M. Quartulli, A STUDY OF PUBLIC ACCEPTANCE OF AUTONOMOUS CARS, https://web.wpi.edu/Pubs/E-project/Available/E-project-043013-155601/unrestricted/A_Study_of_Public_Acceptance_of_Autonomous_Cars.pdf (last visited Sep 29, 2018).

[776] Fraedrich E., Lenz B. (2016) Societal and Individual Acceptance of Autonomous Driving. In: Maurer M., Gerdes J., Lenz B., Winner H. (eds) Autonomous Driving. Springer, Berlin, Heidelberg

[777] Census 2012, USA

[778] Olarte, 2011

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extension – albeit a large extension – of such existing technologies. Two of the more powerful technologies that are currently being researched are called Vehicle-to-Vehicle (V2V) and Vehicle-to-Infrastructure communications (V2I). V2V communications are communications between nearby vehicles in which data about a car's position and velocity are transmitted. Nearby cars can utilize that information to, among other things, coordinate movements safely while passing through intersections and driving on highways. Similarly, V2I communications are communications between vehicles and nearby infrastructural objects, such as a computer serving as an intersection manager. In such a scenario, the intersection manager is the coordinator for the intersection that it governs, guiding 6 vehicles through the intersection safely and efficiently (Newcomb, 2012). However, V2V and V2I communications are still in the early stages of research and development. Communicating data to and from cars comes with a risk, though. As with any computer network, there are security issues that could put drivers in danger if the network is attacked by hackers. Current networked car technologies, a popular one being OnStar, are already targets. So far, there has only ever been one real-life example where a car's networked technology was attacked.

Attacks could become more frequent and significant in a world filled with autonomous vehicles where the cars are not only supplemented by V2V and V2I communications, but potentially dependent on them[779]. Luckily (or unluckily depending on your point of view) the problem of communications and network security is nothing new and the same principles can be applied to vehicular communications. For example, in a three-year long research project by the National Highway Traffic Safety Administration, the researchers used a digital signature – a common method used in cryptography to guarantee the identity of a message's sender – in their communications system (NHTSA, 2011). So even in proof-of-concept research, the problem of network security is already being addressed. Even without communications systems like V2V and V2I to help keep the car and driver safe, autonomous vehicles have a great track record. After 300,000 miles of driving between all of the cars in Google's fleet, only one car has been involved in one minor accident. Ironically, the car was under manual control at the time. In 2010, Dr. Alberto Broggi and his 7 team at the University of Parma in Italy went on an 8,000-mile road trip from Parma, Italy to Shanghai, China in their own version of an autonomous car (Newcomb, 2012). If future versions of autonomous vehicles adhere to current trends, then the 90% of car accidents due to human error could indeed become a thing of the past.

COST

There is no doubt that the development and utilization of autonomous cars has a cost. The cost of the parts for the car, the cost of the research, the cost of manufacturing, and the cost to the

[779] Russell D. Roberts, WHY SOFTWARE REALLY WILL EAT THE WORLD--AND WHETHER WE SHOULD WORRY | RUSSELL D. ROBERTSTHE INDEPENDENT INSTITUTE(2016), http://www.independent.org/publications/tir/article.asp?id=1105 (last visited Sep 12, 2018).

eventual customer have to balance if autonomous cars are going to become popular. But what are the purchasing and costs of owning an autonomous car? For a field of research that is relatively new, the numbers aren't obvious or immediately apparent. But one thing is certain for now: it will cost more than $30,303, the average price of a car[780]. The Google Car, the most heavily tested and advanced autonomous car system in development, has a very expensive price. The car itself costs about $150,000 in all. The most expensive portion of the equipment is the $70,000 LIDAR system[781] . This alone is far above what the average consumer is willing or able to pay. However, Google remains hopeful. Experts say "reasonably priced LIDAR systems are coming relatively soon". Even if this is true, this cost will have to drop dramatically to fall into a reasonable price range. Currently, the cost of the LIDAR system costs about as much as a 2012 Cadillac Escalade ($66k – $74k), a car far out of reach for the every-man. A survey posed by J.D. Powers and Associates recently polled public interest in autonomous cars[782]. The survey found that one out of every five people were interested in purchasing an autonomous car after learning how much extra the feature would cost. This extra cost was a mere $3,000 more. The director of marketing and sales at Ibeo Automotive Systems, a manufacturer of LIDAR systems in Germany, has said that it hopes to develop LIDAR systems for autonomous cars for as low as $250[783]. If this is true, the remarkably low cost of LIDAR that the Google Car paid ($70,000) could potentially drop the price of the car from $150,000 to $80,250. And if similar sensors and equipment in the car also follow price drops as technology advances, then meeting the goal of an only additional $3,000 for an autonomous car might not seem entirely impossible.

PRODUCTIVITY

Since autonomous vehicles are still not fully developed it is difficult to predict their effects on productivity. Yet many people seem to believe that the efficiency of road systems and an individual's productivity are both are likely to increase once autonomous vehicle become heavily used. A fully autonomous vehicle could eliminate the need to transport those with restrictions on operating a vehicle due to age or physical ability[784]. Elderly individuals, or those with disabilities that make them unable to transport themselves, would have more independence. This would allow them to do errands, visit friends and relatives, and go to work without the aid of a driver. Children and teens below the age of 16 would be able to travel independently, sparing their parents the time it would take to transport the child back and forth. The core benefit of an autonomous vehicle in terms of productivity is that it frees up the time you would otherwise spend driving or being stuck in traffic to instead be devoted to other, more productive tasks. Eliminating the need for an actively focused driver would allow for a user to redirect their

[780] Nickel, 2012
[781] Priddle and Woodyard, 2012
[782] J.D. Power and Associates, 2012
[783] Priddle and Woodyard, 2012
[784] Gilles Duranton, TRANSITIONING TO DRIVERLESS CARS , https://www.jstor.org/stable/26328282 (last visited Sep 14, 2018).

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attention from the road to something more productive. They could go on their computer and get some work done, or just rest. The user would also be able to interact more attentively with their fellow passengers, whether they are talking with friends or preparing for a meeting with co-workers. A system built around autonomous vehicles would allow for more efficient parking organization. The vehicle could drop the passenger off at their destination, and then go to a mass parking facility some distance away. Later, when summoned, it would return to pick up the user. These facilities cousld be made more space efficient than today's parking garages because they won't need to include the room for people to move around[785]. Another two beneficial outcomes of an autonomous system would be increased roadway capacity and reduced traffic congestion. Due to the high reaction speed of the electronics, as well as the ability to better regulate speed, cars could travel much closer together while moving more quickly. This high reaction speed of the electronics could reduce the chance of accidents, providing not only safer travel but fewer delays due to traffic accidents. A system of vehicles all communicating with each other (using the V2V system mentioned in the safety section) could organize itself so that each vehicle travels an optimized route to its destination. The optimization of routing would prevent traffic congestion from forming on any road. As a result, people would get to their destination much more quickly. Looking further into the future, it is not hard to imagine that an autonomous vehicle could even go off and do chores without you. Given more time and money to develop, these vehicles may get to the point where they could go pick children from school or drop them off at soccer practice while their parents are still at the office. If companies adapt to the new technology, a user may even be able to send their car to a local food market where it would be filled with pre-ordered groceries and sent right back home to be unpacked. In industry, vehicles that can travel without a driver could allow companies to have large fleets of self-driving trucks, effectively lowering the cost and duration of shipping[786]. Autonomous cars have the potential to not only free up time otherwise spent driving both one's self and others around, but also the potential to travel faster. They also enable the operator to do more productive tasks while traveling, and maybe one day they will do chores for their owners while their owners do other work.

PUBLIC OPINION

Autonomous vehicles, while technologically possible and very likely to be utilized in the near future, have a major roadblock. Despite the growing precision of sensors, awareness of their surroundings, and navigational control that these test vehicles have demonstrated recently, the public and its perception of this technology will truly define how soon it will arrive on the

[785] Brandon Fuller, CAUTIOUS OPTIMISM ABOUT DRIVERLESS CARS AND LAND USE IN ..., https://www.jstor.org/stable/26328280 (last visited Sep 11, 2018).

[786] Naughton, Keith. DRIVERLESS CARS: ARE BILLIONS BEING INVESTED IN A ROBOT AMERICANS DON'T WANT? (2016)

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market. The public has demonstrated a certain level of distrust concerning the ability of autonomous vehicles to safely operate on public roads. Many automotive providers and researchers agree that this distrust, warranted or not, is a major factor in determining the success of these autonomous vehicles[787]. Public concern is the core obstacle for autonomous vehicles. Many people find the lack of control unsettling, believing the technology to be unreliable and the programming to be incapable of proper control, worrying about the risk of computer malfunction[788]. They find the lack of control to be limiting, seeing the autonomous car as a risk to the freedom to drive, some going as far as to say that the autonomous car is leading to a slow brainwashing and desensitization to man's need to explore. And they find the autonomous nature of the car itself to be threat to their security, tracking their every movement and allowing the government to spy on them. Recent surveys show the majority of people would not purchase an AV if it were available today, yet they would be willing to spend a little more equipping their next vehicles with features like crash avoidance and lane keeping systems that are the building blocks of tomorrow's fully autonomous vehicles. It seems a large portion of the general population may not be ready to give up control of their vehicles or trust that a computer might make better decisions at the wheel.

These sceptics believe these concerns are paramount. Scouring the Internet reveals blogs, magazines, forums all dedicated to how the automation of driving will push an already weak society to further technological dependence.

LIABILITY PERSPECTIVE

Who can be held liable in case of an accident concerning an autonomous vehicle?

Car accident litigation usually turns on whether a driver acted negligently, or failed to exercise a reasonable level of care. By contrast, a lawsuit involving an autonomous vehicle could revolve around whether the self-driving system had a design defect[789].

Design defect claims do not require a finding of fault or negligence. To prevail, a plaintiff must show only that a product had an inherent design defect that would render it unsafe[790]. Automakers and software writers could counter with detailed data gathered by on-board sensors on how cars behaved during a collision, experts said, to show that it was impossible for the vehicle to avoid a collision and that all the systems functioned properly.

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[787] Newcomb, 2012

[788] Klayman, 2012

789 Sam Levin & Mark Harris, THE ROAD AHEAD: SELF-DRIVING CARS ON THE BRINK OF A REVOLUTION IN CALIFORNIA THE GUARDIAN (2017), https://www.theguardian.com/technology/2017/mar/17/self-driving-cars-california-regulation-google-uber-tesla (last visited Sep 10, 2018).

790 Jacqui Jubb, FIFTY SHADES OF GREY AREA: AUTONOMOUS CAR LIABILITY | SMITH'S LAWYERS BLOG RSS, https://www.smithslawyers.com.au/post/fifty-shades-of-grey-area-autonomous-car-liability (last visited Aug 29, 2018).

In March, a pedestrian in Arizona, USA was killed when she was struck by an autonomous car. Although it was simply a test run, the car, which was operated by UBER, had an emergency driver in the ca[791]r. The victim was walking with her bicycle, and it appeared that the car did not slow down at all prior to striking her. She was struck at 40 mph.

Currently, laws have not been able to keep up with technology, and technology has not yet advanced to the stage where level four or level 5 autonomous cars should be on public roads. It is expected that as cars move towards being more and more autonomous, eventually, liability will shift from the driver to the car/its manufacturer[792]. Autonomous cars in the future may even be programmed not to commit certain traffic offenses, such as speeding, traffic violations, etc. This would mean that autonomous cars might even be the safest option for vehicles in the future – as studies have shown, the vast majority of crashes occur because of human error.

Self-driving vehicles collect and store massive amounts of data. Gathering this information, as well as any photographic or video evidence from the vehicles, is valuable in reconstructing accidents and determining liability.

California has set forth insurance requirements for the testing of autonomous vehicles. Two of the options for manufacturers are to buy commercial auto coverage or to post a USD 5 million bond.

Autonomous vehicles present an interesting opportunity for insurance companies, because the risks they encounter do not neatly fit into existing policies. Some combination or blending of coverage may be required to meet the needs of autonomous vehicle manufacturers, owners and operators[793].

Case law on autonomous vehicles is also in its infancy. One of the first-ever lawsuits involving a motorcyclist and an autonomous test vehicle was filed in San Francisco in January 2018. It remains to be seen how courts will consider such cases.

Manufacturers, component suppliers, and technology companies will start to assume more liability for the performance of their systems, which will require a refocusing of current risk management strategies

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791 Robert L. Rabin & Sharon Driscoll, UBER SELF-DRIVING CARS, LIABILITY, AND REGULATIONSTANFORD LAW SCHOOL, https://law.stanford.edu/2018/03/20/uber-self-driving-cars-liability-regulation/ (last visited Aug 15, 2018).

792 Steven Seidenberg, WHO'S TO BLAME WHEN SELF-DRIVING CARS CRASH? ABA JOURNAL, http://www.abajournal.com/magazine/article/selfdriving_liability_highly_automated_vehicle?icn=most_read (last visited Sep 13, 2018).

793Munich Re, AUTONOMOUS VEHICLES | MUNICH REINSURANCE AMERICA, INC. REINSURANCE: GLOBAL RISK SOLUTIONS FROM MUNICH RE, https://www.munichre.com/us/property-casualty/knowledge/expertise/global-topics-experts/autonomous-vehicles/index.html (last visited Sep 19, 2018).

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The liability pendulum will shift from personal auto to commercial product liability or a hybrid of some form of coverage. The strongest growth in insurance will be in the area of product liability.

PRODUCT LIABILITY – THE TRADITIONAL ROUTE

Up until now it has been fairly clear where a claim for product liability might exist in the context of automotives. Certain parts of a car are driver-operated and malfunction can be a result of consumer misuse leading to a potential personal claim against the driver (in personal injury, negligence or criminal action). Liability rests with the driver rather than the manufacturer who relies on their relevant insurance policy where applicable. Faulty parts as a result of a manufacturing design failure, defect or a failure to use reasonable care and skill, however, lead to a claim against the manufacturer under product liability laws[794].

Whether the liability of a driver can be limited if an accident is caused due to autonomous systems?

Under the Consumer Protection Act 1986, (CPA) a manufacturer is strictly liable in respect of defective products and the injured party does not have to establish fault; only that a defective product caused the loss[795]. A product is defective under the CPA if it is not as safe as persons are generally entitled to expect taking into account the purpose for which the product has been marketed, any instructions for use or warnings, what might reasonably be expected to be done with the product at the time when the product was supplied – a product is not unsafe simply because a safer product was later developed or industry safety standards were raised after it was supplied.

The test is, therefore, one of consumer expectation and this will be more complex in the context of autonomous vehicles where users are unlikely to have any significant understanding of the technology products used. As to their expectations on safety, these could be higher or unrealistic. Manufacturers will need to ensure that they inform consumers sufficiently as to how the automated features should be used safely and explain any potential risks[796]. Manufacturers and software providers should consider taking advice on the formation of product instructions and

794 Katie Chandler, DRIVERLESS CARS AND PRODUCT LIABILITY DRIVERLESS CARS AND PRODUCT LIABILITY, https://www.taylorwessing.com/download/article-driverless-cars-and-product-liability.html (last visited Sep 7, 2018).

795 Narayan Lakshman, SELF-DRIVING CARS AND PROSPECTS FOR INDIA - THE HINDU, https://www.thehindu.com/business/Industry/Self-driving-cars-and-prospects-for-India/article14630888.ece (last visited Sep 10, 2018).

796 Background on: Self-driving cars and insurance, III, https://www.iii.org/article/background-on-self-driving-cars-and-insurance (last visited Aug 22, 2018).

warnings given to consumers with the automated vehicles (particularly in the user manuals) as such documents will become increasingly important in the context of product liability claims.

Whether vehicle manufacturers can limit their potential liability when someone gets injured in a self-driving car accident situation?

AUTONOMOUS VEHICLES – SETTING A NEW SCENE FOR PRODUCT LIABILITY

Automation in cars continues to develop at a rapid pace. Consumers have been, for some time, enjoying elements of automation with cruise control functions, parking assist technology, on-board cameras and automated braking systems. These combine human input with technology assistance and allow the driver to take control of the vehicle if necessary[797]. The goal for automated vehicles is to ultimately improve safety and reduce the number of accidents on the road caused primarily by driver errors. That being so, it follows that software developers and technology providers of automated components will be firmly placed in the spotlight for consumer safety. We can expect to see questions of liability being raised with a number of parties being responsible for components of the automation, and liability shifting from user error to supplier default[798].

Under the product liability route, it is important to look at how liability will be determined between the driver, manufacturer and technology/software providers. There could be multiple parties liable. At the moment, car manufacturers (such as Volvo) have spoken out to say they will accept liability for losses arising out of faults in the design/functionality of the automated technology assistance.

Evidence will be a new issue - how will liability be proven, what evidence will be available? The 'black box' of data will be key[799]. Expert evidence will also be needed to opine on any limitations in the software and how faults could have occurred[800].

Can users still be held responsible if they have failed to service the vehicle and/or maintained it in accordance with manufacturer instructions?

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[797] Dani Alexis Ryskamp, PRODUCT LIABILITY LAW FOR SELF-DRIVING CARS THE EXPERT INSTITUTE(2018), https://www.theexpertinstitute.com/product-liability-law-for-self-driving-cars/ (last visited Aug 28, 2018).

[798] K.C. Webb, PRODUCTS LIABILITY AND AUTONOMOUS VEHICLES: WHO'S DRIVING ..., http://jolt.richmond.edu/2017/05/13/volume23_issue4_webb/ (last visited Sep 9, 2018).

[799] Douglas Horelick & Hilary N Rowen, CLYDE & COTHE UAE'S NEW ARBITRATION LAW : CLYDE & CO (EN), https://www.clydeco.com/insight/article/self-driving-car-liability-picture-still-hazy (last visited Aug 29, 2018).

[800] Who's Liable When an Autonomous Car Crashes? | Colucci Colucci Marcus & Flavin, P.C., COLUCCI COLUCCI MARCUS & FLAVIN, PC, https://www.coluccilaw.com/whos-liable-when-an-autonomous-car-crashes-2/ (last visited Sep 2, 2018).

Time will tell how these issues will be considered in the legislative framework surrounding driverless cars.

There are some practical steps which manufacturers can consider now to help in protecting their position on liability. These include:

- Reviewing existing testing procedures and risk assessments to ensure they adequately deal with new risks arising out of the shifts in liability from driver to manufacturer;
- Keeping documentation up to date to justify steps taken (in respect of the design and manufacturing process and testing phase) and prove the manufacturer is acting reasonably with regard to safety and in line with the state of the art or any relevant industry standards;
- Reviewing policies for responding to product risks – do they adequately deal with urgent product recalls for automated technology or hacking incidents? Is active monitoring of security and safety issues arising from connected devices required? Can all components of the software assistance be traced to the correct manufacturers/suppliers? How will all relevant parties in the supply chain of an automated vehicle be informed of any potential safety issue? And;
- Reviewing product instructions and warnings provided to consumers and making any necessary amendments to ensure that consumer expectations on safety are adequately covered.

CONCLUSION

Through most of the past century, automated vehicles could only be found science fiction novels, but new technologies are making this possibility a foreseeable, even imminent, future. Yet before we can reap the huge potential benefits of AVs, we must ensure that we have policies in place to guide its safety regulations and liability regimes.

Liability is best prevented by the implementation of safe products. There's no need for complicated liability schemes if AVs are well tested before hitting the roads. Accidents may inevitably occur, however, and car companies are afraid of being punished for AV software malfunctions. Limiting the damages they face for having deep pockets could be a huge step towards motivating them to develop and implement autonomous technology[801].

As autonomous vehicles get closer to the public, lawmakers will likely pay close attention and introduce legislation designed to protect the public across a wide range of AV impacts, including

[801] Tina Bellon, FATAL U.S. SELF-DRIVING AUTO ACCIDENT RAISES NOVEL LEGAL QUESTIONSREUTERS(2018), https://www.reuters.com/article/us-autos-selfdriving-uber-liability-anal/fatal-u-s-self-driving-auto-accident-raises-novel-legal-questions-idUSKBN1GW2SP (last visited Sep 5, 2018).

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licensing and certification of vehicles, infrastructure, cyber security, and, of course, safety standards. In insurance, regulators may seek to prevent adverse selection and moral hazards, and protect privacy and personal information. Litigation associated with determining liability will also likely lead to legislation. As laws are changed, insurance coverages will likely change to meet the needs of customers. In any case, insurers will likely be impacted, and those who remain informed on AV issues will be better positioned to manage that impact successfully.

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A CONTROVERSY OVER RELIGIOUS PERSONAL LAWS: IMPLICATION ON GENDER JUSTICE

- *Rudresh Batra*[802]

ABSTRACT

Debate on subjugation of women is not a new development. It has been discussed and just discussed but no concrete decision or outcome is been developed so far. Even after 70 years of independence, the discussion is far from closed and the ambiguous status of religious personal laws has been one of the reasons for subjugation of women and has been a source of legal and political controversy.

The increasing number of cases in the courts where the religion and fundamental rights and principles of law come face to face and challenge each other, it becomes difficult for the courts to determine whether to accept the said religious law or not, further there are cases that challenge certain practices in a religion and the ambiguous status of these religious personal laws leave the courts in ambiguity and it becomes difficult for the courts to balance between the social justice, protection and promotion of religion. Even if the legislators try to legislate and bring in a change there are various actors in this process also which act as the countervailing forces and again the topic is just left at the discussion level and no reform is possible. That is the reason that the discussion religious personal laws is far from closed.

The paper will discuss the various definitions and evolution of religious personal laws, further it will highlight the constitutional provisions under the Constitution of India protecting these laws and then the countervailing forces that play an important role in legitimizing and practicing of these laws. Finally, the paper examines the implication on the gender justice and provides the argument of the religious personal laws to be discriminatory towards women and look for a civil law independent of religious dominance.

INTRODUCTION

This article examines the concept of religious personal laws in India. It includes matrimonial matters, guardianship, adoption, succession, property rights and other religious institution from the gender justice point of view. Religious personal laws ambiguous status serves to legitimize the continual denial of gender justice to women in the above mentioned matters because of which religious personal laws have long been a source of legal and political controversy. The

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paper's focus is on the repercussion of religious personal laws on gender justice and the status of women.

There are 3 broad parts to this article and the argument is developed as follows:

The first part explains the concept of religious personal laws and discusses "What are Religious Personal Laws" and examines the meaning of religious personal laws as understood by various socialists, lawyers, legal researchers, and other scholars. The next part discusses the constitutional framework and the intent of constitution framers to continue the concept of religious personal laws and also discusses the countervailing forces affecting religious personal laws. It also focuses on as to how even after 70 years of independence the discussion on religious personal laws is far from closed. The last part of the paper discusses on the major question i.e. the repercussion of religious personal laws controversy on gender justice towards women, where an analysis of customs and customs to be accepted as a law has been provided.

The paper does not uphold the secularity of the state nor does it presents disrespect towards the religious differences. This paper sought that it is high time to recognize the difference between a custom and custom to be accepted as law, and discard those laws that present disadvantage to any section of the society and make gender just laws.

WHAT ARE THE RELIGIOUS PERSONAL LAWS?

The preliminary level of understanding about the religious personal laws is that the laws which originate from the religious scriptures and the customs that a particular religious group follow over the period of time, but the religious personal laws existing today are discussed over bout their legitimacy to be called as religious personal laws, because religious personal laws are legacy of the colonialism. The whole concept of religious personal law is subject to the formation in specific geographical, political and historical situation. The colonial rulers left the religious personal laws unregulated and let the religious communities decide and adjudicate their own religious matters. As such, it is a widely discussed topic but the paper only presents the various developments which led to today's definition of religious personal laws.

Before the British arrived in the subcontinent, the people belonging to different religion governed themselves according to their own personal laws, if we analyze the Hindu- Muslim communities the Muslims had a firm law by thirteenth century i.e. Shariat law. Whereas, the Hindus were free to decide on their religious laws except in the case of criminal offences. With the arrival of the British in India, the courts were set up and were given the power to exercise judicial authority. The Warren Hastings plan of 1772 gave a scope to the religious laws to develop. Article 23 of Regulation II of the 1772 plan that 'saved' the right of Hindus and Muslims to be governed by their respective religious laws in the matters of inheritance, marriage,

caste and other religious usages or institutions[803].Religion did not make any division between the law as to what is a personal law or any other law; it was the colonial administrators who introduced the idea of personal laws and gave a distinction between personal laws and territorial laws.

The point on which the emphasis is to be laid on is that before the arrival of the British all the laws were religious in their nature but, it was the British who formulated a set of laws for their own convenience. The British authorities inked the personal laws and the religious laws together. Hence from the above discussion, it can be derived that there exists artificiality in the religious personal laws and they are not what we understand. This artificiality could be further seen and understood when the judicial authorities apply these laws, it is widely accepted that when the religious laws of these communities were mentioned it is not evident whether the administrators meant their scriptural laws, customary usages or both[804] and even today we can see this controversy to prevail. In specific, talking of the Hindu Law, the colonial administrators faced a problem to find ways of determining what was the substantive law applicable to Hindu's and what should be the areas governed by religious laws. For answering this question the courts appointed local experts (Hindu Pandits) to translate the Dharmashastra to find the substantive law and at times courts sought help from Brahmins and Pandits i.e. they acted as an *amicus curiae* in certain dispute.

However, the British colonial rulers could not form a permanent or fixed law in this regard hence the judges started following the precedents laid down in Common law. Further, it was realized by the common law judges that the religious laws that were followed were not necessarily derived from the scriptures. Therefore, they started legitimizing the customs of the people. Customs along with the British administration led to a completely different road of development of personal religious laws. Senior and learned judges of the common law courts observed the scenario and realized that they are following their own precedents and in furtherance, they started clubbing rule of 'justice equity and right' with the insight of the religious personal laws to decide the further disputes. Hence, the so called religious personal laws were altered and modified because of the above mentioned scenario, and today what we follow are the modified and altered form of religious personal laws and not the actual religious laws which were derived from the scriptures. These laws can be termed as the "Adulterated Law" because these are not the pure law that is been derived from the scriptures but the result combination of various law which have undergone a lot of change and have modified the original text of the law.

Under the British administration, customs and the adulterated laws were recognized by the courts. It became an important part of the legislation which could not be amended. As such the law was not able to address the changing needs of the society thereby making it redundant. These modifications were furthered by the legislative actions of the colonial rulers where initially they left the religious and personal laws independent and refrained from making laws

[803]Ilbert, Courtenay, The Government of India: A Brief Historical Survey of Parliamentary Legislation Relating India, (1907).

[804] Archana Parashar, Religious personal laws as non - state laws: implication for gender justice, 45:1, JLPUL, 5, 7, (2013).

relating to them, and only focused on providing a set of civil and criminal laws to govern the state. But, later they enacted laws relating to personal matters under the head of religious laws which were again enacted from a British perspective and not from the religious or the societal perspective. The argument that is presented here with respect to this paper concludes that the so called religious personal laws are modified due to the colonial judicial and legislative activities and hence the controversy over religious personal laws are far from closed because the laws are adulterated from the beginning and cannot be considered as religious laws from the authors point of view.

THE CONSTITUTIONAL FRAMEWORK

The controversy existed at the very enactment period of the Constitution. It was a big question in front of the constitutional framers whether to include and protect the religious personal laws under the preview of the constitution or not and if they had to include, what should be the extent and the manner of their protection. The Constituent Assembly debated the issue of RPLs at various stages in the process of enacting the fundamental rights and directive principles.[805] After giving the guarantee of freedom to religion as the fundamental right, the next question was how to maintain the spirit of the constitution drafted so far as many religious personal laws were in conflict with the provisions of the constitution. The Constituent Assembly did not resolve the issue decisively and, rather than articulating whether RPLs had to conform to the Constitutional guarantees and any social reform legislation enacted in accord with these guarantees, it made the promise of a Uniform Civil Code as a directive principle. [806]This DPSP is still debatable because the speeches and documents of the 1920's and 1930's strongly reaffirm the values and the needs for the constitutional safeguards for the sacred laws.

The provisions relating to the personal law system are enunciated in the following articles of the constitution:

- Article 15: directing the State not to discriminate against any citizen on the ground only of religion, race, caste, sex or place of birth or any of them; without prejudice to its power of making special provisions for women and children and for socially and educationally backward classes (including Scheduled Castes and Tribes).
- Article 25 (1): guaranteeing the right to profess, practice and propagate religion.
- Article 25(2): explaining that the right to freedom of religion shall not affect the State's power to regulate or restrict secular activity associated with religious practice and to provide for social welfare and reform.

[805]Archana Parashar, Religious personal laws as non - state laws: implication for gender justice, 45:1, JLPUL, 5, (2013).

[806] Archana Parashar, Religious personal laws as non - state laws: implication for gender justice, 45:1, JLPUL, 5, (2013).

- Article 26(b): guaranteeing every "religious denomination the right to manage its own affairs in matters of religion";

- Article 29(1): guaranteeing to all sections of citizens the right to conserve their distinct culture, if any.
- Article 38: directing the State "to strive to promote people's welfare" by securing and effectively protecting a social order under which, inter alia, justice shall inform all institutions of national life (non justiciable).
- Article 44: directing the State "to endeavor to secure for the citizens a uniform civil code throughout the territory of India" (non justiciable).
- Article 246: empowering Parliament and state legislatures to make laws in the areas which since the pre-Constitution days fall in the domain of personal laws.

After looking into the above provisions it is clear that the state wanted to continue the legacy of the colonial administrators and wanted to safeguard and promote the religious laws. However, the constitution gives the power to the legislators may it be Union or State to amend, rewrite, strike down, modify or replace the personal laws on the basis of social justice to provide social reform. To make the case for reform crystal clear, the state is encouraged via Article 44 to seek reform and to lead the nation towards uniformity in the area of civil law.[807]

This law has put a restriction on the fundamental right of freedom to religion and it was a very fragile task keeping the view of the secular character of the constitution and country. Due to this movement for socioeconomic reforms in the structure of Indian society as a whole, it was felt that one of the factors that had kept India from advancing to nationhood was the existence of personal laws based on religion which kept the nation "divided into water-tight compartments" in many aspects of life[808] and because of this very reason Uniform Civil Code(Article 44) was inserted in the Indian Constitution. In the initial discussions among lawmakers, the concept of UCC was to be included as a Fundamental Right but it could not be accepted by the committees looking into the scenario of the country and secular nature. Henceforth, it was included in DPSP so that the courts could not force the government to implement UCC but just suggest to take it as a responsibility, because of which even today the religious groups, courts, union government, and state governments are just in a debate and no concrete steps are being taken up by anyone towards bringing UCC in the country.

[807] Subrata K. Mitra, Alexander Fischer, Sacred laws and the secular state: An analytical narrative of the controversy over personal laws in India, 1:3, India Review, 99, 109, (2002).
[808] Subrata K. Mitra, Alexander Fischer, Sacred laws and the secular state: An analytical narrative of the controversy over personal laws in India, 1:3, India Review, 99, 109, (2002).

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THE COUNTERVAILING FORCES AFFECTING PERSONAL LAWS

The Indian Constitution enunciates principle of division of power where matters are divided between the State legislature and Central legislature. Local matters are generally allocated to the State legislatures and issues of national importance are allocated to the Central legislature. But, the status of personal law in this respect is very ambiguous, as the customs and general practices of the public are allotted to state legislature which is of a very fragile nature because amendment in practice of certain communities in one state can affect the sentiments of the community in another state. As such, matters such as marriage and divorce have been placed under concurrent powers, where both the Union and the States have the competence to make laws. The entire region of the maintenance of Hindu religious property is represented by the State governments through their Devaswom Boards. States, through their entitlement, to administer in the issues of training, and their general obligation regarding peace, which ends up striking with respect to rules overseeing religious rules, additionally assume a job. Yet, on the off chance that the State government acts in a way which a few networks think about profoundly hostile, and these networks express their disdain in a way that bothers the peace and makes legal government incomprehensible, the Union government has the privilege to intercede, to the degree of announcing a State of Emergency and ruling the State directly.

In India, the Supreme Court and the High Courts are given the power to 'make laws' and to reform as well as create legal institutions through rulings and interpretation. This power makes them another countervailing force in the debate of the religious personal laws and then obviously the religious groups or boards, national minorities commission also act as a countervailing force. Also, political parties play a vital role in nation building because it is political parties that create the mood or say the direction of the public and in India, we see that political parties generally have a religious narrative in the backhand and want to propagate the religion that they believe in. The problem that arises is that all these institutions have their own perspective of propagating the religion and have a different stand on different issues as discussed in the paper that the religious laws that we have today are not the pure form but the adulterated one. Hence, all the institution interpret in their own way and want the law to be reformed as they interpret, because of this very reason whenever there is an effort made to amend the religious personal law all these institutions start putting pressure to amend it in their own way and the main objective of bringing social justice or gender equality in the present scenario gets blurred and forgotten, and the discussion drops down to square one and again the country just discusses the problem and does not reach a conclusion. One of the reasons that even today the controversy over the religious personal laws are far from closed is that the status of governance of religious personal laws is not definite and hence there are various countervailing forces as discussed above that want to gain their own benefits out of this controversy.

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IMPLICATION ON GENDER JUSTICE

After all the discussion and analysis of the development of the concept of religious personal laws, the analysis of these laws through the lens of gender justice comes up where the paper attempts to discuss and prove that these religious personal laws have widespread negative implication on the gender justice. Most of the women activists believe that all the existing personal laws are discriminatory towards them and showcase a patriarchal society which wants to dominate women. The Consultation Paper by Law Commission of India on Reform of Family Law[809]dated 31 August 2018 also accepts and acknowledges that there are discriminatory provisions under Family Law which require legislative reform and the commission has gone ahead and suggested the reforms also in this regard. Further, the report states that "Various aspect of prevailing personal laws disprivilege women"[810] as discussed in the very beginning of the paper that the religious laws that exist today are not the pure law but the adulterated one, hence the scholars establish that any particular contemporary customary practice is 'Religious Personal Law' in a meaningful sense, that is, something more than the fact that certain community claim it to be in conformity with dharma.

When it comes to formal application of these religious personal laws, these laws should have at least some derivation from the scriptures so that these customs can be accepted as Religious Personal Laws but in practical sense we do not see this approach and that is why we have laws that are not gender neutral and the society continues to be of a patriarchal nature. Scholars consider this as discrimination perpetuated by law because the Constitution itself is providing space for these customs to prevail and to be practiced in society. [811] Some scholars like Vasudha Dhagamwar have made a persuasive argument that the practices that go in the name of custom can be inhumane[812]. The caste panchayats are set to give punishments that are heaviest on women and State laws also permit these laws and punishments to be practiced in the name of customs. Is it not a mockery of justice that is been done? The long history of these religious personal laws has perpetrated lesser rights for women and always has kept them a step below men. For example, women under sharia law are subjugated to this level that their identity is been bound in the limits of a black cloth i.e. purdah or burkha. Further, in Muslim marriage laws (sharia law) allows polygamy and the infamous triple talaq though through various women movements and judicial activism it has been struck down by the Supreme Court, the judicial history has seen many cases were just because polygamy is allowed under Muslim law, men following other religion have converted to Muslim and remarried so the subjugation is not just limited to women of that religion but has extended to the women community at large. In Joseph

[809]Law commission report 2018 (http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf).
[810] Law commission report 2018 (http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf).
[811] Archana Parashar, Religious personal laws as non - state laws: implication for gender justice, 45:1, JLPUL, 5, 15, (2013).
[812] Archana Parashar, Religious personal laws as non - state laws: implication for gender justice, 45:1, JLPUL, 5, (2013).

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Shine v. Union of India,[813]the Supreme Court, while referring the matter to Constitutional Bench, observed: —

"The provision (Section 497) really creates a dent in the individual independent identity of a woman when the emphasis is laid on the connivance or consent of the husband. This tantamount to the subordination of a woman where the Constitution confers (women) equal status"

Looking into Hindu religion, the Hindu daughters were not entitled to joint heirship of the ancestral property as per the codes of Mitakshara, a school of Hindu Law governing succession. These rights could only be won after a 20 year long legal battle in the Supreme Court. Further, under the Parsi laws, a Parsi Daughter who married non-Parsi men lose their property rights and non-Parsi wives of the Parsi husbands were entitled to only half of the husband's property in this regard. Only debates are taking place and no concrete steps are being taken to evolve the laws according to the changing needs of the society and if laws are not amended or changed with the changing time and society, then the law becomes redundant. Also, under the Parsi law the divorce proceedings are still done through the jury system. The bench sits only twice in a year to confirm divorces and it entails a jury to oversee the divorce proceedings despite the fact that the jury system has been abolished in India. Several decades ago, for all other cases in 1950's and 60's.[814], the story of discrimination does not end here, there are tribal women in Maharashtra and Bihar who do not have any land rights and they are still fighting for their rights in the Supreme Court. Basically, the subtext of all these religious personal laws is that women are not equal to men, and hence there is discrimination against women in marriage, inheritance and guardianship of children. The state has accepted the equation of personal law with group identity and has not questioned this definition of group accommodation or of group interest. By allowing Religious leaders to continue to exercise authority over women of the community, by refusing to reform the personal law, together with the state's policy of reinforcing the public/private split by claiming that no change is possible in the personal law unless the call for change comes from the community itself, the state has abandoned women to patriarchal interpretations of personal law and has legitimized their continued subordination.[815]The onus is on the judiciary and the legislature to control the countervailing forces that become a hindrance in providing gender neutral laws to the society and being a welfare state. The state actors have to intervene and reform the existing laws to gender just laws to ensure social justice to the dominated section of the society, though it is a difficult task but it is high time to amend these laws which do not conform to the societal needs of today. The society has developed and the laws also need to develop accordingly if the laws are not amended with the changing time, the law becomes redundant.

[813](2018) 2 SCC 189

[814] Law commission report, 2018 (http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf).

[815]Tanja Herklotz, Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective, 1:3, Indian Law Review, 250, 259, (2017).

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CONCLUSION

Religious personal laws are discriminatory in nature, is a well-established fact and it is a far discussed and realized issue. There has always been a fight between religion and law, as whenever it comes to deciding matters related to personal issues in the court, it has been observed that there have been cases where religion and law have stood face to face and the judiciary has been in a dilemma whether to allow the religious practices to prevail even when they violate the provisions for basic human rights. Also, in maximum cases it was the women who were subdued and the one who suffered. Personal laws have been a highly debated topic and still continue to be as there are varied interests of the communities which are opposing to each other.

The need of the hour is that the legislature and the judiciary should come up with a new jurisprudential approach with respect to religious personal laws. The first step has been taken towards it and can be seen in the case of triple talaq where the Supreme Court went ahead and pronounced the judgement quashing the religious claim of giving divorce by just stating a word 3 times 'Talaq Talaq Talaq'. The Supreme Court took a bold stand here by applying a liberal approach to the religious matters where the court interpreted the law for the welfare of the society superseding the religious claims. But, such issues relating to religious matters are very often in nature and it becomes difficult for the court to go against the religion of the people. As Indian people are very sensitive towards their religion and they don't want State to interfere. So, whenever there is any decision taken against their interests, it can initiate a nationwide 'bandh' or agitation which can cause destruction of public property at the national level, leaving behind huge amount of loss to be borne by the State and tax payers. Hence, the onus shifts to the legislature to enact a law that is not religiously dominated and religion is no longer considered to be part of the law, the laws being independent from religious dominance should not be confused with uniform civil code, uniform civil code may be the ultimate goal but the author here wants to contend that whenever there is a conflict between law and religion, the fundamental rights of the human and fundamental principles of law should prevail rather than the religious laws, it's the time for affirmative action by the judiciary and legislature towards a gender neutral society not just in theory but in practical sense also. The governance should be through the law which is free from religious dominance but to avoid religious violence by way of 'bands' and also to protect the essence of religion and secularity in India. The religious institutions can be given the governance on the second level i.e. if both the parties consent to be governed by one particular religious law then only the practices of that religion will be applicable to them if even one party dissents from being governed by the religious law then the civil law independent of religious dominance will be applicable, this will in first place will reduce dominance towards women and ultimately would lead to uniform civil code to be adopted by the society as discussed above. Most religious personal laws are discriminatory in nature hence when there will be an option for a law that does not discriminate the society will tend to adapt that and ultimately there will be a shift from religious dominated civil laws to a common civil law or say uniform civil code that will be gender neutral and progressive in nature. The society is evolving and the law also has to

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evolve, because if law does not evolve the law becomes redundant. Hence, the paper concludes that the personal laws of the country should be free from religious dominance and the religion can be given the second position in governance of personal laws but primarily it should be free from religious dominance to promote gender neutrality because as analyzed above most of the religious personal laws are discriminatory towards women.

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CHILD CARE LEAVE IN INDIA: AN ANALYSIS

- *Sagarika Suresh*[816]

ABSTRACT

When my mother, the only doctor in her central government institute (Indian Institute of Horticultural Research) applied Child Care Leave (CCL) for a month when I was appearing for my 10th board examination, it was denied on the basis that her job was an essential service. She always found this unfair as she noticed a large number of women in her institute were allowed to apply for CCL under the 6th pay commission for months on end. Having had discussed this with my mother, I felt the need to read up more into this topic and how CCL impacted the lives of working women positively.

After having read a few cases on CCL and the basis for it being denied to central government workers, I further found out its negative impacts on the institution and instances where it has been misused as well. Not only does this rule hold loopholes in practicality, it also stereotypes gender roles in the society as the 7th Pay Commission, although extended the leave to single male parents, did not extend it to married male parents.

OBJECTIVE

The objective of this paper is to understand what Child Care Leave means in India, the regulations governing it, an analysis on Child Care Leave as per the 7th Pay Commission and the effects of the same on gender roles in the society.

STATEMENT OF PROBLEM

This paper aims at answering the following questions-

1. What is Child Care Leave?
2. What are the pros and cons of the existing regulations on Child Care Leave?
3. How do these regulations affect gender roles in the society?

CHAPTER I

The debate over whether it is a change in rules and laws that leads to a corresponding change in society or vice versa is a continuing one. The order is often case-specific. When it comes to gender roles that are non-exploitative to everyone, a change in institutions can do more than what is popularly imagined.

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The central Pay commission (CPC) of the government of India regularly reviews and suggests revisions to the pay structure, leave entitlements and pension benefits of central government employees once every decade. These suggestions made by the Central Pay Commissions have potential not only to impact central government employee's professional lives but also have a huge impact on the society as a whole. One such instance is Child Care Leave that was introduced in the 6th Central Pay Commission which came into effect from 1st September, 2008. On 14th August 2008, the United Progressive Alliance Government, headed by Manmohan Singh approved the 6th Central Pay Commission with some modifications.[817] Under the 6th Central pay Commission recommendations, in order to enhance the quantum of Maternity Leave which was applicable women employees working for the central government, during pregnancy, for a maximum of 12 weeks, it introduced Child Care Leave.[818]

Consequent upon the decisions taken by the government on the recommendations by the sixth Central pay Commission relating to maternity Leave, the existing provisions of the Central Civil Services 9Leave) Rules, 1972 were modified as follows in respect of the civilian employees of the Central Government:

(a) The existing ceiling of 135 days Maternity Leave provided in Rule 43(1) of Central Civil Services (Leave) Rules, 1972 shall be enhanced to 180 days.

(b) Leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) that can be granted in continuation with Maternity Leave provided in Rule 43(4)(b) shall be increased to 2 years.

(c) Women employees having minor children may be granted Child Care Leave by an authority competent to grant leave, for a **maximum period of two years (i.e.730 days)** during their entire service for taking care of up to two children whether for rearing or to look after any of their needs like examination, sickness etc. Child Care Leave shall not be admissible if the child is eighteen years of age or older. During the period of such leave, the women employees shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. It may be availed of in more than one spell. Child Care Leave shall not be debited against the leave account. Child Care Leave may also be allowed for the third year as leave not due (without production of medical certificate). It may be combined with leave of the kind due and admissible.

[817] Department of Expenditure- Notifications https://doe.gov.in/sixth-cpc-pay-commission
[818] Introduction of Child Care Leave in respect of central Government employees- Dot Orders issued on 11.9.2008

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These orders shall take effect from 1st September, 2008.

In view of paragraph 2 above, a women employee in whose case the period of 135 days of maternity leave has not expired on the said date shall also be entitled to the maternity leave of 180 days.

Formal amendments to the Central Civil Services (Leave) Rules, 1972 are being issued separately.

In so -far as persons serving in the Indian Audit & Accounts Departments are concerned, these orders are issue in consultation with the Comptroller & Auditor General of India.

Hindi version will follow.[819]

This was further modified in the 7th Central Pay Commission[820] which recommended extending CCL to single male parents[821] employed by the central government. According to the report, "The commission notes that in the event of a male employee is single, the onus of rearing and nurturing the children falls squarely on his shoulders." Taking cognisance of the burdens faced by employees who are single mothers, the commission has recommended the availability of CCL in six spells per year, as opposed to three spells to mothers currently.

CHAPTER II

The committee has not necessarily attempted to define what Child Care Leave is, it has laid down certain eligibility criteria which extends to minor children (below the age of 18 yrs.), can be applicable to a maximum of 2 years and is limited to apply only for the 1st two children born to couple or single parent but the reason to apply for CCL is abstract in nature which includes examination of the child, sickness, etc.[822] The term 'etcetera' added at the end of the sentence provides for loopholes, misinterpretations and misuse of the rule.

In the infamous Saphla Rani' Bhatia's case[823], who became a mother at the age of 57, was denied CCL in 2014 who was employed as a junior manager with RITES (a public sector undertaking

[819] 7th CPC News https://7thpaycommissionnews.in/introduction-of-child-care-leave-in-respect-of-central-government-employees-dopt-orders-issued-on-11-9-2008/
[820] https://www.india.gov.in/pdf/sevencpcreport.pdf
[821] NDTV Profit https://www.ndtv.com/business/seventh-pay-commission-for-extending-child-care-leave-to-single-male-parent-1245676
[822] 7th Central Pay Commission
[823] https://www.ndtv.com/india-news/mother-at-57-she-wanted-child-care-leave-sacked-days-before-retirement-1685979

under the ministry of railways), she gave birth to a baby boy after undergoing 15 cycles of in-vitro fertilisation (IVF) cycles, a physically and financially draining procedure.

Three years later, she started fighting her employee – first, for not sanctioning her Child Care Leave (CCL), which she claims is her Fundamental Right, and second for withholding her due salary when she anyway proceeded on CCL. Saphla mentioned that she received a suspension letter from RITES and claims that despite her repeated applications for section of CCL, her employer refused to grant it. She then filed a complaint with the National Commission of women, which sent a letter to RITES seeking a report on the matter. In an interview with a senior official in RITES, he said that RITES is a public sector enterprise under the ministry of railways, hence its employees are not central government employees and have a different pay package and due to the commitment to the projects and clients, peculiar nature if work of the company, affordability of the company, the Board of directors have not found it feasible yet to introduce Child Care Leave. The Department of Personnel and Training (DoPt) has made an official clarification that under no circumstances can any employee proceed without prior proper approval of the leave by the leave sanctioning authority. The Bengal government on the other hand has slashed entitlement of school teachers to a maximum of 60 consecutive days after school heads were swamped by applications seeking up to 730 days of uninterrupted leave on short notice.[824] The curtailment came within in 3 months of Mamata Banerjee announcing that all women working in schools, colleges and universities would be entitled to two years of paid childcare leave on par with government employees.

Schools were flooded with leave applications from the day the new childcare rule took effect on August 1st. "a teacher in my school whose son was just 6 months short of 18 when the announcement came immediately went on a four-month holiday" said a headmaster who didn't wish to be named in an interview with Times of India[825]The head of the school with two geography teachers and two history teachers for classes viii and XII said all four took childcare leave at the same time, leaving colleagues who teach in the junior classes to fill for them.Several schools have been unable to find replacements for teachers in certain subjects, a source in the school education department mentioned in the interview.

Science teachers are scarce anyway and one of the headmistresses spoke of her predicament when the only maths teacher in her school for the senior classes applied for childcare leave. What makes refusing leave difficult for school heads is the definition of childcare. A working mother can go on leave for her child's education, health or any such reason till the child turns 18. The provisions remain unchanged except that the state government has cut the duration of uninterrupted leave. The revised order states that school employees can take a maximum of 60

[824] WE THE TEACHERS https://www.wetheteachers.in/leave.html
[825] Times of India published on 7.11.15

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days of childcare leave at a stretch, which in “exceptional circumstances” can be increased to 120 days. The total entitlement remains 730 days.

In schools, employees taking long leaves creates a problem because the job of an absentee teacher cannot be done by a colleague specialising in another subject, unlike in offices where staff members are shuffled across verticals.

Education minister Partha Chatterjee confirmed that too many teachers going on long leave was disrupting the academic schedule. "The government has taken the right decision by extending childcare leave to all teachers as every mother has the right to take care of her children. But at the same, we don't want academic activity to suffer. We won't allow misuse of the privilege," he told.[826]

Heads of several schools welcomed the government's move to prevent teachers from suddenly going on long leave. Dipak Das, a former general secretary of the West Bengal Government Schoolteachers' Association, urged the government to arrange replacements while granting childcare leave to teachers.

Childcare leave has, of course, been the subject of a debate the world over. Yahoo CEO Marissa Mayer had faced a storm of protests for announcing that she would take only a couple of weeks off for the birth of her twins.

She had done the same for the birth of her son in 2012. Under her, Yahoo has doubled paid maternity leave to 16 weeks but her critics say that she is making life difficult for working women not only in Yahoo but everywhere else by going public about her short maternity leave. Many women face medical and other complications that she hasn't had to and can't afford the kind of childcare that she can, Marissa's critics argue.

CHAPTER III

Biologically, women have the ability to give birth. However, this biological function has been assumed to be an ordained role and used as an excuse to justify the continued exclusion of women from higher posts in jobs. It is believed that only a mother is capable of properly nurturing children and, therefore, should sacrifice any ambitions that require her to forsake this ‘natural’ role.

[826] METRO magazine published on 12.08.16

While breast-feeding is a biological function that women can perform, feeding children as they outgrow breast-milk and taking care of them as they grow further can be performed by either parent, regardless of gender. Nothing is science or psychology suggests that fathers cannot perform all social roles and functions expected of and performed by mothers.

In an in-depth scientific study[827] and analysis on caretaker-child interactions, it has been clearly established that the gender of the caretaker is not relevant and that a make and female are capable of providing for a child in the same manner, without affecting the child in any given way.

When the mother's physical and emotional bond with the child is much more pronounced than that of the father up to a certain age, the father may find it difficult to take over care-giving roles from the mother after the child has outgrown the age of breast-feeding. These further fuels the idea that women are natural caregivers when it is actually only a matter of practice.

CONCLUSION AND SUGGESTIONS

Through the paper, it is evident that Child Care Leave introduced by the Sixth Central Pay Commission has been a very progressive step taken by a developing country which was further relaxed and extended to single male parents as well. As far as the positive aspects are taken into consideration, there are a number of loopholes in the rules put forth in its practicality.

The balance between providing rights to central government employees and the misuse of the same regulations is an on-going problem to curb.

Some of the recommendations include:

1. Reducing the number of days one can apply for Child Care Leave at a stretch, taking into consideration the Bengal state government's rules for teachers.
2. Removing 'etcetera' from the eligibility clause and limiting the leave to examination and sickness of the child.
3. Making it mandatory for the employees to provide proof that the child has examinations or of sickness with relevant documents.
4. Reforms to the current system to curb the problem of gender roles:

In place of the current system, a general child care leave applicable to both mother and father mat be more desirable. If both parents are government employees, this would mean granting them one year of leave each, if sharing of responsibilities is of essence here or leave it to the discretion of the parents to divide the 2 years of leave by themselves.

[827] Men and Women in Childcare: A study of child-caregiver interactions https://www.tandfonline.com/doi/full/10.1080/1350293X.2017.1308165

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Currently, CCL is applicable to two children only. However, what about family set-ups where only one parent is a government employee? Should the parent in question therefore be entitled to two years of leave? This could lead to problems as people of the same gender would be given different leave structures. However, we should consider that the entire block of government employees as one genderless group, male and female employees (broken up into married fathers, single fathers and mothers) are already entitled to different childcare leave structures.

The duration of leave granted to a parent can eventually be varied depending on the involvement of the other parent (not in government employ) in childcare. CCL is intended for the proper care of children; the best interest of children is prime here.

TAKING UNCONVENTIONAL PARTNERSHIPS INTO ACCOUNT

A couple in a partnership which consists of them bringing up children could be made entitled to a certain number of days as part of general CCL. How to split this number between them could be left to the couple, subject to certain conditions such as restrictions on both taking leave on the same day as this would take away from both their stocks while subtracting one day from the entitlement of the child.

In the short term, it might be women who avail the entire stock of leave available to a couple. Sanyogita Yadav, 47, a central government employee, welcomes the proposal to extend CCL to male employees. However, she mentions that some of her female colleagues worry that men could misuse it and go on mass leave without contributing to childcare and add to the burden of their wives.

However, with time, a general child care leave policy will encourage women to demand that their partners also take equal responsibility for childcare. Children will benefit from active and equal involvement of both parents and grow up without present gender roles in mind. S.K. Ritadhi, PhD candidate at University of California, Berkeley, says that having a training course for all public employees – about sharing household responsibility and how this aids overall family welfare – can aid in the matter.

'Partnership' need not be marriage-specific. People who are not in a conventional romantic relationship but are involved in bringing up children together should be included in the definition, as should former partners with children between them. General CCL schemes will not need drastic surgery if and when India accepts same-sex unions as legally valid. Government policy will eventually encourage private firms to follow suit.

CCL also does not consider an individual's third child. The question of children born of second (or further) marriages and later partnerships merits serious thought in a society embracing new patterns of relationships. The widening of the definition of "partnership" has been seen as

problematic by many. It is feared that such an inclusion will pave the way for multiple 'meaningless' relationships and serial monogamy, resulting in irresponsible parents producing more babies than our economy can handle. Holding parents responsible for the care of children through legislation will make them more responsible about their right to parenthood. If anything, such legislation will make sure that the children born of irresponsible parents have certain safeguards protecting them. Moreover, the stereotype of "bad-partner-means-bad-parent" needs to be seriously challenged.

Many are of the opinion that child care leave should be renamed family care leave. A family includes but is not entirely composed of children. As the provisions of CCL stand exclusively for the benefit of children in the care of parents, a revision of the name seems unnecessary.

NEED FOR SOCIAL CHANGE

Children and child care have often been seen as hindrances to women's success at work. The way we think about work involves a commitment that often comes at the cost of the time spent nurturing children and women are expected to make the sacrifice if they wish to succeed professionally. In the absence of spousal help, many women find that the rearing of children falls squarely on them. Equality at work comes from equality in domestic responsibilities. About 15 years ago, there was a cultural shift towards the "Wonder Woman"— the woman who embodied the perfect mother and the perfect professional. As a preteen, I lapped up that subliminal message about women from television advertisements and popular culture. Any era undergoing a mass transition — in this case, the large entry of women in the workforce — needs such myths. That was a period when many worried that women being in the workforce would lead to them neglecting the household. Hence, the Wonder Woman was conjured up – a woman who could have it all! That myth lead to burnouts among women as sustaining a work-and-home labour routine proves to be very exhausting.

The advertising agency FCB Ulka conducts a series of studies titled Woman Mood every seven years to understand the changing Indian woman. Woman Mood I from 2001 notes: "Working women are inspirational, but they are evaluated by how good a homemaker they are."[828]

Changes in the government's child care leave policy could bring us a step closer to a society with changed attitudes towards gender roles, one in which everyone is able to live without being enslaved by age-old societal norms.

[828]https://books.google.co.in/books?id=8AwiDAAAQBAJ&pg=PT51&lpg=PT51&dq=%E2%80%9CWorking+women+are+aspirational,+but+they+are+evaluated+by+how+good+a+homemaker+they+are.%E2%80%9D&source=bl&ots=bpp7C2O__8&sig=7352ehmfGppJCII6zlI_7EVETCU&hl=en&sa=X&ved=0ahUKEwj3rMyXpIjNAhVML48KHVM-AI8Q6AEIHDAA#v=onepage&q=%E2%80%9CWorking%20women%20are%20aspirational%2C%20but%20they%20are%20evaluated%20by%20how%20good%20a%20homemaker%20they%20are.%E2%80%9D&f=false

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ECONOMY AND CYBER SPACE: THE IMPACT OF CYBER CRIME ON ECONOMY

- *Lavnish Kumar Sharma*[829] *& Priya Rathore*[830]

ABSTRACT

Business studies have invariably and consistently mentioned factors that can easily condition and influence a business, the first and the most rudimentary are the internal factors ensuing inside the organizations which can be controlled and reined in, and the other ones being the external factors, which cannot be controlled by any organization. A large number of external factors can be counted on fingertips which include, inter alia, climate, fashion, trend, government policies but as has been widely known, the term business has expanded significantly in these years that it is not only confined to territorial boundaries, but it's also present in the virtual spaces, with websites offering products and services via internet. Every business demands expansion and to expand, it needs connectivity to other business, consumers and all the other entities whether it be banks or stock exchange market. But, there is one significant thing which needs to noted, and that is, the same internet over which these businesses are flourishing, the very internet plays the role of affecting the business externally in a negative manner and these negative external factors can be crafted by any individual sitting in any corner of the world. Just a simple mouse click and everything the business has ever achieved can vanish and the term given to such acts is Cyber Attack. The researchers in this paper have tried to put light on the same by showcasing various incidents on the issue, as to what impact do these Cyber Attacks have on an economy.

INTRODUCTION

Technology has gifted humans with something so conspicuous and essential, the internet, but with the advent of the internet, came along something which was not related to land, air, space and sea. It was something which was operating in a completely different domain. knows as the Electromagnetic field. It was the Cyberspace. The term Cyberspace was coined by William Gibson who was a science fiction writer[831]. this term essentially included those things which work on the basis of internet whether it is online stores or government portals or any other thing which makes use of Internet. Cyberspace has helped economies of countries to flourish and expand by helping them to operate from a place in a completely different part of the world. Now a day, the headquarters of Multinational Companies are situated mostly in USA, UK, and Finland and their sales are taking place in India and China. Internet is the ship on which all the

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[830] 3rd Year, B.A. LL.B. (Hons.), Nirma University, Ahmedabad
A special report on cyber security – Defending the digital frontier, The Economist, available at http://www.economist.com/news/special-report/21606416-companies-markets-and-countries-are-increasingly-under-attack-cyber-criminals posted on July12, 2014

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trading is taking place. It is something which has provided us with all the tools to expand our businesses as vast as we can imagine and that too at a very low cost. One such example is of Flipkart, which is an online shopping store. Even if a company is having a very extraordinary goodwill it has to have a website in order to reach more and more customers and provide them services at their doorsteps. The goodwill which was created by Flipkart is the reason that Walmart has invested a humongous amount in the company. However, selling products and making them available at the door steps is not the only activity that e-commerce business is doing to gain the trusts of consumers, they have also started tie-ups with various national banks in order to provide more discounts, offers. They have also tied up with organizations like VISA, MasterCard etc. to make their transactions more secure. Within cyberspace, some non-state actors are also active and their sole purpose is to create barriers in working of cyberspace and the sole reason for doing so is to gain economic benefits. The latter objective of these can sometimes raze the world economy within seconds. To corroborate this, the following example will show us how can a cyber-attack affect a whole country. The average financial cost of natural disasters in US was around $11 Billion in the year 2000 and in the same year a virus named "Love Bug" also called as "I Love You" virus caused a loss of around $15 Billion all around the world.[832] And all this was done with the help of a single E-Mail.. E-mail has taken the place of being a necessity in today's world, as a large and quite essential activities concerning the personal and business lives take place on them. Having an E-mail account is almost as important as having a bank account. Now, this was the situation in year 2000 where a small malicious code written in an E-mail caused such a havoc. In that year 50 million computers were affected by that virus. This was only one of the many cases; there are several other cases which had the same result. U.S. President Barak Obama in his speech on cyberspace in the year 2014 stated that

"In this interconnected, digital world, there are going to be opportunities for hackers to engage in cyber assaults both in the private sector and the public sector. Now, our first order of business is making sure that we do everything to harden sites and prevent those kinds of attacks from taking place…"

Barak Obama, December 19, 2014[833]

it can be inferred that there are still some issues which are to be dealt with, seriously, by India as well. Although India has already started giving attention to this issue, to make the country able enough to deal with such issues in the future more efficiently and effectively.

[832] James A. Lewis, Assessing the risk of Cyber Terrorism, cyber war and other cyber threats, Centre for Strategic and International Studies, available at http://www.enhyper.com/content/0211_lewis.pdf
[833] SECURING CYBERSPACE – President Obama Announces New Cybersecurity Legislative Proposal and Other Cybersecurity Efforts, available at http://www.whitehouse.gov/the-press-office/2015/01/13/securing-cyberspace-president-obama-announces-new-cybersecurity-legislat

CYBER ATTACKS, E-COMMERCE & BUSINESS ENVIRONMENT

Today, where majorities of the people are shopping online, making use of the internet, it is the same internet where most of the attacks are also ensuing on the sites that provide the users with online shopping facilities. In May, 2014 one such attack occurred on E-Bay, one of the largest online stores. The Hacker stole data of around 233 million users including their username, password, phone number, and physical address. They also managed to access sensitive information of the buyers after which E-Bay told their users to change their password.[834] What are the kind of potential impacts that attacks of this kind can have on any business? , first and foremost is the economic impact: Richard Power, Director of Computer Science Institute, San Francisco give an example to explain this loss, he says that if you are conducting an online business like Amazon, you are earning at least $600000 every hour and once you are attacked by a cyber-criminal which makes your website behave abnormally, then you start losing the same amount hourly. If you are Cisco, you are making $7 Million daily. And this is not the only cost which you would have to bear. The collateral damage of such Cyber-attacks are also enormous and lasting, as after this you would have to conduct an investigation about this attack which will also cost you some tens of thousand dollars.[835] The second way in which the businesses get affected is not by something which can be measured in money. The second impact is on, the trust of consumers, whenever any business in the world has been attacked by any hacker, the first question which is raised by the consumers is question of security? Is the data that they provided, safe? If yes, then how was it possible for the attack happen? If no, what about the personal data which was lost during such attack? After the attack on E-Bay, a cybersecurity firm, ClearSwift conducted a survey on the consumer response of adults in UK. Almost 49% of adults have lost their trust in E-Bay and as a result, they are not inclined to use E-bay in future.[836] This year, Facebook, which has been declared as the largest social media platform, revealed that, in a cyber-attack, they have lost data of around 50 million users. Facebook is not an e-commerce website, it is a social media website, where people connect with each other virtually and such a virtual connection and platform usage demands high security of data and yet, a simple attack and Facebook lost 3% on their market shares.[837] Another such example is a big retailer known as Target Stores; during a holiday shopping season around 40 million Target Store customers have lost their debit and credit card account details. The store has already paid $60 Million in legal fees, they are also faced with 140 lawsuits, the profit of company has already decreased by 50%

[834] Jay McGregor, The Top 5 Most Brutal Cyber Attacks of 2014 so far, available at http://www.forbes.com/sites/jaymcgregor/2014/07/28/the-top-5-most-brutal-cyber-attacks-of-2014-so-far/ 28th July, 2014

[835] The Financial Cost of Computer Crime, The Frontline, available at http://www.pbs.org/wgbh/pages/frontline/shows/hackers/interviews/power.html

[836] EBay Cyberattack Fallout – Consumer Response: half of UK adults have lost trust in EBay since cyber attack, ClearSwift, available at http://www.clearswift.com/about-us/pr/press-releases/ebay-cyber-attack-fallout-consumer-response

[837] Facebook just announced a major security issue affecting 50 miilion users, Business Insider India, available at https://www.businessinsider.in/Facebook-just-announced-a-major-security-issue-affecting-50-million-users/articleshow/65999322.cms

and 12% of customers have stopped purchasing from the Target Stores.[838] Due to this, the other companies have managed to gained support from these customers. The most famous example of 2015 which made the consumer lose their trust in that particular site was the "Ashley Madison" cyber-attack. This was a match making site which provided details to its customers mostly married men and women to have an affair. The hacker group, calling themselves as "Impact Team" hacked into the system of the site and stole around 9.7 GB of data which is equal to the information of their 33 million customers, and they tried to extort the site for giving them money which was refused by site. As a result they made all the data available in public domain.[839] The Avid Life Media which is the holding company of Ashley Madison faced three multimillion dollar suit totals of $760 Million. The company also offered $500,000 to those who provide information related to the hackers.[840] Now a days there are also allegation on companies which are involved in such activities, for example the allegation on the Chinese company Huawei for spying the US facilities. The allegations were based on the documents provided by the Edward Snowden but the company has denied these allegations.[841] The concept of business environment is not new in economics, in which the technical advancement of a company can help the business to have greater demand of product but today is the right time to include this factor as well, that a cyber-attack can affect the business of a company. It is an external factor which is not in control of business. Such cyber-attacks increase the cost of company as a result they are forced to equate the loss by increasing the prices. However, it can have a positive impact on the industry too, the reason being, it will raise the demand of cyber security experts like Cyber Lawyers, Cyber Security Experts etc. One more issue in this section is the "Trade Secrets" of a company. The loss to the world economy which is of $74.9 trillion dollars in 2013 can range from $749 Billion to $2.2 Trillion.[842] And talking about India, a survey report published by the KPMG in November 2015 says that 72% of Indian companies faced cyber-attacks in the year 2015 and these attacks can have far reaching impacts on the company like loss to reputation (49%), financial loss (63%) and operational loss.[843]

[838] Alexis Petru, Can Companies Restore Consumer Confidence after Data Breach, Triple Pundit, available at http://www.triplepundit.com/2014/07/can-companies-restore-consumer-confidence-data-breach/ posted on July 8, 2014

[839] Donna Mahoney, Ashley Madison hack highlights cyber extortion risks, Business Insurance, available at http://www.businessinsurance.com/article/20150901/NEWS06/150909978 posted on 9th January 2015

[840] Adi Robertson, Ashley Madison owners promise $379,000 bounty for information about hackers, The Verge, available at http://www.theverge.com/2015/8/24/9197833/ashley-madison-hack-reward-avid-life-media/in/8943006 posted on 24th August 2015

[841] China has never asked Huawei to spy: CEO, Security Week, available at http://www.securityweek.com/china-has-never-asked-huawei-spy-ceo posted on 22nd January 2015

[842] Managing cyber risks in an interconnected world: Key findings from The Global State of Information Security, Survey 2015, PWC

[843] KPMG Cybercrime Survey Report 2015, available at https://www.kpmg.com/IN/en/IssuesAndInsights/ArticlesPublications/Documents/Cyber-Crime-Survey-2015-30Nov15.pdf , November 2015

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E-G OVERNANCE

To be a country which can meet world's standard, it should provide facilities at a single click. India has accepted this fact in the year 2006 by initiating National E-Governance Plan with an objective of making all the government services available to layman and to ensure transparency and reliability.[844] A lot of people are benefited by this service but on the other hand a lot of "non-state" actors are gaining benefits because more the number of people using e-governance, more the number of opportunities for cyber criminals to exploit. Presently 12,456 cases are registered every month in India and a total of 149,254 are registered till May 2014 growing at the rate of 107%. This clearly indicates the large number of opportunities available to the cyber criminals in the cyberspace.[845] As per a report of RBI and CBI, India has lost total 220 Crore by electronic fraud from the year 2011-2014.[846] Another important report which was published by the Internet solution provider company Symantec states that India has lost around $4 Billion from cyber ransoming, identity theft and phishing during the period of August 2012 to July 2013.[847]With the increase in the use of internet through mobile, application, desktop at home, and extensive use of credit and debit cards for online transactions, have also provided an opportunity for the attackers, as a result of which more and more cyber crimes are being registered. Nearly half of the government websites are prone to cyber-attacks.[848] In February 2014 the sites which were being hosted by National Information Centre were attacked by Pakistani hacker group which is responsible for hacking more than 2000 websites on the previous Republic Day including the Defense Ministry website.[849] And Indians are also not lagging behind when it comes to cyber-attacks. On the 7th anniversary of the 26/11 attacks, a group of such hackers calling themselves as "Indian Black Hats" attacked on various Pakistan's government websites which includes www.csd.gov.pk and www.mona.gov.pk, and it was not only govt. websites which were attacked but also the non-govt. websites.[850]. The non-state actors do such attacks in conventional way (using physical means of destructions) but the 21st century wars are not the same. Today the

[844] National e-Governance Plan, National Portal of India, available at http://india.gov.in/e-governance/national-e-governance-plan

[845] Embargo for Release on Sunday, January 4, 2014 Cyber Crimes in India is likely to cross 3,00,000 by 2015: Study, ASSOCHAM India, available at http://www.assocham.org/newsdetail.php?id=4820

[846] PTI, Cyber Frauds Cost India Nearly 220 Crores since 2011, The Hindu, available at http://www.thehindu.com/news/national/cyber-frauds-cost-indians-nearly-rs-220-cr-since-2011/article5455659.ece posted on 13th December 2013

[847] Cyber Fraud Cost India $4 Billion, The Hindu, available at http://www.thehindu.com/business/Economy/cyber-frauds-cost-india-4-billion/article5261594.ece?ref=relatedNews posted on 23rd October 2013

[848] Piyali Mandal, Half of govt. websites are prone to cyber attacks, Business Standard, available at http://www.business-standard.com/article/technology/half-the-govt-websites-in-india-are-prone-to-cyber-attacks-113010600025_1.html posted on 6th January 2013

[849] Liaqh A. Khan, Pakistani Hackers Defaced Ministry Website, The Hindu, available at http://www.thehindu.com/news/national/pakistani-hackers-deface-ministry-website/article5650092.ece posted on 4th February 2014

[850] Dennis Marcus Mathew, Indian hackers 'pay back' Pakistan for 26/11, The Hindu, available at http://www.thehindu.com/news/national/kerala/indian-hackers-pay-back-pakistan-for-2611/article7919162.ece posted on 27th November 2015

definition of war includes drowning the GDP of a country by any means whether it is physically or electronically.

SHARE MARKET

Today, the economies of all the countries are dependent on each other. An attack on one country's economy can have effect on the economy of other country as the attack is being shared by all other countries. Every country is having its stock exchange which deals with selling and buying of shares of companies. Now suppose a situation where some enemy country of India breaks into the mainframe of stock market and injects a virus into it which changes the price company's shares. In a single attack hacker will be able to buy and sell millions of shares of company or multiple companies. Now multiply this with companies listed in Fortune 500. This is only a hypothetical situation based on the situation given in the summer issue of "Eightkay" magazine.[851] Such an attack is a part of "Fire Sale" which is designed to attack nation because of its reliance on the computer technology. It has three stages of attack: first on transportation, second on financial & security market, and lastly infrastructure system. A movie was based on this named *Die Hard 4.0: Live free or Die Hard.* Recently the website of New York Stock exchange was attacked by a cyber-group. A Report from International Organization of Securities Commission stated that almost 53% of stock exchanges have reported cyber-attack on their system. According to studies conducted by Norton and McAfee the cost of cyber-attacks are ranges between $338 Billion to $1Trillion.[852]

PIRACY & ECONOMICS

In India, Copyright Act 1976 deals with copyright protection of any type of artistic, architectural, cinematographic, musical, literal or dramatic work. But since a very long time, it has been seen that a work of copyrighted material is easily available to every person in the world just because of peer to peer sharing. This peer to peer is facilitated by some sites known as Torrent sites; even India has a lot many sites that are operative. So what economic impact does it have on economy? To answer this question, only facts shall suffice the purpose, but before moving to the facts, first and foremost we must understand how infringement actually takes place. Section 51 of Copyright Act, 1957 which states that if, a person makes copies of any copyrighted material, to sale or hire or offer for sale. The owner of the copyrights loses a large amount of money and this is most commonly seen in the case of movies. The facts which are cited here are mostly based on US studies. Secondly, the facts will only be related to entertainment industry because this is the industry which suffers the most due to copyright infringement. The first study conducted was done by LEK on Motion Picture Association of America for evaluating the cost of piracy the

[851] Paul, Szoldra, Hacker Reveals How Devastating a Cyber Attack on Cyber Market Could be, Business Insider, available at http://www.businessinsider.in/Hacker-Reveals-How-Devastating-A-Cyberattack-On-The-Stock-Market-Could-Be/articleshow/21957887.cms posted on 31st August 2013

[852] Rohini Tendulkar & Gregoire Naacke, Cyber-crimes, securities market and system risks, Joint Staff Working Paper of IOSCO Research Department and World Federation Exchange, Staff Working Paper: [SWP2/2013], IOSCO &WFE

major findings of the study was that the piracy rates in world are highest in China, Russia and Thailand. The US motion pictures had a loss of $6.1 Billion in the year 2005 out of which 38% was due to internet piracy. Out of 10 countries on which study was conducted India stood second last in the list but these facts were of 2005 when people were not aware of torrent or peer to peer sharing services.[853] However in India not many such studies are made use of, but one was done by US-India Business Council which was done to study the impact of piracy in Entertainment Industry on Indian Economy. A single point in the study will be enough to give a picture of the impact, which says that in a year, the industry losses 820,000 jobs and revenue of $4 Billion each year.[854] In India, the movie *Bang Bang* produced by Fox Star India Private Ltd moved to court and the Delhi HC passed a restraining order to 90 websites from streaming, broadcasting and access to film just before its release.[855] Again in 2011 a study was conducted by Business Software Alliance which is a non-profit trade association which promotes safe and legal digital world. The study looked into the software piracy aspect all around the world and it was found out that the losses due to software piracy has raised to $58.8 Billion in 2011 with China topping the list.[856] All these facts prove that piracy is a humongous issue which the government should deal with. The 4 main functions of a state are to promote, produce, regulate and plan. The government should not only regulate the businesses but they should also try to regulate such types of practices to ensure that the businesses feels safe in carrying on transactions and create a secure environment. Another important reason for regulating is that Intellectual property attracts Foreign Direct Investments. Researches show that if in a country there is a potential threat of piracy and counterfeiting of IP, then companies will not invest. The assessment is shown by Organization for Economic Cooperation and Development on IP in Developing Country which shows that if a country shows 1% increase toward IP protection then it can attract 6.8% and 2.8% more FDI in copyright and patent.[857]

FINANCE SECTOR & CYBER ATTACKS

It is one of the softest targets of today. Hackers are always ready to give a blow to financial market by attacking various banks, insurance companies. The most common techniques used in this area are Phishing, Social Engineering, DDoS attack and various other techniques. Phishing is the term referred to a manner where the attacker invites the victim to give his personal information. the modus operandi of this is, the usage of e-mail, a mail is sent across by hackers

[853] The cost of movie piracy, MPA and LEK, An analysis prepared by LEK for the Motion Picture Association, available at http://austg.com/include/downloads/PirateProfile.pdf
[854] The Effects of Counterfeiting and Piracy on India's Entertainment Industry, USINDIA Business Council Bollywood-Hollywood Initiative, March 2008
[855] High Court Restrain Websites from Showing Bang Bang, The Times of India, available at http://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/High-Court-restrains-websites-from-showing-Bang-Bang/articleshow/43967333.cms posted on 1st October, 2014
[856] Software Piracy losses, jumps to $59 Billion in 2010, Report Says, Bloomberg Business, available at http://www.bloomberg.com/news/articles/2011-05-12/software-piracy-losses-jump-to-59-billion-in-2010-report-says posted on 12th May, 2011
[857] Counterfeiting, Piracy and Smuggling in India – Effects and Potential Solutions, ICC, BASCAP and FICCI,

to the victims in the name of their bank asking them to give their password and username. The victim taking this to be a genuine email from bank, provides the information. Social Engineering is an interesting technique wherein the the attacker makes use of human interaction to gain the access into the system network, here the attacker doesn't make use any technical method. Last one is the DDoS attack, which became very famous recently, because one of America's greatest multinational company JP Morgan and four other companies were a victim to the DDoS attack which led to the leak of information of more than 76 Million households and 7 Million small businesses.[858] Next in the list comes an attack which is being considered at the largest cyber fraud in the world. The cyber security firm Kaspersky Lab issued a report on this attack named *Carbanak APT The Great Bank Robbery"* the major findings in the report were the Carbanak is responsible for a loss of $1 Billion USD, targets were the employees of the affected institutions, India was also in the list of affected IP's of countries.[859] The hackers stole the money by way of manipulating the account balances and transferring them to banks situated in other countries. The third trick was that they gained control over the ATM machines situated in the country and ordered them to dispense cash at a predetermined time, so whenever they wanted to withdraw money from the ATM the gang member was waiting outside the ATM and the other gang member ordered the ATM to give out money.[860] In our country. the most common and predominant way of attack on banks is by cyber fraud. Sometimes the attacker wants to gain the money and sometimes the attackers wants to harm the image of company. Talking about the insurance sector, KPMG which is one of the largest employers in the world released a report in the year 2012 which stated that Insurance sector is having the greatest threats due to social engineering.[861]

CYBER CRIME & GDP

This section will only deal with how Cyber Crime affects GDP? The only way to prove this point is by the way of facts. However, in India, a very few studies are available on this topic and those which are available discuss this subject with little attention on it. The facts which are presented in this sector are of other countries and some international organizations. The first fact which we should pay attention to is the study conducted by Centre for Strategic and International Studies titled "*Net Losses: Estimating the Global cost of Cyber Crimes".* The report was released in 2014 and it clearly states that the loss due to cyber crime to the world GDP can range from $375

[858] JP Morgan hack exposed data of 83 million, among biggest breaches in history, Reuters, available at http://www.reuters.com/article/2014/10/03/us-jpmorgan-cybersecurity-idUSKCN0HR23T20141003 posted on 2nd October, 2014

[859] Carbanak APT The Great Bank Robbery, Kaspersky Lab, available at https://securelist.com/files/2015/02/Carbanak_APT_eng.pdf February 2015

[860] Lee Boyce, Banks are hit by largest cyber-crime ever detected: Are they doing enough to prevent fraud or are we now at the hacker's mercy?, This is Money, available at http://www.thisismoney.co.uk/money/saving/article-2955442/Banks-hit-largest-cyber-crime-mercy-hackers.html posted on 16th February, 2015

[861] Data loss barometer: A global insight into lost and stolen information, KPMG, available at http://www.kpmg.com/Ca/en/IssuesAndInsights/ArticlesPublications/Documents/1363-DataLoss-Barometer-FY13-V2.pdf

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Billion to $575 Billion. It also stated the data of countries like US and Germany in which the loss to the US GDP is 0.64% and to Germany is 1.6% which is worst among all the countries.[862]

IS THERE A WAY OUT?

First of all, the government has to take step in this field because there is a very low number of cyber experts in India who can deal with such problems. Government should try to promote such jobs which require experts in cyber security matters. To tell the inadequacy of total number of Cyber Experts in India, National Security Council Secretariat released a report which state that US has 91,080, China has 1.25 Lakh, Russia has 7,300 cyber experts but India only has only 556 cyber experts. As a result of which the government has now decided to recruit total 4,446 experts in 6 of its organizations which are Computer Emergency Response Team, National Informatics Centre, Department of Telecom, National Technical Research Organization, Intelligence Bureau, Ministry of Defense and Defense Research and Development Organization.[863] One more important thing which was done by government is launching of National Cyber Risk Policy 2013, one of its mission is to create a force of 5 Lakh professionals in next five years.[864]

Second, is the Cyber Insurance, this concept may be new in India because we do not have such policies but in west, this concept has already been introduced. Companies get insurance policy for various reasons and now cyber-attack can also be one such reason. In India, a few companies have started giving this type of insurance to other companies. Some examples are Tata AIG, ICICI Lombard, HDFC Ergo, Bajaj Alliance, and Reliance General. There limit as of now is 300 crore but it is anticipated that they can increase it up to 600 crore.[865]

Thirdly, is the Public Private Partnership against cyber crime? The government as well as private players should come together to formulate policies related to cyber crimes in India. In year 2012, National Security Council Secretariat released a report named "*Recommendation of Joint Working Group on Engagement with Private Sector on Cyber Security".* In this, they mentioned that both public and private sector should work together in this field. One suggestion was that there should be a Joint Working Group so with the representation of both Government and Private sector.

Fourthly, there should be some Non-Government Organizations which can work for this field like creating awareness in public about risks which can make them vulnerable to cyber crime.

[862] Net Losses: Estimating the Global cost of Cyber Crimes, CSIS, June 2014
[863] Sandeep Joshi, An IT Superpower, India has just 556 cyber security experts, The Hindu, available at http://www.thehindu.com/news/national/an-it-superpower-india-has-just-556-cyber-security-experts/article4827644.ece posted on 19th June, 2012
[864] National Cyber Security Policy 2013
[865] Sandeep Singh, Data theft threat sees rise in cyber security insurance policies, The Indian Express, available at http://indianexpress.com/article/india/india-others/data-theft-threat-sees-rise-in-cyber-security-insurance-policies/ posted on 15th September, 2014

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CONCLUSION

After looking into the various facts above with the help of reports, it is clear that cyber-attacks are not a thing to be ignored going by the deep impact it has on the economies. They can cause loss to a single business in millions or billions and when we talk about world economy this figure goes to trillion. So it's high time that the companies start taking steps towards tackling this issue effectively because if they are going to be ignorant or late, the more prone they will be to such attacks and these attacks can hamper the growth of the business. The Government is also trying to curb such practices by passing legislations like Information and Technology Act, 2008 which fixes the liability of each and every person but the punishment given in these are not proportionate to crime committed. The government is also trying to promote awareness among public about such types of crimes because in all these crimes the victim is ultimately the customer. Hence, at last it can be rightly said that prevention is better than cure.

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BITCOIN IN INDIA

- *Akshatha Niranjana*[866]

ABSTRACT

Cryptocurrency has taken the world by storm and most famous example is bitcoin. Financial systems around the world have been battling with regulation-based issues from conventional currencies ever since societies started trading on a non-barter system. With the coming of the digital age, it is now finally practicable to use currency which is not controlled by the Government. However, this kind of currency comes with its own problems – mainly its susceptibility to fraud and lack of public trust. Nevertheless, bitcoin has been adopted in various countries around the world with at least semi-successful results and very varied regulatory frameworks. While issues do exist, they do not outweigh the problems faced with conventional currency, and can be mitigated to a large extent. Like most forms of crime, bitcoin-related offences can not be wiped out entirely but can be mitigated to a much larger extent than can be problems with conventional currency. India has demonstrated the lack of trust in bitcoin when the Reserve Bank of India issued a notification prohibiting banks from dealing in bitcoin, effectively reducing bitcoin activity by more than half in India. This paper will address why and how bitcoin should be supported by the Indian Government and make recommendations as to measures to be taken to reduce the concern of the RBI, which is mainly the ease of committing fraud.

RESEARCH QUESTIONS

1. Why has the Reserve Bank of India, vide a notification, effectively done as much as is in its power to curb cryptocurrency use?
2. How can the concerns of the Government be addressed in order to at least support, if not encourage bitcoin use in India?

THE CASH PROBLEM

One of the early principles that helped establish human society was that of quid pro quo – something for something in return. Food in exchange for water. Security in exchange for shelter. No one man possesses everything required for survival, even if all he needs is the security of a group. It is because of this that quid pro quo is such an important element of human society from nomadic villages to Wall Street. This principle was originally manifest in the barter system of exchange, but as human society and needs evolved, the barter system was no longer sufficient. This is when money was invented. The problem is that in the barter system, the goods being exchanged – various kinds of food, clothing, shelter, security etc. - had an inherent and obvious worth. Money does not have such worth. A dollar bill or a ten-rupee note is simply paper. A

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fifty-paise coin or a sovereign is simply metal. The worth of money is not inherent but derived from the backing of the Government, which is why the barter system did not vanish until the establishment of ruling powers. The modern Indian ten-rupee note states "I promise to pay the bearer the sum of ten rupees" and is signed by the Governor of the Reserve Bank of India. It is this statement that gives the note its value – that the Reserve Bank of India considers it worth ten rupees. It is also this statement that gives the Reserve Bank of India control over money. The Reserve Bank of India may stop printing these notes one fine day, or may declare them invalid. One day, the dollar is worth sixty rupees – another day, it is worth seventy. Every time a cash transaction is made, the Reserve Bank of India is essentially a middleman without whom the consideration is worthless. We trust in the Reserve Bank of India to give the note its true worth. In more modern terms, transactions over the internet have become a large percentage of all transactions. However, all of these transactions take place with yet another middleman – Paytm, OlaMoney, PayPal, MobiKwik, FreeCharge, JioMoney, PhonePe, etc. All these middlemen make profit by taking a percentage of the payment in the transaction that they handle, which increases the cost of at least one of the parties. These middlemen have survived and even gained popularity in spite of this increased cost by making the increased cost less than the cost of buying the product in cash in a marketplace – in simpler terms, the percentage taken by the middlemen has to be less than the cost of travelling to the market, locating the good, bargaining, and travelling back, otherwise their service will no longer be beneficial to their consumers.

BITCOIN AND CRYPTOCURRENCY

Satoshi Nakamoto[867] envisaged a scenario one step further – the ease of online transacting, without the added cost of payment to the middlemen. The problem is that this is well-nigh impossible unless the middleman is a nonprofit organization in which case it would go bankrupt before the system became popularized. Satoshi Nakamoto made it happen. A peer-to-peer network was created for the transfer of virtual currency called bitcoin (BTC). The peers replace the middlemen since the essential function of the middlemen is to verify the transaction in order to prevent one party later claiming his money back after availing the good or service on the ground that the transaction never took place – a problem that Satoshi Nakamoto has called 'double spending'. When there are a hundred people in a network, and two of them engage in a transaction, say a sale, the ninety-eight other people witness the transaction and verify it, eliminating the double spending problem. By having the users of the network, themselves do the verification, the problem of payment to the middlemen is also eliminated, making the transaction cheaper for all users.

The network took time to gain publicity and popularity, with the major surge in value occurring as recently as 2017. Big name-brand companies started accepting bitcoin as a mode of payment such as Subway, Overstock, PayPal, Expedia, Virgin Galactic (a space travel company) and even

[867] Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, BITCOIN, http://www.bitcoin.org/bitcoin.pdf

Microsoft[868]. As of January 2018, 16.7 million BTC are in circulation, but the maximum number of bitcoins in circulation at any point of time cannot exceed 21 million. It is as yet a niche market, with 40% of all BTC in circulation being owned by just 1000 people around the world. However, 64% of BTC have never been used.

On October 5, 2009, New Liberty Standard published for the first time a bitcoin exchange rate establishing the value of bitcoin: 1 USD = 1309.03 BTC[869]. Bitcoin exchanges sprung up to facilitate the buying and selling of bitcoin in exchange for national currencies. Bitcoin wallets were invented – apps that facilitate the sending and receiving of BTC, hold transaction history, and available balance. In a securities market analogy, a bitcoin exchange is like a stock exchange, while a bitcoin wallet is like a dematerialization account. The first bitcoin ATM was even set up Vancouver, Canada[870]. A Bitcoin Conference and World Expo was held in New York City in 2011[871]. In the same year, bitcoin attained parity with the U.S. dollar[872], an astonishing hike when compared to the first publication of BTC value by Liberty Standard just two years prior. Still two years later, Bitcoin surpassed USD 1000[873] after Senate hearings. By 2013, bitcoin transaction volume surpassed that of the Western Union[874]. Donations to political committees in bitcoin was approved by the Federal Election Commission[875] in 2014. In November 2015, Satoshi Nakamoto was nominated for the Nobel Prize in Economics[876]. In March 2017, the value of 1 BTC surpassed the spot price of an ounce of gold[877].

THE BIRTH OF BITCOIN CASH

However, there was still a problem with BTC. Because the transaction verification was by individual users, the system was decentralized. This was an intentional feature since it made the verification almost impossible to manipulate. In order to manipulate all the individual computers, the manipulator would have to possess more CPU power than all the other computers combined,

[868] Kayla Sloan, 7 Major Companies That Accept Cryptocurrency, NASDAQ, (January 31, 2018, 09:56 AM), https://www.nasdaq.com/article/7-major-companies-that-accept-cryptocurrency-cm913745
[869] Arthur Sullivan, Bitcoin: Charting the Life and Times of a Cryptocurrency, Deutsche Welle (February 23, 2018) https://www.dw.com/en/bitcoin-charting-the-life-and-times-of-a-cryptocurrency/a-42470161
[870] Marc Cieslak, World's First Bitcoin ATM opens – And Other Tech news, BBC (November 1, 2013), https://www.bbc.com/news/av/technology-24756030/world-s-first-bitcoin-atm-opens-and-other-tech-news
[871] Adrianne Jeffries, Bitcoin Conference and World Expo 2011 in New York Just Announced, Observer, (August 7, 2011), https://observer.com/2011/07/bitcoin-conference-and-world-expo-2011-in-new-york-just-announced/
[872] Jeff Desjardins, Here's a Short History of How Bitcoin Reached Parity with Gold, Business Insider, (March 6, 2017) https://www.businessinsider.com/chart-how-bitcoin-reached-parity-with-gold-2017-3?IR=T
[873] Dan McCrum, Bitcoin Passes $1,000 but Only Number That Matters is Zero, Financial Times, (January 3, 2017) https://www.ft.com/content/b5d66ed8-d1b3-11e6-b06b-680c49b4b4c0
[874] Jerin Mathew, Bitcoin Set to Overtake eBay's PayPal in Transaction Volumes, International Business Times, (May 24, 2014) https://www.ibtimes.co.uk/bitcoin-set-overtake-ebays-paypal-transaction-volumes-1449856
[875] Nick Corasaniti, Election Commission Votes to Allow Bitcoin Donations, New York Times, (May 8, 2014) https://www.nytimes.com/2014/05/09/us/politics/election-commission-votes-to-allow-bitcoin-donations.html
[876] Rob Price, The Mysterious Creator of Bitcoin Has Been Nominated for the Nobel Prize in Economics, Business Insider, (November 9, 2015), https://www.businessinsider.in/The-mysterious-creator-of-bitcoin-has-been-nominated-for-the-Nobel-Prize-in-Economics/articleshow/49726113.cms
[877] Supra at note 6

and if a single entity possessed that kind of CPU power, it would be more profitable for them to mine bitcoin than to commit fraud. Because of this, the verification system had to be decentralized, but this also causes delay in transaction verification. Bitcoin transactions take about 10 minutes[878] to process, and processing time will almost certainly increase as the number of users on the network grows.

This problem was solved, but in order to understand the solution, we need to understand the process of verification by public key cryptography as used in the bitcoin network. Public key cryptography allows you to hand people a public key and use the corresponding private key to prove the ownership. A random private key can be created and a corresponding public key calculated accordingly. The private key is used to sign a message (declaring a transaction) and other users verify the transaction by comparing it with your public key.

A Bitcoin address is just a shorthand notation for a public key. When a user makes a transaction to an address, they state that "I give the right to spend this money to the person who owns the private key corresponding to this address" (The equivalent of "I promise to pay the bearer x rupees" on the Indian rupee note). The person who has received this transaction will in turn be able to spend the BTC involved in the transaction by signing the transaction using his private key. With this signature the user proves that he owns the key, without disclosing it. Others can verify the signature using the public key. When the user in turn transfers the bitcoin to someone else, this trail of verification acts as authentication to the buyer that the BTC is not counterfeit or stolen.

Bitcoin transactions were taking a long time because of the large amount of data put on blocks by users in the process of verification. To solve this problem, users representing roughly 80%-90% of the total computing power in the bitcoin network (mainly mining pools and companies) voted to incorporate segregated witness technology (SegWit2x)[879]. The signature data – that is the long trail of verifications attached to each BTC showing its authenticity – was removed and attached to an extended block. However, for obvious reasons, this undermined the integrity of the whole system by not verifying authenticity, so Bitcoin cash (BCC) was started by miners by initiating a hard fork – a permanent divergence from the previous version of blockchain, requiring all users to upgrade as all previous valid blocks become invalid or vice versa – and implemented an increased block size to accelerate processing speed.

INDIAN SCENARIO

Mahin Gupta launched the first bitcoin exchange in India in 2012 called Buysellbitco.in[880] He is now a co-founder of Zebpay, India's largest bitcoin exchange. Bitcoin's major surge in India was

[878] Bitcoin Cash is Bitcoin, Bitcoin, (October 16, 2017) https://www.bitcoin.com/info/bitcoin-cash-is-bitcoin
[879] Id.
[880] Internet Software and Services – Company Overview of Zeb Ventures Pte Ltd, Bloomberg, (September 30, 2018, 10:29 AM ET)

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in 2017[881] - In January 2017, 1 BTC was worth INR 68,000. By October 2017, 1 BTC had risen to INR 295000. Zebpay and Unocoin, major bitcoin exchanges in India witnessed drastic increase in user base. In March 2017, the market cap for cryptocurrency transactions was under USD 25 billion, but by October it was USD 149 billion. Bitcoin accounted for half the market cap.

However, the Reserve Bank of India had cautioned against virtual cryptocurrencies as early as 2013[882]. The concerns expressed were lack of regulatory approval, authorization by a central bank/authority, licensing, and registration – essentially lack of centralization, which is what sets apart bitcoin from traditional currency and solves the cash problem. The RBI stated that electronic wallets are susceptible to "hacking, loss of password, compromise of access credentials, malware attacks…". Another concern expressed was the volatility of the currency. The press release also stated that the legal status of bitcoin exchanges is "unclear". Warnings by the RBI were repeated in February 2017[883].

In February 2018 the Report of the Working Group on FinTech and Digital Banking[884] conducted an analysis into cryptocurrency technology and concluded that distributed ledger technology and blockchain technology have "potentially broad applications in financial market infrastructure" but "hold new challenges for regulation".

In August 2018, the RBI called cryptocurrency a "Ponzi scheme and an environmental disaster"[885]- although it is as yet unclear exactly how cryptocurrency is an environmental hazard, but the fact that it can be used for Ponzi schemes does not mean that the currency system itself is a Ponzi scheme.

On April 6, 2018 the Reserve Bank of India introduced what the media called a blanket ban on bitcoin. In reality, the RBI issued a prohibition on dealing with virtual currency or for facilitating such dealing for regulated entities. This essentially means that virtual currency cannot be exchanged for INR by recognized banks or financial institutions and bitcoin exchanges cannot use the services of banks. The RBI cannot stop users from conducting peer-to-peer transactions

https://www.bloomberg.com/research/stocks/private/person.asp?personId=321612388&privcapId=321433288&previousCapId=321433288&previousTitle=Zeb%20Ventures%20Pte%20Ltd

[881] Lokeshwarri SK, Gaining Interest: Bitcoin Value Surges in India, The Hindu Business Line (October 8, 2017) https://www.thehindubusinessline.com/money-and-banking/gaining-interest-bitcoin-value-surges-in-india/article9893236.ece

[882] Press Release, Reserve Bank of India, RBI Cautions Users of Virtual Currencies Against Risks, (December 24, 2013) https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=30247

[883] Press Release, Reserve Bank of India, RBI Cautions Users of Virtual Currencies, (February 1, 2017) https://rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=39435

[884] Reserve Bank of India, Report of Working Group on FinTech and Digital Banking, Digital Currencies, (8 February, 2018) https://rbi.org.in/scripts/PublicationReportDetails.aspx?ID=892#5.4

[885] Reserve Bank of India, Annual Report of the RBI, Economic Review (August 29, 2018) https://rbi.org.in/scripts/AnnualReportPublications.aspx?Id=1229

and exchanging services or goods for bitcoin, but this has a lot of effect on user volume and bitcoin exchanges.

The order was challenged in the Supreme Court and proceedings are underway with a decision to be made before the end of the year[886]. However, India's largest bitcoin exchange announced its closure five months after the order[887].

SOLUTION

From the various press releases and notifications released by the RBI, it appears that the main concern is the fear of the unknown and lack of trust in the bitcoin software. A very real concern that the RBI has not explored in any of its documents is fraud and the repetition of incidents like the Mt. Gox collapse. However, fraud is not out of the question even with traditional money and cannot wholly be eliminated. Regulation, however, can minimize this risk.

The United States Government has conducted extensive research on the subject with a view to obtain an effective system of regulation for cryptocurrency. Although the initial reaction in the US was similar to that in India, with California's Department of Financial Institutions issuing a cease-and-desist letter to the Bitcoin Foundation[888], the measure was not successful and since then, the New York Department of Financial Services has expressed interests in introducing appropriate safeguards via regulation rather than attempt to stop the development of virtual currency. The Federal Bureau of Investigation also concluded in a report[889] that Bitcoin anonymity can be overcome if the IP address is not masked or BTC have not been laundered.

The European Central Bank, in a report[890], has stated that central banks – like the RBI – have an incentive to regulate virtual currency since such currencies are created outside the regulation of central banks, they have potential to lessen the effectiveness of central banks attempts to control money and credit developments. It is useless to try and ban virtual currencies since the peer-to-peer system can continue without help from banks and it is this kind of activity that can have enormous implications for a country's economy and activities that can cause such implications must be at least overseen by a central authority to plan for the future, if nothing else. The ECB

[886] FE Online, Bitcoin: SC to Hear Final Arguments on RBI Ban on Cryptocurrency Exchanges Today – What Happened So Far, Financial Express (September 25, 2018) https://www.financialexpress.com/market/bitcoin-sc-to-hear-final-arguments-on-rbi-ban-on-cryptocurrency-exchanges-today-what-happened-so-far/1325816/

[887] Zebpay, India's Largest Cryptocurrency Exchange Shuts Down After RBI's Bitcoin Ban, Business Today (September 28, 2018) https://www.businesstoday.in/current/economy-politic/zebpay-cryptocurrency-exchange-in-india-shuts-down-bitcoin/story/283036.html

[888] Jon Matonis, Bitcoin Foundation Receives Cease and Desist Order from California, FORBES (June 23, 2013, 11:11 AM), http://www.forbes.com/sites/jonmatonis/20 13/06/23/bitcoin-foundation-receives-cease-and-desist-order-from-california/.

[889] Intelligence Assessment, Fed. Bureau of Investigation, Bitcoin Virtual Currency: Unique Features Present Distinct Challenges for Deterring Illicit Activity (Apr. 24, 2012), http://www.wired.com/images_blogs/threatlevel/2012/05/Bitcoin- FBI.pdf

[890] European Central Bank, Virtual Currency Schemes 33 (2012), http://www.ecb.int/pub/pdf/other/virtualcurrencyschemes201210en.pdf

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report also interestingly concluded that central banks have a responsibility or duty to regulate virtual currency since such currencies pose a threat to the assigned task of central banks to protect price stability, financial stability, and payment system stability.

These measures, if implemented by the Government of India and the RBI, can allow the virtual currency technology to develop, allow users to explore such technology, while still protecting the interests of the users.

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GEOGRAPHICAL INDICATION UNDER DIFFERENT JURISDICTIONS

- *Surbhi Ahuja*[891]

INTRODUCTION

Every region has its own name and fame. Prior to 1999, there was no specific law in India to safeguard the products and goods from a particular region. There is no specific law in India on geographical indications which could adequately protect the interest of the producers. Despite India being a party to TRIPS Agreement, she did not enact a law on geographical indication until 1999. The judiciary has played an active role in preventing persons to take unlawful advantage of geographical indications. These goods come under geographical indications because these goods are produced in that region. Geographical indications are an emerging trend in India.

The Geographical Indications of Goods (Registration and protection) Act 1999, (hereinafter referred to as 'Geographical Indications Act') defines "geographical indication in relation to goods as an indication that identifies such goods as agricultural goods, natural goods or manufactured goods as originating or manufactured in the territory of country or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case here such goods are manufactured goods, one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality as the case may be." [892]

Geographical indication indicates that particular goods originate from a country, region or locality and has some special characteristics, qualities or reputation which are attributable to its place of origin. These special characteristics, qualities or reputation may be due to various factors, for example, natural factors such as raw materials, soil, regional climate, temperature, moisture etc., or the method of manufacture or preparation of the product such as traditional production region, specialization in the production or preparation of certain products and the maintaining of certain quality standards.[893]

Prior to 1999, there as no specific law in India on GI which could adequately protect the interests of producers. Despite India being a party to the TRIPS Agreement, she did not enact a law on GI until 1999. The judiciary, has been active in preventing persons to take unlawful advantage of GIs. The Delhi High Court affirmed the order of the order of the Registrar of trademarks by which he refused to register the applicant's mark proposed to be used on whisky produced in India consisted of the words 'Highland Chief' and the device of the head and shoulders of a

[891] Symbiosis Law School, Pune
[892] Section 2(1)(e) of the Geographical Indications of Goods (Registration and Protection) Act, 1999.
[893] V.K. Ahuja (2018) 'The Law of Intellectual Property Rights' Third Edition .

gentleman dressed in Scottish Highland costume wearing inter alia, feather bonnet and plaid and edged with tartan, a well-known symbol of Scottish origin.[894] In another case the Scotch Whisky Association succeeded in restraining the defendants from selling their whisky under the description 'blended with scotch' along with the device of Scottish drummer wearing a kit or tartan and the word 'drum beater'.[895]

Articles 22 to 25 of the TRIPS Agreement pertain to GIs and set minimum standards for the protection of GIs by member countries of the WTO. The TRIPS Agreement is flexible for the members of the WTO in protecting the GIs as it does not specify a particular legal means for their protection. Rather, it is left to countries to provide for the protection of GIs in their respective laws.[896] There are different ways prevalent in the world for the protection of GIs. These include sui generis law, certification marks, collective marks, unfair competition and passing off. Most countries protect their GIs either through a sui generis law or trademark law, and this has given rise to varying degrees of protection. The older economies tend to give more protection to GIs through separate legislation whereas newer economies tend to protect GIs within trademark legislation. This is the reason why 'countries in Europe and the former Soviet Union tend to have a stronger interest in protecting geographic indications than do countries with more recently developed economies, such as the United States'.[897] The trademark registration system protects GIs through certification marks and collective marks. In contrast, in a sui generis system GIs are mainly protected under terroir logic. GIs are now seen as an important tool for rural and economic development and poverty reduction. There is empirical evidence which shows a substantial increase in consumer demand for GIs. Apart from wines and spirits, an EU estimate puts wholesale consumption of GIs for agricultural products and foodstuffs somewhere in the region of 14.2 billion Euros.[898]

REQUIREMENTS BY TRIPS FOR MINIMUM STANDARDS OF PROTECTION

The basic framework for the member countries to provide for the protection of GI, the obligations are meant for all members to provide the legal status and means for the interested parties to secure protection of their GIs.[899] The scope of this Article is composed in three components; protection against the use of indications that mislead the public or are deceptive, protection of the use of indications in a manner that are acts of unfair competition and refusal or invalidation of trademarks that contain or consists of indications where it may mislead the public. There are certain exceptions to the framework provided in TRIPS. The most important exception is protection of a geographical indication that does not cease to be protected in the

[894] Mohan Meakin v. Scottish Whisky AIR 1980 Del 125.
[895] Scotch Whisky Association v. Pravara Sahakar Kharkhana AIR Bom 294.
[896][896] Article 22 – 2 of the TRIPS Agreement of WTO.
[897] Lee Bendekgey and Caroline H Mead, 'International Protection of Appellations of Origin and Other Geographic Indications' (1992) 82 Trademark Reporter 765.
[898] Relocating the Law of Geographical Indications (Cambridge University Press 2012) 183. – Dev Gangjee.
[899] Article 22 of TRIPS.

country of origin or has fallen into disuse in that country.[900] The second most important exception is a geographic indication that has become generic, identical with the common name of such goods or services or in the case of wines, identical to the customary name of a grape variety found in that member country. [901] If a trademark similar to or identical to a geographical indication has been applied for or registered in good faith, the obligations to be followed by the members do not apply. [902]

Every member country has applied obligations written down in TRIPS in different ways.

CHINA

China is a nation with a large population and vast territory with numerous products originating in specific parts of the country. The introduction of a geographical indication (GI) regime in China can assist in preserving the authenticity of these products, both in terms of their geographical origin and the characteristics. The history of GI protection in China can be traced back to the mid-1980s when China joined the Paris Convention for the Protection of Industrial Property (Paris Convention).[903] Under the obligations of the Paris Convention, China started to protect indications of source and appellations of origin by way of administrative decrees. China has not adopted a uniform approach in protecting GIs. Both trademark protection and a *sui generis* regime are available for GI protection. These protections are based on laws to protect the general population, including unfair competition, consumer protection and product quality.

Before 1993, it was not possible to protect GIs within the trademark system in China. However, Rules for the Implementation of the Trade Mark Law (1993 Revision) (TM Implementing Rules 1993)[904] introduced provisions for the protection of certification marks and collective marks. This made it possible to protect GIs as trademarks. In December 1994, based on the Trade Mark Law of 1993 (TM Law 1993)[905] and the TM Implementing Rules 1993, SAIC formulated and promulgated the Procedures for the Registration and Administration of Collective Marks and Certification Marks,[906] which provided that certification marks could be used to certify the place of origin, raw materials, method of production, quality, accuracy, or other characteristics of the said goods or services. This was the first administrative rule regarding the protection of a GI in the national legal system in China.[907]

[900] Article 24.9 of TRIPS.
[901] Article 24.6 of TRIPS.
[902] Article 24.5 of TRIPS.
[903] Paris Convention for the Protection of Industrial Property, 20 March, 1883.
[904] Implementation of the Trademark Law of the People's Republic of China (1993 Revision), January 3, 1988.
[905] Trademark Law of the People's Republic of China amended Decision of 22 February 1993.
[906] Procedures for the Registration and Administration of Collective Mark and Certification Marks 1 march 1995, repealed on 1 June 2003.
[907] Qinghu An, Speech at the International Symposium on Geographical Indications: Legal System on Geographical Indication Protection in China and Related Issues (25 June 2007).

Less than a decade later, in 2001, China made a commitment to introduce specific GI protection in its Trade Mark Law as part of its accession to the World Trade Organization (WTO). As a result, the concept of 'geographical indication' was officially introduced in the revised Trade Mark Law of 2001 (TM Law 2001).[908] This legislation elevated the legal basis for GI protection from administrative rule to national law. However, the 2001 revision to the Trade Mark Law did not provide for a specific procedure to register a GI in China. Thus, a year later, in 2002, the State Council promulgated Regulations for the Implementation of the Trade Mark Law (TM Implementing Regulations 2002) in order to create a system of registration. The current protection under the Chinese Trademark system provides that GI means that it is the place of origin on the goods at issue and the special qualities, reputation or other characteristics of the goods are primarily determined by the natural conditions or other humanistic conditions of the geographical location involved.[909]

Under Chinese trademark law, a GI registered as a collective mark or a certification mark may be the name of the geographical region indicated or any other visual signs capable of indicating that a good originates from the region. The area of the region designated as the region from which GI products originate is not required to be fully consistent with the name or boundary of the administrative division of the same region.[910] In this respect, the scope of trademark protection is much wider than that of the *sui generis* protection for GIs, as the latter only allows for the registration of geographically accurate names.

It has been seen in the Chinese Courts, a lot of case have been decided on the principles of the TRIPS Agreement. A case which directly relied on the Sino – US IPR Agreement, which also consists of international treaties and are also a part of China's national law.[911]

PAKISTAN

The Intellectual Property Organization of Pakistan (IPO) prepared and published the Draft Geographical Indication Protection Bill 2016, in accordance with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Since Pakistan has a strong agriculture-based economy, the importance of GIs has increased over the years. It has many valuable GIs like Basmati rice, worth billions of dollars. But not a single GI has been registered in Pakistan due to inadequacies in the present system of the protection of GIs in Pakistan.

Pakistan is a developing country with a strong agriculture base which amounts to 21% of its GDP. The agriculture sector employs 43.7% of the country's labour force, and around 42% of the merchandise export of Pakistan is earned through this sector.[912] Agriculture has an important direct and indirect role in generating economic growth. The importance of agriculture to the

[908] Art. 16(2) of Trademark Law of the People's Republic of China.
[909] Article 16 of the Trademark Law 2013.
[910] Article 8 SAIC Measures 2003.
[911] Walt Disney Production v. Beijing Publisher and Co. (1995).
[912] Government of Pakistan 'Overview of the Economy'.

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economy is seen in three ways: first, it provides food to consumers and fibres for the domestic industry; second, it is a source of scarce foreign exchange earnings; and third, it provides a market for industrial goods.

Despite having hundreds of potential GIs, paradoxically, not a single GI has been registered in Pakistan. Pakistan shares its history, Indus civilization and common law system with its neighbor India, where GIs are protected under a sui generis law. Until 2003, like Pakistan, India did not have a separate law for protection of its GIs. It protected its GIs under a trademark system and the registration of GIs was nonexistent. However, the implementation of its sui generis law encouraged the registration of GIs in India. By March 2014, India had registered 215 GIs for different products ranging from tea, coffee, agricultural products, textiles, horticulture to foodstuff and handicrafts. Out of these, 52 registered GIs belong to the agriculture sector. This registration for the protection of GIs in India started on the 15th of September 2003. Both India and Pakistan were one country before the 14th of August 1947 and, therefore, there are a number of homonymous GIs in the two countries such as Phulkari, Green cardamom and Basmati rice. Pakistan is losing in terms of economic gains by delaying the registration of its GIs abroad. Registration of its GIs will help Pakistan in the promotion and marketing of its GIs in the domestic market and abroad

INDIA

In 1999, India enacted the geographical indication of goods (registration and protection) Act which is the first specific law which provides for the registration and protection of the geographical indications. The Act into force on 15 September 2003. It has been clarified that any name which is not the name of country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be.[913] There are a number of examples in India; Kashmir Pashmina, Tirupathi Laddu, Bikaneri Bhujia, etc.

The Geographical Indications registry has been established in Chennai to administer the Geographical Indications Act 1999, under the Controller General of Patents, Designs and Trade Marks. GIs are valuable to property to producers from particular geographical regions. They basically perform three functions. Firstly, they identify goods as originating in a particular territory, or a region or locality in that territory. Secondly, they suggest the consumers that the goods come from an area where a given quality, reputation or other characteristic of the goods is essentially attributable to the geographical origin and thirdly, they promote the goods of producers of a particular area.

GIs have features that respond to the needs of indigenous and local communities and farmers. They are based on collective traditions and a collective decision-making process, reward

[913] VK Ahuja (2018) ´Law Relating to Intellectual Property Rights'Third edition.

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traditions while allowing for continued evolution, emphasize the relationship between human efforts, culture land resources and environment. They are not freely transferable from one owner to another.

Since the first GI in India was registered in 2004, 301 GI's have been granted Registration as on October 25, 2017 by the GI Registry, India. The GI Registry has received a total number of 610 GI Applications as on January 11, 2018. Out of the Registered GIs 64 per cent are related to handicrafts, 26 per cent are for agricultural products, 6.18 percent are for manufactured products and the remaining are foodstuff and textile products. Karnataka is leading in filing of Geographical Indications with a total of 39 Geographical Indications registered till date followed by Tamil Nadu and Kerala. The latest product from Karnataka to get Geographical Indication Tag is Mysore Saree. Till now Karnataka has obtained Geographical Indication tag for 19 handicrafts, 16 agricultural, 3 manufactured and one for food product.

ANALYSIS

Chinese law has to fill certain gaps in order to follow the intellectual property protection standards provided for by the TRIPS Agreement. Currently, China does not even have laws for the protection of new varieties of plants geographical indications, or layout-designs (topographies) of integrated circuits. However, as soon as China becomes a member of the TRIPS Agreement (through the WTO), these gaps will be filled automatically. Article 142 of the General Principles of the Civil Code, which provides that "if any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations." Article 72 of the TRIPS Agreement, however, states that reservations may not be entered in respect to any of the provisions of this Agreement without the consent of the other members.

In the case of developing countries such as Pakistan and India which have competing economies and strong agriculture, handicrafts and traditional knowledge sectors, GIs can be a very important public policy tool for the development of their economies and the maintenance of the livelihoods of farmers and skilled workers. GIs have the potential to increase rural incomes and establish broader rural development dynamics. GIs can play an important role in the rural development of Pakistan and increase its exports earnings.

Currently, GIs may only be registered in Pakistan as collective marks or certification marks under the Trademarks Ordinance 2001. As Pakistan’s region is rich in culture and traditions, there are a number of GIs in both the agriculture and the manufacturing sector. The most famous agriculture GIs of Pakistan are Basmati rice, Kinoos and Sindhri mangoes. The valuable trade of GIs of Pakistan amounts to billions of dollars. Rice exports alone are worth around 2 billion dollars annually. Pakistan also exports millions of dollars of mangoes and kinoos. In addition to

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this, Pakistan has a sizeable population of over 180 million people and there is huge domestic consumption of GIs. Rice is the second most important staple food of Pakistan after wheat and the livelihood of thousands of farmers is dependent on this crop. It is the third largest crop in terms of the farming area it occupies. Hence, it is important for Pakistan to protect its valuable GIs as these will promote rural and economic development.

As stated above, Pakistan and India have GIs protected under the sui generis law in India. As for Pakistan, it is losing in terms of economic gains by delaying the registration abroad. Registration of its GIs will help Pakistan in the promotion and marketing of its GIs in the domestic market and abroad. This will also encourage India and Pakistan to consider a bilateral agreement for the protection and registration of homonymous marks between the two countries. The most famous homonymous mark shared by India and Pakistan is Basmati rice. Pakistan is losing its international market and India is gaining maximum market access including Pakistan's due share.

Pakistan has very recently enacted a separate law for GI in the year 2016 similar to that of India. They have made sure to include all the standards mentioned in TRIPS needed for the protection of geographical indications in Pakistan. Since the Act is still new, for it achieve complete effectiveness will take some time. In order to improve Pakistan should look at the Indian model of sui generis because of its shared history, common law system and the similarities in economic development. The importance of GIs in Pakistan is to protect traditional cultures, products and production methods.

In India, The Geographical Indications of Goods (Registration and Protection) Act, 1999 has recognized and protected the names of articles which encourage the manufacturer to invest in maintaining the standards and values of such articles. The Act has also increased the reputation of the articles and enhanced the stability in charges for the products containing geographical indication. The manufactures concentrate to conserve the traditional methods and increase the use of natural products. The Geographical Indication of Goods (Registration and Protection) Act, 1999 provides for remedies for violation of Geographical Indications under the criminal laws too, under the criminal laws, if a person is convicted of an offence for applying false Geographical Indications or selling goods to which a false Geographical indication is applied, the court may direct the defendant to forfeit the goods to the government.

CONCLUSION

In India the GI Act, which came into force, along with the GI Rules, with effect from 15 September 2003, has been instrumental in the extension of GI status to many goods so far. The central government has established the Geographical Indications Registry with all India jurisdiction, at Chennai, where right-holders can register their GI. The central government has discretion to decide which products should be accorded higher levels of protection. This approach has deliberately been taken by the drafters of the Indian Act with the aim of providing

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stringent protection as guaranteed under the TRIPS Agreement to GI of Indian origin. However, other WTO members are not obligated to ensure Article 23-type protection to all Indian GI, thereby leaving room for their misappropriation in the international arena. Registration of GI is not compulsory in India. If registered, it will afford better legal protection to facilitate an action for infringement. Once a GI is registered in India, it becomes relatively easier to seek protection in other countries, particularly the member countries of WTO. Countries like Pakistan and China should look into the GI Act of India and induce similar laws in their countries. This would ensure better protection of products around the world. China and Pakistan could fill in the gaps that are currently present in their Act.

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ANTI-NATIONALISM: ITS ABUSE & EXPLOITATION

- *Ashish Vishwakarma*[914] *& Neha Dogra*[915]

"Nationalism is nothing but an apparatus used by leaders to fortify their power and authority."

ABSTRACT

Nationalism has a way of oppressing others and when this nationalism is used in its narrow sense it becomes measles of humanity. This paper focuses on the narrow aspect of the term anti-nationalism that has become prevalent in India. This paper attempts to demonstrate the turbulence in the country that can be caused when the term anti-national is synchronized with the term anti-government. This paper starts with the development of the ideology i.e. anti-nationalism. It takes us to the background of how the term anti-national gained prominence and the events that acted as the catalyst in the growth of the narrow meaning of the term anti-national that endures in India. This paper aims to explain the true essence of the term anti-national and how it is different from the term anti-government. This paper, through the repealed article 31D of the Indian Constitution, tries to reflect how the term anti-national can be misused by the Government. It also tries to explain how the term anti-national is used as a political weapon by the ruling party to shut out any dissenting views and opinion of the opposition. The author, through this paper, tries to persuade people not to narrow their respective minds while using the term anti-national and know what it really means before branding someone as anti-national.

ANTI-NATIONALISM: ITS ABUSE & EXPLOITATION

Nationalism is a system of a political, social, and economic system branded by the elevation of the welfares of a particular country, especially with the objective of achieving and maintaining sovereignty. It is concerned with developing and upholding a collective national individuality based on ideas such as such as culture and language, religion and politics, and a faith in a common heritage. Therefore, it seeks out the preservation of a culture of a nation. Whereas, anti-nationalism signifies the feelings linked with hostility towards nationalism. Another word that is usually used as a substitute for anti-nationalism is anti-government. Anti-government is any action or sentiments opposed to or hostile toward governments or a particular government opposing or resisting governmental policies and power. While the essence of both the terms is entirely dissimilar, yet they increasingly being used in place of each other. In India, the already skinny line of distinction between the two terms continues to diminish.

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It all started in the regime of Indira Gandhi when the slogan was raised "India was Indira and Indira was India". This was the first attempt at using the word anti-national as a tool to gain power. But it surely wasn't the last. The catchword, anti-national has taken a totally new connotation in the today's Indian political vocabulary. It began on August 30, 2015, with the killing of M.M. Kalburgi, a renowned rationalist, The term anti-national achieved eminence as a response against actor Aamir Khan and his wife concerning their opinion about India being an (in)tolerant nation in November 2015[916]. The homicide of a Muslim male for supposedly eating beef was also celebrated. Simultaneously, the students' movement was categorized anti-national subsequent to the suicide of a minority community student, Rohith Vemula, after being systematically hated by dominant caste colleagues and university administration. The branding of people as anti-national touched its apex on February 9, 2016, when Jawaharlal Nehru University students were charged with the offence of sedition over a falsified video. There was a rise in circumstances of killings and public lynchings of minorities by self- declared cow vigilantes. Furthermore, a famous journalist, Gauri Lankesh, killed apparently because of her anti-national writings and activities on September 5, 2017[917]. These instances are only some of the headlines in the recent news. Furthermore, the presence of counterfeit news and character killings of persons by media trolls have attained new altitudes. In a nutshell, the past few years in India has been dominated by the term anti-national.

The main question that arises given the current scenario of the nation is to know the real meaning of the term anti-nationalism and how it is different from anti-government. It is important to know the legal meaning of the term anti-national as to stop it from being used as a mode of power acquisition by the leaders. The evolution of the word anti-national from the time it was first coined and now is noteworthy.

Nationalism, as we know, is concerned all about the welfare of a particular country by installing in its people a shared feeling of love and respect for the nation, based on ideas such as religion and politics, culture and language, and a faith in a common heritage. The term nationalism is often confused with the term patriotism. Although both share some common ideas there is a whole lot of difference between the one. While patriotism basically means love for one's country and inclination to defend it, nationalism is a more excessive, demanding a type of commitment to one's country. Nationalism focuses on the State, however, patriotism centres on the individual. Nationalism, no doubt, is a very strong instrument for uniting people but it must be observed that

[916] TNN, Aamir Khan on intolerance: I am alarmed, my wife suggested moving out of India, Times of India, (Nov 24, 2015), https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/Aamir-Khan-on-intolerance-I-am-alarmed-my-wife-suggested-moving-out-of-India/articleshow/49897156.cms, last accessed on (29/09/2018)

[917] Gauri Lankesh: Indian journalist shot dead in Bangalore, BBC news, (September 6, 2017), https://www.bbc.com/news/world-asia-india-41169817, last accessed on (29/09/2018)

it unites people against other people. Love and affection for one's nation are essential and necessary, but if this love bends out to be more significant than Constitutional morals or democratic standards, it is misdirected. This explains the crisis that the nation faces in today's' era. The people of the country are facing huge trouble in differentiating between what is anti-national and what is anti-government and it's not entirely their fault as the emergence of fake news, social media trolls and character assassination by some journalist coupled with some of the present leaders in the country has led the people in entirely wrong direction concerning the meaning of the term anti-national. By synchronising anti-national with anti-government, the ruling party created a misbelief that there exists no difference between anti-government and anti-national in order to suppress the views and opinion that are dissenting to the interpretations of the ruling party. All of this just for holding and fortifying their power and overpowering the opposition. The main objective behind it is that they want the country to be seen as only its government, so as to oppress any remarks made against the government. When a nation is presumed as simply its government, any opinion or views in contradiction of the government is seen as an assault on the whole nation. By making this presumption they are trying to hide their own shortcomings. People need to understand the prime facie lie that is being forced on them. They need to understand the real meaning of anti-nationalism and that the objection against the government of the time cannot be pronounced as anti-national. The main problem is the misunderstanding that environs around the term anti-nation and what it really means. The expression anti-national, for the first time emerged in the writing of the constitution during the emergency of 1975 with the 42nd amendment[918] but was immediately repealed and excluded afterwards the emergency period by 43rd amendment 1978. It was introduced as an exception clause in Article 31(D)[919]. During its short life of existence, it explained what was considered anti-national by law.

The Article 31D dealt with exception of laws in regard to anti-national activities. The First clause in the article established that no law delivering for prohibition or prevention of anti-national activities or prevention of formation or prohibition of the anti-national association shall be pronounced invalid on the reason that it infringes article 14[920], article 19[921] or article 31[922]. In short, it meant that anyone involved in anti-national activities or associated with anti-national association would have no constitutional remedy available to him. The second clause barred state legislatures from creating of laws concerned with prohibition or prevention of anti-national activities and associations. The third clause maintained the retrospective rationality of laws crafted in consonance with Article 31D and in contradiction of the fundamental rights of the constitution. The fourth clause defines the word association as an

[918] Constitution of India, 1950.
[919] Article 31D of Constitution of India 1950, deals with Saving of laws in respect of anti-national activities (Repealed)
[920] Constitution of India, 1950
[921] Supra.
[922] Supra.

organisation of persons. It is different from the association of individuals and people. A person lawfully can be a non-natural as well as a natural entity or people. In India, an artificial person is barred of Fundamental Rights. The fourth clause broadly bestowed the senses and implications of the expression anti-national actions and anti-national associations. According to clause (b), the anti-national activity involves 1. Any action that may result in cession and succession of Indian territory, 2. Any activity that threatens the unity and sovereignty of the country, 3. Any action which is intended on coup d'état i.e. overthrow government by force, 4. Any act of creating internal disturbance or disruption of public services, 5. Any action to threaten the harmony between religion, caste, races or communities. The clause (c) explained the anti-national association as an organization for the object of any anti-national action.

It was a time when labelling of anti-national was determined by law and constitution, contrasting today, where the anti-national tag is conferred to persons by the news anchors and journalists. It is also quite ironic that the practice of the expression anti-national was not prevalent throughout the emergency, even when the term was present in the constitution itself. Article 31D that granted extraordinary authority on Parliament to legislate laws in regard to anti-national activities was capable of being abused and hence was omitted. In total, the Article 31D was presented only for the suppression of political opposition.

The term anti-national has always been relative to the party in supremacy and the opponent. During an emergency, Congress termed every other political party as anti-national[923]. The succeeding Janta government upraised anti-national charges against Indira. The coming back of Indira Gandhi in power again overturned what it meant to be known and termed as anti-national. The outcome of Operation Thunderstorm and Blue Star that piloted the killing of Indira Gandhi, in 1984, by her own Sikh bodyguards, directed the people in government to label every Sikh people as anti-national. The following decade was dictated by the intensifying extremism of Hindu nationalism and saw the annihilation of Babri Masjid. The Muslims in India were also patented anti-national and this made way for riots in numerous parts of the country. In the interim, the matter of the *reservation* was at its highest and people in contradiction of the policy were baptised anti-national. The elevation of Aam Aadmi Party and regaining of the Gandhian *swaraj* became a substance of contestation, and the party in power named the activists such as Anna Hazare and few others anti-nationals over the Ombudsmen (Lok-Pal) law. Finally, when the AAP accomplished a supreme majority, Bhartiya Janta Party and the Congress (BJP) were termed as anti-national. Now, when BJP is in control in Centre and is continuously attaining a majority in the numerous state legislative assemblies, every type of opposition is designated anti-national. The above-mentioned instances prove that whosoever is opposing the government shall be blessed as anti-national or anti-social. The lone distinction in the present day is that the term anti-national has become

[923] Martand Jha, How the Indian National Congress Lost India, https://thediplomat.com/2017/04/how-the-indian-national-congress-lost-india/, last accessed on (29/09/2018)

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very vulgar and public because of the new communication structures and therefore mass political polarisation is a lot easier than ever before.

One thing that should be obvious but is becoming increasingly not so obvious is that nationalism can by no means be enforced by fiat. The scheme of imposing nationalism by force seems to have obsessed too many individuals and ministers. Ministers, particularly, ought to abstain from branding people, but almost on daily basis ministers are heard talking and warning that there will be dire penalties for those who voice against India. So political leaders instead of giving lectures on anti-nationalism should rather desist and devote more time considering over the disappointments of politics and governance that have fashioned the need for nationalism to be enforced. The most serious concern at the moment is the peoples' perspective of the term anti-national. The popular notion of nationalism which is being followed at the moment is vogue. The scope of the idea of nationalism is so narrow and rickety that singing the national anthem amounts to nationalism and hitting someone who does not rise for it in a cinema hall is deemed to be an act of nationalistic thirst. The notion of compelling nationalism by fiat has stretched not merely across university campuses but even to the courts of law. The Supreme Court appears to have taken it upon itself to direct cinemas to play the national anthem in all movies. This is not something that the judges are expected to concern themselves with. The primary duty of the Hon'ble judges should be to restore the damaged justice system. It is a shame to all Indians that rapists, murderers and terrorists often stay unpunished for decades since the law takes so long to penalize them.

In a truly democratic atmosphere, criticising and dissenting against the government and its policies are not just the right of the citizens but also their duty. This right to dissent cannot be suppressed for the sake of nationalism or patriotism. The attempt to stifle this right is to kill the essence of democracy, which is equal to killing the very breadth of the country. The knowledge or the awareness of one's own weakness is critical if one wants to be successful. Positive criticism is one of the essences of the democracy and should be appreciated. Likewise, positive criticism and opposition should be welcomed by the government and going by the current scenario it really is the biggest need of the hour for the country.

The thought of a scenario where the Article 31D was still applicable in the present circumstances is devastating. Firstly, the people fighting for the moral rights of people in Kashmir for attaining self-determination of Jammu and Kashmir would have been considered anti-national. Secondly, the entire episode of JNU would also have been termed anti-national. Any kind of writing or speaking against the government could have been called anti-national. One can only ponder over the fact that the destruction to public services and property in case of Messenger of God, Ram Rahim Insaan or protest by Jats, Gujjars or Patidars i.e. the dominant class have never been deemed anti-national. Although, the article 31D was repealed so shortly after it was introduced but the anxiety persists that everything that was a part of article 31D is still deemed to be anti-

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national today by the jingoist people and worshippers of the Prime Minister which is considered to be more dangerous than having the existence of the term anti-national in the constitution.

In conclusion, the connotation of the term anti-national activity has evolved over time and come a long way from Article 31D. The fear that the Article 31D once represented has once again come close to reality with the events of the last three years of deaths, killings, suicides, criminal defamations. Also, the episodic character of party politics and people's politics is such that whoever opposes the rule of the government shall be automatically viewed as anti - national, regardless of the substance presented and government represented.

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ADULTERY LAWS AND THE CONFLICT

- *Divyansh Pareek*[924]

INTRODUCTION

The word adultery is derived from the Latin word 'adulterium' which means having sexual relation of a woman with her consent with a man other than her spouse. Adultery is a practice which exists in the society from the very beginning. It has been recognized as an offence in almost every religion and is condemned in most of the religion.

In India the practice of adultery received recognition from formation of smritis by the smritikaras. Now the Indian Penal Code recognizes adultery in its Section 497 which is stated as- "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, the wife shall not be punishable as an abettor."[925]

The law was drafted in 1860 when India was under the British Empire and the state of Indian lady was pathetic. Amid those periods, a man could have a few spouses and ladies were socially and monetarily reliant on men. Women were thought not less than chattel of men and men were having full authority over them. Along these lines, while drafting the laws it was assumed that ladies are hapless victims, not equipped for submitting such an offense, rather, it must be a man who will lure her and include her in a double-crossing relationship. Be that as it may, these laws certainly treat a male and a female unequally in the establishment of marriage.

Adultery is otherwise called infidelity, philandery, an extramarital affair or physical disloyalty in marriage. Adultery is unique in relation to rape as in infidelity is wilful while rape isn't. The assent of both the people for a physical relationship is an absolute necessity for adultery to exist. Prior, the term was related with the hitched lady just who got associated with adulterous act with somebody who wasn't her spouse yet now the term is connected to wedded men too and if the possibly one is unmarried, at that point he/she is considered as adulterous. Adultery is categorized into two types:-

1. Single adultery- If the relationship is between a married person and an unmarried person.

2. Double adultery- If both the partners involved are married to someone else.

[924] National Law University, Odisha, Cuttack
[925] "Section 497 in The Indian Penal Code" <https://indiankanoon.org/doc/1833006/> accessed September 23, 2018

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Now in India, just after the independence there were many allegations on the said section of IPC. There were many cases regarding the equality issue in adultery punishment. There were many conflicts to prove Section 497 as unconstitutional and even to decriminalise adultery. But after all those conflicts the matter is still pending before the highest court of India. And now the Supreme Court has legally recognised LGBT group and legalise gay sex and lesbian sex, the definition of adultery has to be extended.

So, this paper mainly concerns with explaining the laws and statues relating to adultery and the way how society views adultery laws today. It will also try to analyse conflict that the Supreme Court is facing and some cases which have a huge contribution in the study of adultery. It will also try to explain the scope of these laws.

HISTORY OF ADULTERY

In India adultery is not a concept introduced by British but it recognised way back by smritikaras in the smritis. It was mainly defined in Manusmriti by Manu and Yajnavalkya. Out of eighteen topics laid down in these smritis five were related with crime, out of which one was *Strisangraham* which deals with adultery and rape. Basically *strisangraham* is the term used for adultery, as it defines adultery as- "Unlawful coming together of a man and woman for sexual enjoyment constitutes *strisangrahana* or adultery."[926]

According to it the, the methods adopted by a man to have unlawful sexual enjoyment with a woman, the offence was classified into three grades:

1. When a man has intercourse with a woman against her will, or when she is asleep or disordered in her intellect, or do not notice his approach, it is termed as 'forcible enjoyment' of a woman. (Rape)
2. When a man takes a woman to his house under false pretext and, after giving her intoxicating drugs, has intercourse with her, it has to be considered as 'fraudulent intercourse'. (Rape)
3. When a man exchange looks with a woman or send her message and then has intercourse with her, impelled by sensuality, it has to be considered as 'adulterous intercourse'."[927]

The last category describes adultery, we have to understand that the woman should be a woman who is not in the wedlock of the person having intercourse and should be in the possession or wedlock of another person, than only he will commit adultery.

The above stated third point again has three classifications as follows-

- Winking at a woman, smiling at her, sending messages or touching her ornaments or clothes, constitutes adulterous act of first degree.

[926] Justice M Ramajois, Legal and Constitution History of India(Universal Law Publishing 1984)
[927] Ibid

- Sending perfumes, garlands, fruits, clothes, or spirituous liquor or carrying on conversation with her, is considered as adulterous acts of the second degree.
- Sitting on the same bed, dallying, kissing or embracing, is an adulterous act of the highest degree.

Punishments prescribed by Manu for adultery to its aggravated forms is very heavy, varying from death sentence to different types of severe corporal punishments, and only fines in other cases.

After the ancient era of smritis, the major formation of laws of adultery was done in British India. At the time of drafting IPC in around 1860, the first draft was presented by Lord Macaulay for the formation of IPC did not include adultery as crime according to him India do need to criminalise adultery as he said-

"It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes - those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury."[928]

But in the second draft it was included in IPC, adultery was given significance, it was because in the second draft the condition of Indian women was taken into consideration, as it was said that

"While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q', regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment."[929]

This led to the formation of section 497 which states-

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

[928] Macaulay's Draft Penal Code (1837), Notes, Note Q, pp. 90-93, cited from, Law Commission of India, Forty-second Report: Indian Penal Code (Government of India, 1971), p. 20.13
[929] Second Report on the Draft Indian Penal Code (1847), pp. 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, id., p. 365

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If we compare the law modern law and ancient law we can drew some points of similarities and dissimilarities as follows:

- Section 497 defines adultery as sexual intercourse with another man's wife, with her consent but without the consent of her husband, whereas, smritis explained that, even if the husband of a woman had given consent to her to have sexual intercourse with another man, if the latter's wife or her father or other concerned person objected to it, both the man and the woman would be guilty of the offence of strisangarahana.
- In section 497- sexual intercourse with another woman, who is either unmarried or a widow, with her consent but without the consent of his wife, does not constitute an offence, whereas in smritis sexual intercourse with any woman not being the wife, whether the husband of such woman was living or she was unmarried or widow, amounted to an offence
- Under section 497, the man can on be punished who is doing adultery with someone else's wife but in smritis both the man and woman involved in the intercourse were punished.

EXPLAINING SECTION 497 OF IPC

Section 497 talked only about married woman, the law did not consider that the man was married or not. In adultery the consent played a vital role, as if the wife of a man gave her consent for having sexual intercourse with man who is not his spouse and the husband of the lady does not give his consent to his wife to have intercourse with another man, then only the adultery is committed, if the wife does not gives her consent it will amount to rape.

In adultery laws only husband of the adulteress could file a criminal case against the man with whom his wife had sexual intercourse, if the adulterer was the husband himself his wife can neither file a complaint against him nor the adulteress. Husband of the adulteress is always considered as aggrieved and the adulterer the accused. The adulteress was even not considered as abettor though she had given her consent, she was free from accusation. The law was not applied if the male spouse had intercourse with an unmarried woman.

Punishment: "the adulterer shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

STORY OF ADULTERY LAWS

Just after the independence, in 1954 there was the first case which presented the limitation of adultery laws in front of the court was *Yusuf Abdul Aziz v. The State of Bombay*[930] . In this case the petitioner argued that the law is the violation of article 14 which state right to equality. The petitioner said that the by not considering woman as an abettor to the offence and hence not

[930] 1954 AIR 321

punishing her violates the fundamental right of being treated equal. The judges strike down the case on the basis of article 15(2) states that woman centric laws can be made for the upliftment of women and hence the law is constitutional.

Another case named *Sowmithri Vishnu v. Union of India*[931] objected section 497 and discovered many more limitation of adultery law. In this case the husband prosecuted a man for committing the offence of adultery with his wife, so the defender's lawyer argued that article 497 is unconstitutional. The arguments were based on three points:

"(1) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;

(2) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and,

(3) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free licence under the law to have extra-marital relationship with unmarried women. The learned counsel complains that Section 497 is flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'."

To which Justice Chandrachud gave the judgement – "We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman." Court said that the arguments were emotional but do not have legal standings. Again the judgement was in the favour of adultery.

In the case *V. Revathi v. Union of India & Ors*[932], the wife of the adulterer argued that if the husband is allowed to prosecute the adulterer who had sexual intercourse with his wife, the wife of the adulterer should have the right to prosecute his disloyal husband. According to her it was the law which was discriminatory to women. First time the view that the law interprets that the husband has complete authority on his wife and he is the master of his wife. The petitioner argued that woman is not subordinate to her husband and the law only gives right of prosecution to a man which is violates right to equality of wife. The judgement given by Supreme Court was –

"Section 497 of the Indian Penal Code and Section 198(1) read with Section 198(2) of the Criminal Procedure Code go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit. The community punishes the 'outsider' who breaks into the matrimonial home

[931] 1985 AIR 1618
[932] 1988 AIR 835

and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is not why the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination based on sex. While the outsider who violates the sanctity of the matrimonial home is punished a rider has been added that if the outsider is a woman she is not punished. There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman in so far as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated an offender in the eye of law. The wife is not permitted as Section 198(l) read with section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practised in circumscribing the scope of Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer."[933]

JUSTICE MALIMATH COMMITTEE REPORT (2003)

The report laid down the recommendation on various IPC laws and the adultery was one of them. The committee recommended that the law needs to be amended as it had provisions which treat man and woman unequal. The committee highlights that the section 497 deals with punishing only the adulterer and the disloyal wife who gave him consent to have sexual intercourse without the permission of her husband. The committee said the law is gender biased, it was stated in the report that –"The object of this section (Section 497 of the IPC) is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband)."

It therefore suggested that "section 497 be suitably amended to the effect that whosoever has sexual intercourse with the spouse of any other person is guilty of adultery."

Committee did not speak anything on the aspect that the section 497 gives right of prosecution only to husband and not to wife. They did not believe this as discrimination. They only focused only on giving equal rights to husband.

The committee also not mentioned in its report that the whole adultery is unconstitutional and should be decriminalised. According to them it preserves the sanctity of marriage.

[933] (SCC Online) <https://www.scconline.com/Members/SearchResult2014.aspx> accessed September 29, 2018

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CASE ANALYSIS – Joseph Shine v. Union of India[934]

The case was the writ petition filed by an Italian, Joseph Shine on 8 December, 2017. The petition was against the 155 years old of adultery. The case became a landmark case as it decriminalises adultery. The constitutional bench of five judges headed CJI Dipak Misra and other four judges namely Justice Chandrachud, Justice Indu Malhotra, Justice A M Khanwilkar and Justice R F Nariman

Main arguments of the petitioner were –

- The petitioner states that the adultery should be decriminalised as having sex with someone other than husband is not a public wrong but it is a civil wrong.
- Section 497 of IPC tends to offend section article 14 of Indian constitution. The classification of this argument was on the basis of –"(i) Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman, who is pari delicto with the adulterous male, is not punishable, even as an abettor. The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery.
  (ii) The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man has no similar right to prosecute her husband or his paramour
  (iii) Section 497 I.P.C. read with Section 198(2) of the CrPC only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery.
  (iv) The act of a married man engaging in sexual intercourse with an unmarried or divorced woman does not constitute adultery under Section 497.
  (v) If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery. Though it will also break the sanctity of marriage."
- The law interprets that the husband is superior to his wife and the wife is the property of husband. But wife is not the chattel of husband and is equal to husband in the institute of marriage. It was stated that –" protection given to women under Section 497 not only highlights her lack of sexual autonomy, but also ignores the social repercussions of such an offence."
- The petitioner also argued that though article 15(2) gives the power to make woman centric laws but they can only be made for the benefit of woman but here it is not benefiting the woman but providing her immunity.
- The petitioner also argued that section 497 violates right to privacy under article 21 of Indian constitution. According to the petitioner it is the fundamental right of a person to choose with whom they want to be intimate; it's wholly the matter of private choice and cannot be criminalised.

[934] Writ Petition (Criminal) no. 194 of 2017

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On the other hand, the responded gave arguments as follows –

- The responded made her arguments that adultery cannot be decriminalised as the law is to protect the sanctity of marriage and the committers of adultery weakens their marital relationship. This thing not only affects their marriage but also affects their children. It was stated that –"Adultery is undoubtedly morally abhorrent in marriage, and no less an offence than the offences of battery, or assault. By deterring individuals from engaging in conduct which is potentially harmful to a marital relationship, Section 497 is protecting the institution of marriage, and promoting social well- being."
- It was further stated that –"The sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law."
- The respondent also argued that article 15(2) gave the law makers the power to empower woman and by not punishing thw wife who was the abettor to the offence, the law wants to uplift the status of woman as in most of the man is the actual seducer and the initiator and not the woman.

The Supreme Court gave the statement –"A law which could have been justified at the time of its enactment with the passage of time may become out- dated and discriminatory with the evolution of society and changed circumstances. What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic."

It clearly gives an idea that the law was a primitive type and it does not fulfil the aim at the present modern world. Previously the condition of woman was that she was considered as chattel of husband and was considered inferior to man. To uplift the status of woman in the society at that time in 1860 the law was made which gives immunity to the adulteress and the adulterer was considered the offender and the initiator of the act. But now the time has changed and after many efforts and upliftment programmes after independence the status of women in the society is not less than m that of men. So, the law is out-dated and by the changing society law should also be taken into consideration.

Further the Supreme Court considered the view that adultery is a marital wrong, which should have only consequences. It was stated that –"A wrong punishable with criminal sanctions, must be a public wrong against society as a whole, and not merely an act committed against an individual victim. To criminalize a certain conduct is to declare that it is a public wrong which would justify 59 public censures, and warrant the use of criminal sanction against such harm and wrong doing. The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely

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personal, would be repugnant to any interference by the State to take action purportedly in the best interest of the individual."

And finally they considered the view given by the petitioner on the law that it violates article 14.

The judgement given by the bench in unity that –

"(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.

(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

(iii) The decisions in Sowmithri Vishnu (supra), V. Rewathi (supra) and W. Kalyani (supra) hereby stand overruled."

The judgement decriminalised the 155 years section of IPC. Adultery is no more a crime though it is a civil wrong and is a valid ground for divorce. It is also held that if because of adultery any partner commits suicide the adulterer could be made liable for abetment of suicide.

CONCLUSION

Adultery had relevance from the pre-historic era, from ancient to modern world. Initially the section 497 was added in IPC to protect the sanctity of marriage and to punish the male offender so that it could deter the adulterers and to protect the interest of aggrieved husband. The law was made by Englishmen but shortly after independence different cases filed which questions the validity of law. But after about 72 years of independence the Supreme Court of India abolished the law saying that it does not fit in the present scenario. As the law violates article 14, 15 and 21 of India constitution, the Supreme Court had a liberal view that the status of woman in the society had been raised by time and we do not need this type of women centric law as Justice Indu Malhotra stated –" Adulterous woman can't be treated as victim and the man, seducer." The law also highlights the previous conception that women is subordinate to man, as stated by CJI Misra –"Husband is not the master of wife". Law also violates right to equality of both man and woman. Thus the decision by the Supreme Court of India decriminalises section 497 of IPC and section 198(2) of CrPC.

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A STUDY ON THE CAUSES & CONSEQUENCES OF THE ISRAEL-PALESTINE CONFLICT

- ***BHAWNA NANDA***[935]

ABSTRACT

The ongoing conflict between Israelis and Palestinians has directly and indirectly spawned several regional wars in the past five decades and has threatened Western access to critical oil resources in the Middle East. In addition, it has provided a justification for increased militarization throughout the region and has caused a high number of civilian deaths as result of terrorism. The terrorist attacks against the United States on 11 September 2001, the subsequent American-led Global War on Terror and especially Israel's comprehensive offensive attitude through the Gaza Strip and Lebanon, following the capture of three Israeli soldiers by the *Palestinian Islamic Resistance Movement* (*Hamas*) and the *Lebanese Party of God* (*Hezbollah*) in late June 2006, placed the Israeli-Palestinian conflict in the forefront of international debate.

Providing a background, the research paper shall trace the origins of the problem starting with the Zionist movement in the last decade of the nineteenth century to its present day. It shall examine the policy of the U.S. toward the Israeli-Palestinian conflict from the partition of Palestine in 1947 through the current administration, discussing the core issues in the ongoing conflict, the paper shall address recent peace initiatives and underlying trends preventing a sustainable peaceful arrangement. It shall intend to provide readers with a framework for a possible resolution strategy for further exploration. It shall also address implications for U.S. policy aiming on a resolution of the conflict between Israel and its Palestinian neighbors.

To end the Israeli-Palestinian conflict is not simply a question concerning Israel's security and finding a just solution for the Palestinians, it is vital for the interests of the U.S. in the region. Israeli-Palestinian peace prospects, however, are not hopeful. Many peace plans have been advocated to reach a settlement and the U.S., under every president from Truman to George W. Bush, has undertaken efforts on its own.

BACKGROUND OF THE CONFLICT

The three regions on the map, which are, Israel, Gaza, and the West Bank were once known as Palestine. Ownership of the land is disputed primarily between two different groups: Israeli Jews and Palestinian Arabs who are chiefly Muslim, but also include Christians and Druze.

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Palestine was a common name used until 1948 to describe the geographic region between the Mediterranean Sea and the Jordan River. In its history, the Assyrian, Babylonian, Roman, Byzantine and Ottoman empires have controlled Palestine at one time or another.

After World War I, Palestine was administered by the United Kingdom under a Mandate received in 1922 from the League of Nations. The modern history of Palestine begins with the termination of the British Mandate, the Partition of Palestine and the creation of Israel and the ensuing Israeli-Palestinian conflict.

THE PARTITION OF PALESTINE

After the Arab-Israeli War of 1947, Palestine was divided. Jewish Israelis, whose ancestors began migrating to the area in the 1880s, had their claim to the land based on a Promise from God and also for the need for a safe haven from widespread hostility towards the Jewish people known as Anti-Semitism.[936] The Palestinian Arabs proclaim that they are the rightful inhabitants of the land because their ancestors have lived there for hundreds of years. In 1947, the United Nations proposed a Partition Plan for Palestine titled "United Nations General Assembly Resolution 181 (II) Future Government of Palestine." The resolution noted Britain's planned termination of the British Mandate for Palestine and recommended the partition of Palestine into two states, one Jewish and one Arab, with the Jerusalem-Bethlehem area protected and administered by the United Nations.[937]

The resolution included a highly detailed description of the recommended boundaries for each proposed state. The resolution also contained plans for an economic union between the proposed states and for the protection of religious and minority rights. The resolution called for the withdrawal of British forces and termination of the Mandate by August 1948 and establishment of the new independent states by October 1948.

FIRST ARAB-ISRAELI WAR (1948)

Jewish leadership accepted the Partition Plan but Arab leaders rejected it. The Arab League threatened to take military measures to prevent the partition of Palestine and to ensure the national rights of the Palestinian Arab population. One day before the British Mandate expired, Israel declared its independence within the borders of the Jewish State set out in the Partition Plan. The Arab countries declared war on the newly formed State of Israel beginning the 1948

[936]Gurr, Ted. (1994) "Why Minorities Rebel: A Global Analysis of Communal Mobilization and Conflict International."Political Science Review. 14 (2) Pg 161.

[937]Brown, M. Causes and implications of ethnic conflict. In M. Brown (Ed.), Ethnic Conflict And International Security (Pg 3- 26). Princeton: Princeton University Press(1993).

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Arab-Israeli War.[938] After the war, which Palestinians call the Catastrophe, the 1949 Armistice Agreements established the separation lines between the combatants, Israel controlled some areas designated for the Arab state under the Partition Plan, Transjordan controlled the West Bank and East Jerusalem and Egypt controlled the Gaza Strip.

THE SIX DAY WAR (1967)

The Six Day War was fought between June 5 to June 10, 1967, with Israel emerging victorious and effectively seizing control of the Gaza Strip and the Sinai Peninsula from Egypt, the West Bank and East Jerusalem from Jordan, and the Golan Heights from Syria. The U.N. Security Council adopted Resolution 242, the "LAND FOR PEACE" formula, which called for Israeli withdrawal "from territories occupied" in 1967 and "the termination of all claims or states of belligerency." Resolution 242 recognized the right of "every state in the area to live in peace within secure and recognized boundaries free from threats or acts of force."

THE UNHOLY WAR/ THE YOM KIPPUR WAR (1973)

On October 6, 1973, Yom Kippur, the holiest day in the Jewish calendar (during the Muslim holy month of Ramadan), Egypt and Syria launched a coordinated surprise attack against Israel. The equivalent of the total forces of NATO in Europe was mobilized on Israel's borders. On the Golan Heights, approximately 180 Israeli tanks faced an onslaught of 1,400 Syrian tanks. Along the Suez Canal, fewer than 500 Israeli defenders with only 3 tanks were attacked by 600,000 Egyptian soldiers, backed by 2,000 tanks and 550 aircraft.[939] At least nine Arab states, including four non–Middle Eastern nations- Libya, Sudan, Algeria, and Morocco, actively aided the Egyptian-Syrian war effort. A ceasefire was achieved under U.N. resolution 339 and U.N. peacekeepers deployed on both the fronts, only withdrawing from the Egyptian front after Israel and Egypt concluded a Peace Treaty in 1979. U.N. peacekeepers remained deployed in the Golan Heights.

OTHER ISSUES OF CONFLICT

OIL AS A WEAPON (1973)

During the October war, the Arab oil-producing states imposed an embargo on oil exports to the United States, Portugal and Holland because of their support for Israel. The impact was to cause a shortage of petroleum in the United States and a quadrupling of gas prices. Americans

[938] Kurth, J. (2001) Religion And Ethnic Conflict In Theory. Orbis, 45(2), Pg 281- 294.

[939] Ted Robert Gurr. 1970. "Explanations of Political Violence," Chapter 1, pp. 3-15, excerpts from Why Men Rebel. Princeton, NJ: Princeton University Press.

soon had to contend with long lines at gas stations. Several U.S. oil companies that got most of their petroleum supplies from the Middle East and depended on the goodwill of the Arab states to maintain their business relations in the region collaborated, in the embargo against their own nation. Oil company executives lobbied the Nixon Administration to offer more support to the Arabs and less to Israel. [940] The oil embargo was lifted in March 1974, but the United States and other Western nations continued to feel its effects for years to come.

RISE OF THE PALESTINE LIBERATION ORGANIZATION (PLO) (1974)

In 1974, the Arab League recognized the Palestine Liberation Organization (PLO) as the sole legitimate representative of the Palestinian people and relinquished its role as representative of the West Bank. The PLO gained observer status at the U.N. General Assembly the same year. In 1988, the Palestinian National Council of the PLO approved a Palestinian Declaration of Independence in Algiers, Tunisia. The declaration proclaims a "State of Palestine on our Palestinian territory with its capital Jerusalem,"[941]although it does not specify exact borders, and asserts U.N. Resolution 181 supports the rights of Palestinians and Palestine.

THE INTIFADA (1987 TO 1993)

Conditions in the West Bank and Gaza Strip, including Jerusalem, after more than 20 years of military occupation, repression and confiscation of land, contributed to a Palestinian uprising called the Intifada in December 1987. Between 1987 and 1993, over 1,000 Palestinians were killed and thousands injured, detained, imprisoned in Israel or deported from the Palestinian territories.

THE GAZA STRIP ISSUE

The Gaza Strip is a rectangle along the Mediterranean coast between Israel and Egypt. The majority of its approximately 1.4 million residents are Palestinian refugees, many of whom have been living in refugee camps for decades, 80 percent were estimated to be living in poverty in mid-2007. [942] Under the Oslo Peace Accords signed in 1993, Gaza was turned over to the newly created Palestinian Authority, to form one Estonian Authority wing of an emerging Palestinian state, along with the West Bank and a potential land corridor between them.[943] But two different

[940]Conant, M. (1992), Middle East stability: A view from the USA. Elsevier Journal of Energy Policy, Vol. 20, Issue. 11, Pg. 1027- 1031.

[941]Alain Gresh, PLO: The Struggle Within London: Zed Books, 1988, p 18–48.

[942]Ghassan Khatib, "Azma Rahina am Istinfad Dur Tarikhi" ["A Present Crisis or the End of a Historical Role"], Journal of Palestine Studies, Vol. 19, No. 76 (2008).

[943]Walter Laqueur and Barry Rubin, The Israel-Arab Reader: A Documentary History of the Middle East Conflict London: Penguin Press, 2008.

parties rules these two regions- the militant Hamas controlled Gaza and Fatah ruled the West Bank. Many Israeli settlers remained in Gaza. In September 2005 the Israeli Prime Minister at the time, Ariel Sharon, withdrew all Israeli settlers from Gaza, making it the first territory completely in Palestinian hands. Israel however, kept tight control over all border crossings and continued to conduct raids. In January 2006, Hamas won a surprise victory in the Palestinian parliamentary election, ousting the Fatah government. Then in a burst of fighting in June 2007 in which more than 100 people were killed, Hamas gunmen routed the Fatah forces, and seized control of Gaza outright. Israel, which had refused to recognize the Hamas government, responded by clamping down even tighter on the flow of goods and people in and out of the territories.[944] By June 2008, Hamas and Israel were both ready to reach some sort of accommodation and the six-month truce was declared, although never formally defined. After the truce lapsed on December 19, rocket firing stepped up quickly and Israeli air soon followed. On January 3, a land invasion of Gaza began and by January 8, the death toll was 660.

THE PEACE PROCESS (1993)

In 1993, the Oslo Accords, the first direct, face-to-face agreement between Israel and the PLO, were signed and intended to provide a framework for the future relations between the two parties. The Accords created the Palestinian National Authority (PNA) with responsibility for the administration of the territory under its control. The Accords also called for the withdrawal of Israeli forces from parts of the Gaza Strip and West Bank.[945] Implementation of the Oslo Accords suffered a serious setback with the assassination of Yitzhak Rabin, Israeli Prime Minister and signer of the Oslo Accords, in November 1995. Since 1995, several peace summits and proposals, including the Camp David Summit (2000),Taba Summit (2001), the Road Map for Peace (2002) and the Arab Peace Initiative (2002 and 2007) have attempted to broker a solution, with no success.[946]

THE CAMP DAVID ACCORDS(2000)

In July 2000, US President Clinton met with Israeli Prime Minister Ehud Barak and PLO Chairman Yasser Arafat at Camp David with the goal of negotiating a final settlement to the Israeli-Palestinian conflict. The three leaders drew up terms regarding the formation of a Palestinian state, the refugee problem, Jerusalem and the territory that would comprise Palestine. Ultimately, Israel agreed to the formation of Palestine, allowed for the return of around 100,000 refugees to Israeland committed to joint-jurisdiction of East Jerusalem, though Israel would maintain the final say in matters of planning and construction. The area of the

[944]Booth, William, and Ruth Eglash. "Israelis Support Netanyahu and Gaza War, despite Rising Deaths on Both Sides."Washington Post, 29 July 2014.

[945] Edward Said, End of the Peace Process: Oslo and After, New York: Pantheon Books, 2000.

[946]Barak, Oren. "The Failure of the Israeli-Palestinian Peace Process, 1993-2000." Journal of Peace Research. 719-36.

Palestinian state was initially to be composed of about 73% of the West Bank however, Israel was to cede additional areas after about 10-25 years, which would bring the total area to around 94% of the West Bank territory. Israel also agreed to stop settlements in Palestinian territory and vacate the areas.[947] Ultimately, however, the Camp David settlement collapsed as the Palestinians refused to agree to any plan that did not give them sovereignty over East Jerusalem as well as the West Bank in its entirety.

THE DRIVE FOR RECOGNITION OF PALESTINIAN STATEHOOD (2011)

In a speech on September 16, 2011, Mahmoud Abbas, President of the Palestinian National Authority, declared his intention to proceed with the request for recognition of statehood from both the United Nations General Assembly and Security Council. On September 23, 2011, President Abbas delivered the official application for recognition of a Palestinian State to the United Nations Secretary General.[948] Numerous issues remain to be settled by Israelis and Palestinians, however, before an independent state of Palestine emerges. Negotiations are ongoing.

ISRAEL-GAZA WAR OF SUMMER 2014

This conflict had an official duration of fifty days lasting from July 8, 2014 until August 26, 2014. In the summer of 2014 this event, according to most sources, was the kidnapping of three Israeli teenagers as they were hitchhiking in the West Bankon. In these situations Israeli culture is one of strong unity. As a result, an enraged Israeli public over the kidnappings prompted a swift IDF crackdown in the West Bankon find the missing boys, which was ordered by Israeli Prime Minister Benjamin Netanyahu. The summer 2014 conflict was notable, but not completely uncommon, for several reasons. The rapid progression and intensity of the violence was alarming. By late July Israel announced military ground operations into the Gaza Strip to directly fight Hamas. The high death toll in Gaza was increasing at an intensifying rate, and approximately 50-70% of casualties were predicted to be civilians due to the challenges posed by an urban warfare environment. Women, children and other innocent parties were being killed daily as an unintended result of collateral damage from Israeli air strikes or ground fire.[949]

EXISTENCE OF NUCLEAR THREAT

There is great concern over other countries in the region gaining the power of the nuclear bomb. Israel has it, but others do not. The fear of nuclear proliferation is that one day one country will use the bomb and the world is back into a cold war situation. The consequence is that a nuclear

[947]"The Israeli Camp David II Proposals for Final Settlement." Mid-East-Web. 2002. Mid-East-Web, Web. 5 May 2018. <http://www.mideastweb.org/campdavid2.htm>.

[948]Khalid Hroub, Hamas: Political Thought and Practice, Washington, DC: Institute of Palestine Studies, 2000.

[949]Dearden, Lizzie. "Israel-Gaza Conflict: 50-day War by Numbers."The Independent. 27 Aug. 2014. Web. 6 May 2017.

weapon in the hands of untrustworthy autonomous governments is a dangerous thing. Indeed it is, but the alternative is perpetual conflict for hundreds of more years. Without some coming to terms and forgiving the past, the Israeli - Palestinian conflict is likely to continue.

THE PROPOSED SOLUTIONS

THE ONE-STATE SOLUTION

Scholars have argued that the creation of a bi-national state could provide a solution to the turmoil between the Israelis and the Palestinians. This arrangement would change the status of Israel as a Jewish state. Rather, a bi-national Israel would have a constitution that recognizes both Israel and Palestine as state-forming nations, regardless of their size. This arrangement shall be organized in agreement with proponents of power-dividing solutions to ethnic conflicts and civil wars. Under this proposal, the Israelis and Palestinians would virtually have "joint-custody" over Israel.[950] The bi-national solution could definitely be beneficial to both Israelis and Palestinians, as both are interested in residing in the territory that comprises Israel today and neither is willing to give it up. Additionally, their economies are nearly wholly tied to one another and complete partition would have incredibly negative consequences on both economies.[951] Unfortunately, despite the favorable nature of this type of compromise, it is established on completely implausible and unrealistic premises. The first major step towards building a Palestinian and Arab movement for the one-state solution lies in re-situating the Palestinian struggle for self-determination within a "rights" paradigm. It requires that the Palestinian political movement and its leadership shift its political goals from establishing an independent Palestinian state toward the achievement of equal political rights within a single polity. This is the case for Fatah and the PLO at large, the parties to the left- the Popular Front for the Liberation of Palestine (PFLP), the Democratic Front for the Liberation of Palestine (DFLP)and the People's Party and Hamas.[952]

SETBACKS:

- The Nationalism surging through both Israeli and Palestinian populations are incredibly proud, exclusive and determined.
- Neither side is likely to willingly relinquish its vision of separate statehood. The Palestinians have repeatedly rejected living side-by-side with the Jews and the Jews

[950]Karma, Ghadi. "Eretz Palestine: A Single State in Israel/Palestine," Royal Institute of International Affairs, London, August 1999.

[951] H.C. Kelman, "The Role of National Identity in Conflict Resolution: Experiences from Israeli-Palestinian Problem-Solving Workships,"Oxford University Press, 2001, Pg 187-212.

[952]George Bisharat, "Israel and Palestine: a True One-state Solution," The Washington Post, September 3, 2010.

would surely object to and fight against any solution that would leave them without a nation to call their own.[953]

Scholars have criticized that there is no chance at all that the present, post-holocaust, Israeli generation or its successor, will accept this bi-national solution, which conflicts absolutely with the myth and the ethos of Israel. The aim of the founders of the State of Israel was that the Jews or a part of them could at last take their destiny into their own hands[954]. A bi-national state means the abandonment of this aim and in practice, the dismantling of Israel itself. The Jews would return to the traumatic experience of a people without a state throughout the world.

- The hatred that exists between Israelis and Palestinians is so great that a state where they would be living in the same communities or even as equals in the same country, is unlikely to end peacefully. Neither side trusts the other enough to be able to jointly rule a country and any political advancement by one side would be seen as a threat by the other.
- A bi-national state does not eliminate the security dilemma that is at the base of any ethnic conflict. *This type of solution was attempted in Yugoslavia and ultimately led to ethnic cleansing and genocide.*

Ultimately, despite the general attractiveness of a one-state solution to the Israeli-Palestinian conflict, it is unrealistic due to the present tensions between the two groups. Their violent history and mutual distrust would prevent any sort of peaceful coalition from existing. Additionally, neither the Israelis nor the Palestinians have showed any interest in coexisting in a single state and any attempt to do so is likely to end in even more extreme violence.

RESPONSE

- The *de facto* abandonment of the one-state objective was largely the result of pragmatic political calculations. Diplomatically, there was no response to such a vision from the Israeli establishment, which had always refused it.
- Meanwhile, it is not clear that either the Palestinians or the Israelis are particularly ready for co-existence within a single state. Israelis, both within the mainstream political establishment and the society at large, reject the one-state solution. They fear that it will negate their Jewish identity and feel a need for their own state that would protect them from a resurgence of anti-Semitism.
- Palestinians, at the official and the grassroots levels, have also expressed doubts about the feasibility of the one-state option because of the vehemence of the Israeli opposition and more so out of fear of Israel's economic and political domination over the Palestinians within a single state.

[953]Virginia Tilley, The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock Ann Arbor, MI: University of Michigan Press, 2005.

[954]As'ad Ghanem, "Cooperation Instead of Separation: The One-State Solution to Promote Israeli Palestinian Peace," Palestine-Israel Journal of Politics, Economics and Culture, Vol. 14, No. 2 (2007).

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THE TWO-STATE SOLUTION

The solution advocated by many scholars and world leaders, including US President Barack Obama,[955] involves a partition of Israel into two autonomous, Sovereign States: one for the Jews, and another for the Palestinians. Proponents of the two-state solution advocate a peace settlement similar to and along the same lines as the one that was drawn up at Camp David in 2000. President Obama has made the implementation of a two-state solution in Israel one of his primary goals in the Middle East.

Although President Obama has been successful in getting acceptance for the two-state solution from Israeli Prime Minister Benjamin Netanyahu, this solution is still unlikely to succeed in pacifying relations between Israelis and Palestinians. In fact, even if the United States is successful in gaining final acceptance from the Palestinians as well, a Palestinian state comprised of the West Bank and Gaza is a recipe for further conflict, not peace, as this state would be unstable on all accounts. A state comprised of Gaza and the West Bank would thus face a great deal of difficulties.[956]

SETBACKS:

- There are physical barriers to the formation of a successful state- the two territories are disconnected and geographically separated by Israeli territory. This means that Israel could potentially prevent travel between the two areas if it felt only slightly threatened
- Israel has already stipulated that the new state must cede control of its airspace to Israel. Additionally, this type of partition plan has been implemented in the past, but has ended in failure. *In 1947, India was partitioned into the state of India and the state of Pakistan, which was geographically separated by Indian Territory. Agitation formed between East and West Pakistan as the central government, based in the West neglected and exploited the East. These tensions culminated in a bloody war between East and West Pakistan, which led to the partition of the country into two separate states: Bangladesh in the east and Pakistan in the west.*
- A new state comprised of the West Bank and Gaza Strip will also have to deal with intense economic hardship. *Firstly*, these territories are lacking in fertile land and have little access to water, hardly enough to be able to sustain a population and promote growth. *Secondly,* both territories are in a state of economic collapse and will need years of rebuilding their

[955]Obama, Barack."Remarks by President Obama To The Turkish Parliament." Turkish Grand National Assembly Complex. Ankara, Turkey.10 May2017. <http://www.whitehouse.gov/the_press_office/Remarks-By-President-Obama-To-The-Turkish-Parliament>.

[956]Heller, Mark, and Sari Nusseibeh. No Trumpets, No Drums: A Two-State Settlement of the Israeli-Palestinian Conflict. Macmillan, 1993. 3-24.

infrastructure, economy and government. Moreover, schools, institutions, and homes would need to be rebuilt and developed[957].

- In addition to the physical and economic barriers the new Palestinian state would cope with, there are deep political cleavages between the separate territories. Whereas the West Bank is ruled by Fatah, Hamas has recently come to power in the Gaza Strip.[958]

Even ignoring the fact that Hamas is a terrorist group, this could lead to major problems for the new state. As Hamas tries to gain control of the state in its entirety, the cleavages will deepen even further. *This could potentially result in the need to separate the two territories into their own separate states, similar to the situation in Pakistan.*

- The Palestinian territories, however, are too small to be able to serve as autonomous, sovereign states on their own. This is the most undesired consequence that could ensue from a two-state solution and it is the one that must be addressed and remedied in the formation of a peace settlement.

RESPONSE:

On both sides of the conflict, many have begun insisting that an acceptable two-state resolution to the conflict is no longer a possibility. This view tends to rest on Three Premises:

1) As a result of Israeli settlement policy in the West Bank and East Jerusalem, a critical threshold has already been passed with regard to the ability of Israel to offer future land swaps.

2) There is not sufficient political to deal with the inevitable domestic pressure that would result from necessary concessions, whether territorial, security, or justice.

3) Neither the Israeli or Palestinian political establishment is committed to reaching a lasting agreement.[959]

ALTERNATIVE SOLUTIONS

STATUS QUO

Many Israelis believe that managing the status quo is the most viable and feasible alternative to the two-state solution. Lack of justice for Palestinians does not resolve regional issues for Israel.

[957]Halevi, Yossi Klein. "Only the Naive or the Malicious Would Urge a Binational Israel." Jewish World Review (2003): Web. 5 May 2017

[958] Booth, William. "Amnesty International Says Hamas Committed War Crimes, Too." Washington Post. The Washington Post, 26 Mar. 2015. Web. 5 May 2017.

[959] Yezid Sayigh, Armed Struggle and the Search for State: The Palestinian National Movement, 1949–1993 (Oxford: Oxford University Press, 1997).

Status quo is not actually static, but dynamic and trending in negative directions.[960]Periods of calm are often broken by outbreaks of violence. Unilateral steps do not require any broad agreement, follow through or an arbitrator, making them more feasible. Each side may push for counterproductive unilateral steps, but unilateral that are potentially positive for both sides steps should be harnessed and encouraged.[961]

THREE-STATE SOLUTION (ISRAEL, WEST BANK AND GAZA)

There is a growing belief among some that prolonged West Bank-Gaza divide could become permanent, producing a de facto three-state solution.[962] Strongly opposed by the vast majority of Palestinians, who value Palestinian unity, as well as by Egypt, which fears being saddled with responsibility for Gaza and the international community. There could be merit in pursuing a "West Bank first" negotiating strategy and then incentivizing Gaza to join later, i.e. the "2.5-state solution."[963]

EGYPT-GAZA OPTION

Some far right Israelis would like Egypt to annex or assume greater responsibility for Gaza. Egypt views this alternative as a major national security threat and would oppose it, with the support of the international community.[964] Egypt could play a greater role in stabilizing Gaza, including securing the Egypt-Gaza Border, preventing weapons smuggling, allowing legitimate trade and movement of people, using its influence to moderate Hamas.

TRUSTEESHIP

Trusteeship refers to Interim international administration over the future Palestinian state. A transitional international administration could serve as a mechanism to facilitate implementation of a final status agreement rather than a prelude or substitute for such an agreement.[965] This

[960] Ali Abunimeh, One Country: A Bold Proposal to End the Israeli-Palestinian Impasse New York: Metropolitan Books, 2006.

[961]H.C. Kelman, "The Palestinianization of the Arab-Israeli Conflict,"Jerusalem Quarterly, Vol. 46, 1988, Pg 3-15.

[962] George Bisharat, "Maximizing Rights: The State Solution to the Palestinian-Israeli Conflict," Global Jurist, Vol. 8, No. 2 (2008)

[963]Lev Grinberg, "Israeli-Palestinian Union: The 1–2–7 States Vision of the Future," Journal of Palestine Studies, Vol. 39, No. 2 (Winter 2010), Pg. 49.

[964]J. Shamir & K. Shikaki, "Public Opinion in the Israeli-Palestinian Two-Level Game," Journal of Peace Research, Vol. 42, 2005, pp. 311-28.

[965] Benny Morris, One State, Two States, Resolving the Israel/Palestine Conflict, New Haven, CT: Yale University Press, 2009.

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would allow the PA to devote its resources to its governance capacity while relying on international security assistance. It would also alleviate Israeli security concerns associated with withdrawing IDF troops from the West Bank.[966]

RECOMMENDATIONS

The divisions that exist between the West Bank and Gaza Strip, in both culture and the topography, could make real issues were they consolidate and frame together a state. Also, the monetary underdevelopment of the regions on top of their restricted access to assets would make it troublesome for the state to create and bolster itself. Destitution and anguish will in all likelihood develop, not reduce and the Palestinians would start to look for another objective to fault for their dissatisfaction and hardship. This represents the hazard that the regions would betray each other, prompting the interest for a segment that can't consistently happen. The regions of Israel, Jordan and Egypt would come back to their pre-1967 setups; the West Bank region would be come back to Jordanian run and the Gaza Strip would be come back to Egyptian run.International forces will thus need to mediate and stand between Israelis and Palestinians for a prolonged length of time to ensure that violence does not recommence. Additionally, since the infrastructure of the Palestinian territories is virtually nonexistent and the government is corrupt and immoral, Egypt and Jordan will need considerable aid and support in rebuilding the territories and integrating them into their countries. It is also important that the Arab nations play a strong role in trying to eliminate terrorism from the territories by training new leaders, eliminating grievances and tracking down extremist elites. If these steps are taken, the violence can stop and a durable peace will emerge in its place.

CONCLUSION

No Balance of Power lasts forever. A genuine resolution of the conflict will become possible in the longer term, given a change in the present balance of power. It is impossible to foresee exactly how this change may come about. But it seems quite certain that it will not be confined to the relationship between Israel and the Palestinians, while all else remains as it is, it will necessarily involve tectonic movements in the entire region, as well as international global shifts. Two interconnected and mutually reinforcing processes will be vital for changing the present balance of power. First, decline in American global dominance and in particular in the ability of the U.S. to go on backing Israeli regional hegemony without incurring unacceptable economic and political costs. Second, a radical-progressive social, economic and political transformation of the Arab East, leading to a degree of unification of the Arab nation, most likely in the form of regional federation. The positive vision extends not only to the future of the two peoples in their independent states within the land they are agreeing to share, but to the future of the shared land

[966]Kelman HC. A one-country / two-state solution to the Israeli-Palestinian conflict. Middle East Policy Journal. 2011; 18 (1):27-41.

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itself, a land to which both peoples are attached, even though each agrees to claim only part of it for its independent state. In this spirit, the vision of a common future includes freedom of movement across state borders, as well as a range of cooperative activities that treat the shared land as a unit and are designed to benefit it in its entirety.

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POLITICS, A MARKET FOR CRIMINALITY: A THREAT TO DEMOCRACY

- *Shaurya Pandey*[967]

ABSTRACT

Criminalization of politics or the use money and muscle power into politics has become very prominent these days which is adversely affecting the practice of free and fair elections which has been held as the essential and unassailable feature of Indian Democracy in the case of *Indira Nehru Gandhi v. Raj Narain*[968]. The word 'money' and 'muscle power' is used here because the data which tells us about the elected candidate's wealth and criminal record shows that the chances of winning of those candidates are much higher as compared to the other candidates. An investigation into the record of 500 persons who were candidates in the Lok Sabha elections of 1998 revealed that 72 of them had criminal proceedings pending against them. In the 2009 General Elections for the 15th Lok Sabha, among the 7810 out of 8070 candidates whose affidavits were considered, 1158 candidates have declared that criminal cases are pending against them. This constitutes around 15% of the total number of candidates contesting in the election. Out of these 1158 candidates, there are serious criminal cases pending against 608 candidates.[969] It has become a trend in today's era of politics to give tickets to the persons with criminal background or history sheeters and the situation gets more out of hand when these type of people get elected as the Member of Parliament or Member of Legislative Assembly. This paper aims to point out the various issues which are pertaining to criminalization of politics and also tries to find out ways to curb down this menace. These ways can be, power must be decentralized, rules and regulations must be transparent, and there must be greater involvement of people in the government running through citizen, committees, cooperatives etc.[970]

INTRODUCTION

It is often argued that Principles and Politics cannot go hand in hand and even if they do which happens in a few exceptional cases then the principles has to be altered or distorted in order to link it with politics. It may be noted that criminalization of politics has taken a toll on the country's political scenario which is ultimately defaming politics and elections. Also, it further supports corruption and weakens the administrative sector of our country.

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[967] School of Law, Christ University
[968] AIR 1975 SC 2299.
[969] Page 27, LOK SABHA WATCH 2009-A Compendium of State Election Watch Reports by National Election Watch and Association for Democratic Reforms.
[970] Criminalization of Politics and Administration (India), Dr, Lekha Ram Chaudhary, ISSN: 2249-2496 Impact Factor: 7.081.

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If we go ahead and define Criminalization of politics then we need to first define what crime is. Gaining something through illegal means is called crime and use of politics or political power for criminal gains is known as Criminalization of politics. Earlier, politicians use to protect criminals from the law enforcement agencies in return of their muscle power during election but now, the criminals themselves have directly taken over the duty and they are contesting election and even go ahead and win elections. Few criminals take the help of the poorer and marginalized sections of the society and create a good image of themselves which ultimately help them is mass mobilization and by doing this their criminal face does not come up in front of the common voters. These criminal candidates also tend to be folks who are strongly rooted to the villages and towns that make up their electoral jurisdiction. They have local networks which they use to obtain political support and to generate resources for their political ambitions. Presumably, they get interested in politics because of the opportunity it offers in rent seeking. Vohra Committee Report on Criminalization of Politics which was constituted to identify the extent of the politician-criminal nexus says: "The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country" and that "some political leaders become the leaders of these gangs/armed senas and over the years get themselves elected to local bodies, State assemblies, and national parliament.[971]

In the election of 2005 investigation about the criminal activities of candidates contesting-the election was made and the survey reveals the following figures:

Party	Candidates	Criminal Cases	Winner
R.J.D.	215	74	29
Janata Dal (U)	138	56	24
B.J.P	103	48	17
L.J.P	178	60	11
Congress	84	16	3
C.P.I	17	6	2
N.C.P	31	10	2
CPI (ML)	104	48	2
CPI (M)	12	7	1

[971] Chapter 4 of the National Commission on the Review of the Working of the Constitution (NCRWC).

Another phenomenon of criminalization of politics is that the criminals use the political arena to neutralize the charges levied against them by getting elected as the Member of Parliament of Legislative Assemblies. By getting elected there they enter into the system and change it by twisting and turning it their own way. There are a lot of popular names which have been elected into the Legislative assemblies and Parliament despite the number of heavy charges pending against them. A few are: Mohammed Shahbuddin from Bihar who was named as Minister of State in Home Ministry in the H.D Deve Gowda Government in the year 1996 and is currently serving a life sentence for kidnapping with intent to murder and as many as 34 cases of serious crime are pending against him, Mukhtar Ansari from Uttar Pradesh, Arun Gawli from Mumbai, Shibu Soren from Jharkhand, Raja Bhaiya and Adiq Ahmat from Uttar Pradesh again and many more. The main concern regarding this is the electoral process would ultimately fall into the hands of these anti-social beings which would pollute and corrode the entire arena of Politics and Elections.

The process of criminalization is evil to the extent that it has started corroding the administrative arena too. If at once, a criminal becomes politician, the one who protects society from them becomes their protector in return and they are none other than 'Police'. The combination of bureaucracy and political leader is very dangerous and it opens the doors of criminalization of politics. The interference of politicians into the administration may be regarded as another reason for criminalization of politics.

FACTORS & REASONS PERTAINING TO CRIMINALIZATION

The use of money power in the elections is very evident from the various reports which the election commission has given in the recent years. In today's era of elections, the use of money has become very prominent, and this is the reason why various political parties tend to give tickets to people with strong financial background or get in touch with the people with the strong financial support. Political parties tend to gain support of criminals as they have strong connections at the local level which help the parties to gather their vote banks. Also, in order to contest elections a lot of expenditure is required and to meet through the expenses political parties collect money through donations. But, sometimes these donations do not match the amount of expenses which are to be incurred during the elections so political parties tend to give tickets to people who can collect money through donations as well as illegal means. So, one can connect the dots here as to why the tickets are being given to the people with criminal background and that is just to collect money through illegal means.

A survey by the Centre for Media Studies estimated the total expenditure from the party funds on the Lok Sabha elections at around Rs.10,000 crore. A quarter of it, or Rs.2,500 Crore approximately was assessed to be "unofficial money" or the cash outgo on inducement to voters. The candidates of national parties were in addition expected to spend another Rs.4,350 Crore, while the candidates fielded by the regional parties accounted for an expenditure of Rs.1,000 Crore. These figures are staggering by any yardstick. The compulsion to mobilize resources of

this magnitude leads to a dependence on criminals and crooks and reinforces the nexus between politics and crime.

Another way which the political parties have found to gain votes is the use of muscle power in the elections. Various political parties use this muscle power mainly on the eve of election in order to say the mob to vote for them particularly which in turn increases the menace of Criminalization. The politicians are thriving today on the basis of muscle provided by criminals. The common people who constitute the voters are in most cases too reluctant to take measures that would curtail the criminal activities. Once the political aspect joins the criminal elements the nexus becomes extremely dangerous. Many of politicians chose muscle to gain vote bank in the country, and they apply the assumption that, if we are unable to bring faith in the community then we can generate fear or threat to get the power in the form of election.[972]

The influence of muscle power in the elections is such that candidates with criminal background not only get ticket to contest election but also are appointed as Minsters at the State as well as Centre level and the leaders of such political parties stoutly defend any criticism of such choices.

One of the major factors which leads to the Criminalization of Politics is the vote bank politics which certain politicians practice in the name of caste and religion. The sector which is effected the most is the administrative sector due to this vote bank politics. It has been found that a minister of a certain caste will distribute favors in the administration to the people of his/her same caste. Rather than focusing on general values, candidates tend to focus majorly on issues which are pertaining to the people of their own caste which uplifts the idea of caste politics and further helps in criminalization of politics.

LEGAL THREADS & SOLUTIONS TO CURB DOWN CRIMINALIZATION OF POLITICS

The Most important legislation which deals with the elections and their procedure is the Representation of People Act, 1951. It was enacted by the Parliament of India "to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections"[973] The amendment to this act which took place in the year 1966 abolished the election tribunals and transferred all the petitions to the High Courts and appeal could be filed to the Supreme Court. This is one of notable amendments in this act as it enabled the judiciary to look into the matters of criminalization of politics in a more detailed and serious manner.

[972] Criminalization of Politics and Administration (India), Dr, Lekha Ram Chaudhary, ISSN: 2249-2496 Impact Factor: 7.081

[973] Representation of peoples act 1951 Page 64. Law ministry of India.

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The most important section of the Act is Section 8 which clearly focuses of the disqualification of the members and lays down grounds for the same which keeps a check of the inclusion of crime and criminals in the political arena. The judiciary has also laid down the importance of this section in the case of *K Prabhakaran v. P Jayarajan*[974] by stating that the reason why this section has been added into the representation of peoples act is to prevent criminalization and keep persons with criminal background away from law and ensure that those who are always involved in breaking laws must not get the chance to make laws. The court in this judgment also clarified the Section 8(3)[v] of the act states that the person getting convicted for period of less than two years several times will also stand disqualified if that time adds up to 2 years.

The loophole under this act was thoroughly discussed too in the case of *K Prabhakaran v. P Jayarajan*[975] which was regarding Section 8(4) of the act which gives MPs and MLAs a protective shield to continue in their posts, provided they had appealed or filed an application for revision against their conviction in higher courts within three months from the date of conviction. The Constitutional Bench of the Supreme Court stated that the division cannot be held as unreasonable as the purpose of this section is not provide immunity to the members but to protect the house because if this division is not made then the candidate has to go through imprisonment and would lead to forfeiture of his seat in the house or assembly and would ultimately make the party and house unstable. This is one of the major loopholes in the act which has to be amended and a provision against this loophole should be brought upon.

But recently in 2005 when Lily Thomas and an NGO Lok Prahari filed a Public Interest Litigation questioning the validity of Section 8(4), the Supreme Court in July 2013 passed a judgment[976] which was exact opposite to what was decided 8 years back. By a division bench of the Supreme Court, comprising of Justice A. K. Patnaik and Justice S. J. Mukhopadhya, in a judgment delivered by Justice Patnaik, section 8(4) of the Representation of People Act, 1951 was struck down as unconstitutional being beyond the legislative competence of the Parliament. This sub section of Act 1951 was stated as ultra vires the constitution. Fali Nariman, who argued the case for the petitioner, argued, among other things that the Parliament is not constitutionally competent to enact section 8(4). The court held that there is no provision in Articles 102 and 191 of the Constitution which confers power on Parliament to make a provision to protect sitting members from the disqualifications, it also said that the parliament lacks legislative power to enact section 8 (4) of the Act and therefore it is ultra vires to the Constitution. Further, the court relied on the Constitutional Bench's decision in *Election Commission of India v. Saka Venkata Rao*[977] wherein it was held that there will be same set of disqualification for election as well as

[974] AIR 2002 SC 3393
[975] Ibid
[976] WRIT PETITION (CIVIL) NO. 490 OF 2005

[977] AIR 1953 SC 201.

for continuing as member and so the parliament does not have power to make different laws for a person to be disqualified under section 8(4) of the Representation of Peoples Act 1951.[978]

The Apex Court has also clearly stated in the case of *Union of India* v. *Association for Democratic Reforms & Anr.* [979] that the candidates filing their nomination have to give account of their criminal record, if any, along with their financial and educational history.

CONCLUSION

The main victims or the people getting effected the most due to the Criminalization of Politics is the People in the system particularly the Administration and Police. This is because they are the ones who are given the duty to protect society from criminals and when criminalization takes place they themselves have to work under serious offenders. In order to curb down the menace of Criminalization of Politics very aggressive campaigns need to be taken up to tell the common voters to choose the right candidate. Illiteracy is one of major reasons why the candidates with criminal background get their votes so easily and further even win the elections. They tend to sway the people who don't have much knowledge in this area. So, a trend of election literacy campaign need to be taken up to fight with criminalization of Politics. Sustained campaigns of awareness building among voters and against crime in politics along with concerted efforts on the legislative front will be required to undo the damage done to the country's electoral system by politics of expediency and pursuit of power at any cost.

Blame cannot be just put upon the legislature or the judiciary for this menace. It's the common people too who have to stand up and raise their voice against such criminalization of politics and politicizing of administration. Also, amendments should be brought upon in the Representation of Peoples Act, 1951 which would ensure the disqualification of member in a case where there is an ongoing case against him at the time of election and is found guilty after he/she wins the election then such member should be disqualified and should be barred from contesting any further election for his/her lifetime. There should also be a clear cut demarcation in the types of crimes under which the disqualification is done and based of the rigidity of crime, the duration of the candidate being barred from contesting the election should be decided upon.

[978] Decriminalization of Indian Politics, By: Trishala Sanyal, Edited by; Saksham Dwivedi.
[979] 2002 (5) SCC 294

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IMPACT OF MINING ON TRIBAL RIGHTS IN INDIA

- *Shefali G.*[980]

ABSTRACT

This paper gives an insight to the strategies employed by private companies and the state by exploiting the illiteracy of the tribal community in order to gain access to land and resources. Therefore the tribal communities have suffered a lot due to development projects that have caused loss of access to forest, land and other resources that they have depended on for their livelihood, particularly in the mineral rich states of Orissa, Jharkhand, etc. They have been denied rights to the mineral wealth found under the land they own.

In India, ownership of minerals lies with the state. However the government has promoted privatization by leasing mines to private companies. The MMRDA bill aims to further encourage privatization and has no provision for consent from tribals for mining operations. Though it has provisions for mandatory payment by the companies to give funds, the problem is that the funds are in the hands of district mineral foundations which are dominated by the bureaucracy and mine owners with a very nominal representation of local communities.

There are several legislations that protect the interest of tribals such as the FRA (Forest Rights Act) which grants legal recognition to the rights of the traditional forest dwelling communities who depend on the forest for their livelihood, PESA (Panchayats Extension to Scheduled Areas Act) which is an act that enables the gram sabhas and the panchayat to implement a system of self governance on issues relating to sanctioning of mining projects, etc in scheduled areas. The Fifth and Sixth schedules were also included in the Constitution to protect tribals from exploitation. In the landmark Samatha decision, the Supreme Court ruled that the purchase of tribal land for mining activity by any entity that is not state owned must be barred and upheld adivasi rights to informed consent and to a share in mineral wealth. However they haven't been implemented properly.

The paper therefore examines the impact of mining on tribals and concludes that due to poor implementation of laws and inadequate provisions to protect their interests, the tribal communities have been reduced to being encroachers on their own land or have been displaced instead of being recognized as owners of their land and its resources. The object of this paper is to examine the impact of mining on the tribals of India and to showcase mining induced displacement as a highly relevant social economic and human rights issue.

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INTRODUCTION

In India,the indigenous peoples are predominantly composed of the large and diverse tribal populations scattered across several States. In Indian languages, there is no exact equivalent for the "tribe", but close synonymous are vanavasis (Forest dwellers) or adivasi (Original inhabitants).[981]Development in India paved the way for establishment of large scale projects like mining, infrastructure projects, irrigation and various other types of industries. But unfortunately these same projects have been responsible for the displacement of people mostly tribals from their original land and they are forced to move to other places. This problem of mining induced displacement and resettlement will result in severe economic, social and even environmental crisis. People get impoverished when their incomes are being taken away from them and people are relocated to different places where their standard of living further decreases, their community traditions are lost, their families get separated and most importantly they lose their cultural identity and their deep rooted traditions. As a result of all there is a gross violation of human rights.[982] As these tribals are forced out of their own lands, they face a traumatic and psychological experience due to the loss of their only source of income i.e. their lands and the deep rooted customs and traditions that they so closely identify with.

GLOBALISATION AND THE DEVELOPMENTS IN THE MINING INDUSTRIES

After India got independence in 1947, the government introduced five year plans. The setting up of National Coal Development Corporation (NCDC), nationalization of private coal mines, the enactment of Mines and Minerals (Regulation and Development) Act and its several regressive amendments that enhanced government control such as removing of ceiling on individual holdings, the authorization of the central government to reserve areas for public sector undertaking and the approval of mining plans were being made mandatory.

The economic policy of 1991 was marked by a shift from state monopoly to the opening of markets in the global world. The MMRDA act was amended continuously in order to accommodate private parties and encourage inflow of foreign funding on these matters. Now in states like Orissa, Chattisgarh, Jharkhand, Andhra Pradesh are being exploited exhaustively for the extraction of minerals and MoU's with corporate bodies. This places mother earth at great environmental risk, causes a huge loss to the cultural ecology of the people at the grassroots, and generates a threat to the symbiotic relationship between the resources and the people that has existed since time immemorial Finding no other alternative, the people resort to non-traditional sources of income. This results in the increasing participation of people in the labour market as

[981] Patil, Dr. Yuvraj Dilip, Forest Rights of Indigenous People in India (May 25, 2012)
[982] DR ROMESH SINGH, MINING AND ITS IMPACT ON TRIBALS IN INDIA:SOCIO- ECONOMIC AND ENVIRONMENT RISKS, INTERNAT'L JOURNAL OF SOCIAL SCIENCE AND HUMANITIES RESEARCH (2015)

diggers, lifters, and other labour intensive engagements, while a few unfortunates who fail to secure any employment migrate across the state borders to work in construction units, etc.[983] Governance has failed the welfare objective to a point where it is now being believed that the country is ruled by a materialistic ideology shared by business lobbies, political groups cutting across party lines and several sections of society.[984]

STATES AFFECTED BY MINING

ORISSA

The Vedanta Mining Case- The Government of Odisha in 2003 had signed a Memorandum of Understanding (MoU), for extraction of three million tonnes of bauxite every year with Vedanta Aluminum Limited (VAL), a firm that belongs to Anil Agarwal-owned Vedanta Resources a mining major listed in London, previously called the Sterlite. Vedanta in a joint venture with the Odisha Mining corporation proposed to mine bauxite ore in Niyamgiri hills. However, the Ministry of Environment and Forests (MoEF) had cancelled Stage II forest clearance granted to Vedanta and OMC in 2010. Niyamgiri, a series of four hills in Odisha is home to approximately 8,000 Dongria Kondhs, a primitive tribal group who worship the hills and consider the apex of the hill ranges as the abode of Niyam Raja. Activists for nearly a decade have been fighting against repeated attempts to convert the mountain into what they call, an industrial wasteland. Dongria Kondhs, original inhabitants of Dandakaranya forests who live at high altitudes are a primitive tribal group who are experts at farming without chemicals. They depend on Niyamgiri for their livelihood. All the Kondhs believe that mining will incur the wrath of Niyam Raja and will consequently lead to extinction of their community and deforestation with possible adverse effects leading to water crisis. Therefore, Niyamgiri is crucial to these communities to the point of being sacred and to them no amount of money could ever compensate for the mining-related ecological problems.[985]

The Supreme Court, in its ruling directed the Odisha government to hold Gram Sabhas within a three-month deadline, to ascertain violation of individual, community, and religious rights of the tribes people under the Forest Rights Act in the Niyamgiri hills as a consequence of $1.7-billion mining of bauxite by VAL. The Court further ruled that the MoEF should finally decide on the grant of further clearance for mining of bauxite ore with reference to the decisions of the Gram Sabhas, in what can be considered as the firstever environmental referendum in the country. But many hold the view that the way the Gram Sabhas are being held defies the spirit of the Supreme Court direction. All the Gram Sabhas convened to decide the future of the crucial

[983] DR ROMESH SINGH, MINING AND ITS IMPACT ON TRIBALS IN INDIA:SOCIO- ECONOMIC AND ENVIRONMENT RISKS, INTERNAT'L JOURNAL OF SOCIAL SCIENCE AND HUMANITIES RESEARCH (2015)

[984] SHRIVASTAVA & KOTHARI, 2012; THE SIGNIFICANCE OF NIYAMGIRI,(2013)

[985] NALINI BIKKINA AND A. S SASIKALA, VEDANTA MINING CONTROVERSY :CONFLICT RESOLUTION IN THE SPIRIT OF GRAM SWARAJ.

bauxite mining project of VAL refinery at Lanjigarh and they categorically rejected the Vedanta proposal and voted to state that the mining of bauxite ore on the hill ranges of Niyamgiri would be an infringement of individual, community, cultural, and religious rights of Kondhs and other traditional forest dwellers. The direction of the Supreme Court combined with the mandate of the Dongria Kondhs would also communicate that these corporate entities cannot use the strategy of setting up the refineries without seeking the mandate from the indigenous communities. The Supreme Court order that villagers would have to be provided with forest rights and land titles — a constitutional protection extended to Schedule V areas, guaranteed to tribals and inhabitants of forest areas — and that they alone have the right to decide on the issue of mining in their area goes a long way in reinforcing the spirit of local self governance.
After a struggle for nearly a decade the Kondhs have been given justice.[986]

ANDHRA PRADESH

The tribal population in the State of Andhra Pradesh and in the country as a whole is the most deprived and vulnerable community that faces severe economic exclusion. Although certain constitutional safeguards are provided, there has been no economic, social and political mobility across these communities. Contrary to Scheduled Castes and other Backward Castes who witnessed certain degrees of progress because of protective discrimination policies of the government, the Scheduled Tribes remain abysmally backward and socially excluded, still living in harsh environs. The fifth schedule provisions which forbid the transfer of tribal lands to non-tribals.

The Samatha Judgement - Samatha an NGO working in the scheduled tribal area of Andhra Pradesh filed a case against the state. This NGO worked for the rights of the tribal communities and was involved in the dispute over leasing of tribal land to the private mining industries. The tribal community wanted to regain control over the their lands rather than work as labor force in the mining operations on their own lands. After losing the initial battle in the lower courts samata filed a special leave petition in the supreme court of india. The four year legal battle led to a historic judgement in 1997. It was a landmark judgement in favour of tribal rights . it permitted the mining activity to go on as long as it is undertake by the government or instrumentaliy of state or cooperative society of tribals. It declared that 'person' would include both natural and juristic. All land leased by the government or its agencies to private mining companies apart from the instrumentalities in the scheduled areas are null and void.it directed that the government should consider a mechanism to include cooperative societies of tribals for mining operations. As per the 73rd amendment act every gram sabha shall be competent to safeguard and will have the power to prevent alienation of land in scheduled areas and take appropriate action to restore any unlawful alienation of land of a scheduled tribe.the minerals are to be exploited by the tribals

[986] No to Mining in Niyamgiri (2013, August 20). Business Line

themselves either individually or through cooperative societies with the financial assistance of the state.[987]

JHARKHAND

Jharkhand which means 'forest tract' is the richest area in the country, it is rich in minerals such as coal, iron ore, bauxite, mica, etc. Here again after new economic policy, nationalization of private coal mines and the massive expansion of mining in this mineral rich area, the indigenous people of Jharkhand is one of the struggles against the outside exploiters who have gradually reduced them to a subordinate position in their own land .[988]

THE LEGAL ASPECTS

Under the contemporary deregulated neo liberal policy framework, the exploitation of natural resources, including minerals by multinational mining companies have intensified. But the resistance by the affected committees has also grown through the framework ILO and UN conventions which recognize the rights of indigenous people to ownership, control and management of their land and resources. The central government which has control over major minerals have promoted privatization through leasing mines. According to various reports 95% of the leases comprising 70% of the land were given to private companies. The MMRDA bill aims to further deregularise the mining sector based on the recommendations of the Hoda Committee. It has easier terms of conversion to mining leases in order to encourage the entry of foreign companies. There is a provision that makes it mandatory for coal mining companies to give funds amounting to 26% of their profits. But the main problem is that these funds are to be in control of a district mineral foundation which is essentially dominated by the mine companies and the bureaucracy with a nominal representation of the local community. Also the rates of royalties in India are shockingly very low. For example the royalty for one tonne of iron ore fixed by the central government for Orissa was just 26 rupees until recently.

The very scheme of the bill has reduced the tribals into some sort of recipients of charity instead of being recognized as the rightful owners of the land and resources. It is an assault on the constitutional rights given to the tribal community particularly in fifth schedule areas. the PESA – Panchayat Extension (to Scheduled Areas) Act mandates the consultation with the gram sabhas, even these laws are just good on paper and are violated in reality as there is a complete absence of any consultative process prior to the granting of lease.

[987] Samatha v. State of Andhra Pradesh, 1997 8 SCC 191
[988] MATHEW AREEPARAMPIL, DISPLACEMENT DUE TO MINING IN JHARKHAND, ECONOMIC AND POLITICAL WEEKLY(1996)

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In fifth schedule areas the law prohibits the transfer of tribal held land to non tribals. There is an unwarranted differentiation between the rights of the tribals in the fifth schedule non forest areas and forest areas. Even for forest area there is no provision on what would happen in case the owner does not give permission.[989]

There are many other issues such as compensation to those who have lost their livelihood. The Scheduled Tribes and other Traditional Forest Dwellers(Recognition of Forest Rights) Act also defends the rights of the tribals but is not implemented properly. The MMRDA bill which was amended in 2015 has no provisions for consultation with the gram sabhas. The adivasis have the right to compensation but if they do not agree with the mining plan then the state government shall order them to allow the licensee to enter upon the said land and carry out the necessary operations. It is under this cruel provision that lakhs of tribal families get forcefully evicted out of their own land and have probably been reduced to being contract labourers in mines that have destroyed their own forest and homeland.[990]

Fifth and Sixth Schedules of the Constitution:

The provisions relating to the administration and Control of the Scheduled Areas and scheduled Tribes in any state, other than Assam, Meghalaya, Tripura, and Mizoram are contained in the Fifth Schedule to the Constitution.

Article 244-A empowers parliament to form an autonomous State comprising certain Tribal areas in Assam and create local legislature or Council of Ministers for such States.

The Administration of the Tribal Areas in the State of Assam is carrying on according to the provisions of the sixth Schedule. It provides for autonomous districts and autonomous regions.

Constitution of Commissions:

The Constitution of India does not define as to who are the persons who belong to Scheduled caste's and scheduled Tribes. However, Article 341 and 342 empowers the President to draw up a list of these castes and tribes. Under Article 341 the President after consultation with the Governor with respect to the State, specify the Castes, races or tribes or of groups within castes, races or tribes for the purpose of their constitution.

Article 330 deals with the reservation of seats to scheduled tribes in the autonomous districts of Assam. Art.332 provides for the reservation of seats of scheduled Castes and Scheduled Tribes in the legislative Assembly of every State (Except Assam).

[989] BRINDA KARAT, OF MINES, MINERALS AND TRIBAL RIGHTS, THE HINDU(2015)
[990] BRINDA KARAT, A GLASS HALF EMPTY FOR ADIVASIS, THE HINDU (2015)

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The Constitution (89th Amendment), 2003 has amended Article 338 and added a new Article 338-A which provides for the establishment of National Commission for the Scheduled Tribes.

CONCLUSION

To sum up, mining has become one of the most important sources for the nation's development. This has resulted in rapid expansions of mining activities and hence, over exploitation of natural resources. Most of the mineral resources are located in tribal lands and the forests. Thus, mines have had an impact on forest-dependent tribals the most. The greatest impact of displacement due to mining has been the transformation of tribals from a close association with nature to culturally and ecologically degraded communities. The situation in these areas are already extremely disturbing, with massive mining leading to displacement of tribals, destruction of their livelihood and their support system including forests and water sources, large scale air and water pollution, and destruction of socio-cultural life through massive influx of outsiders. Undoubtedly, mining induced displacement has brought a drastic changed in socio-economic and cultural life of the tribal people which provide symbolic meaning to their existence, social control, and interaction. Subsequently, it also resulted in emergence of many revolutionary movements in tribal areas which act as counterproductive in nation building process. Therefore, there is urgent need for re-examining the rehabilitation project by considering the peoples socio-economic and cultural needs and immediate. Considering the fact, it is desirable to rethink and reformulate our policy for a justified distribution of development benefits and to protect the due share of the poor tribals.[991] In the wake of these problems, there is more need to gather people participation and make them aware of their right to land . While there are some laws that don't consider the rights of the tribals, there are many laws and judgements that protect and recognize tribals as the rightful owners of the land. Due to corruption and influence of the government and because the tribals are illiterate and unaware of their rights these measures haven't been implemented properly .

Thus, the result is seen in many parts of India of how tribal land acquisition for mining activities demonstrates the violence of mining and reveals the formal and informal tactics deployed by the state and private companies to dispossess the poor.[992] In India, the indigenous peoples are predominantly composed of the large and diverse tribal populations scattered across several States. In Indian languages, there is no exact equivalent for the "tribe", but close synonymous are vanavasis (Forest dwellers) or adivasi (Original inhabitants).[993]

[991] DR ROMESH SINGH, MINING AND ITS IMPACT ON TRIBALS IN INDIA:SOCIO- ECONOMIC AND ENVIRONMENT RISKS, INTERNAT'L JOURNAL OF SOCIAL SCIENCE AND HUMANITIES RESEARCH (2015)

[992] Mining, Land acquisition and tribal rights: Does FRA secure that? (Insights from commons , displacement and conflicts due to the overlapping of FRA / PESA in the scheduled areas of Odisha) Sarmistha Pattanaik

[993] Patil, Dr. Yuvraj Dilip, Forest Rights of Indigenous People in India (May 25, 2012).

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ANTI-NATIONAL & ANTI-GOVERNMENT – TWO SIDES OF THE SAME COIN

- Arjun Sahni[994]

ABSTRACT

For the longest time, the terms *antinational* and *antigovernment* have been thrown around interchangeably, with the common man not having a shred of hint that the two are distinct ideologies, and are far from alike. This stems from the simple understanding that the nation and the government are two separate entities. The State itself treats a majority of seditious activities as antinational conduct, and vice versa— much to its unwarranted advantage. The conflation of these words, vis-a-vis Section 124A of the Indian Penal Code that deals with the punishment for violence-inciting antigovernment actions, has withered away the very foundation of our democracy and the unalienable freedoms guaranteed by it, which India thrives on.

This essay will address the inherent differences between the concepts of antinational and antigovernment, in a threefold manner. Firstly, the explanation of both the terms will be dealt with, in accordance with international understanding of the same. Next, the pertinent Indian laws will be brought forth and discussed. Alas, the essay will delve into the nuances of antinational and antigovernment sentiments and conducts, with the support of relevant definitions, laws, instances, and cases.

There exists a plethora of confusions that needs to be cleared as soon as possible, keeping the recent developments in this arena in mind, like the suicide of Rohit Vemulla and the arrest of Kanhaiya Kumar. One needs to come to terms with the fact that the government is subsumed within the nation, not the other way round; ergo, the government can't curb resistance by branding anything and everything as seditious in nature when it comes to criticism. By interpreting dissent as antinational and effectively illegitimating it, the ruling party might risk betraying the founding idea of India.

ARTICLE

'*Patriotism is supporting your country all the time and your government when it deserves it.*'
-Mark Twain

This time-honoured quote, by one of the most classic authors of the nineteenth century, is an apt start to show that there exists a stellar difference between the entity of a country, and that of its government;

[994] Symbiosis Law School, NOIDA

that the two are distinct, and call for partisanship at levels that do not conflate. Similarly, their opposition, i.e., antinational and antigovernment conducts, are also rigged with explicit differences, and that is what this essay shall establish.

This essay will address the inherent differences between the concepts of antinational and antigovernment, in a threefold manner. Firstly, the explanation of both the terms will be dealt with, in accordance with international understanding of the same. Next, the relevant laws, vis-a-vis India, will be brought forth and discussed. Alas, the essay will delve into the nuances of antinational and antigovernment sentiments and conducts, with the support of relevant definitions, laws, instances, and cases.

Being **antinational** is defined as being opposed to or hostile towards one's country, and/or propagation of antipatriotic elements in the society. In laymen's terms, antinationalism connotes the feelings related to an opposition to nationalism. The imposition of nationalism as a belief or identity, when in conflict with self-sustaining beliefs, oftentimes based on freely chosen cultural or religious practices can be surmised to undermine the validity of territory based nationalism. There exist several kinds of internationalism, which propose alterations in the current system. Not all of them necessarily oppose the idea of countries, boundaries, cultures and politics; for instance multilateralism does not, whereas various forms of cosmopolitanism and proletarian internationalism overtly do so.

On the other hand, being **antigovernment** means being hostile towards or in rebellion against the country's government, and/or opposing governmental policies and power. Antigovernment conduct may be inclusive of opposition to government's vision and policies, political dissent, sedition, anti-statism, and anarchism; each of these advocates the abolition of the either the ruling government itself or its policies.

First of all, we need to comprehend that government and nation aren't the same, at least not in a *democracy*. Here, the ruling party is voted to power at the will of law-abiding citizens themselves. This is the whole point of having elections at regular intervals— for people to judge and evaluate the government at the end and decide whether they want its term to continue or not. Many instances of re-elections have been recorded wherein it was done before the government completed its course, due to the sturdy antigovernment sentiments showcased by the citizens.

So, what is the relation between the charges of being antigovernment and being antinationalist? These are used interchangeably; but in actuality, bear a less than tenuous relation.

The buzzword, antinational, has surfaced as the most fervently used terminology in the Indian political glossary. It all took flight with the killing of a rationalist, M.M. Kalburgi, followed by actor Amir Khan's statement about coveting to leave the country, which resulted in prominent uproar. The debate continued with dignitaries returning their national awards in order to protest against the involvement of the ruling party with majoritarian politics. Subsequently, a Muslim man was axed to death over eating beef, and the students' initiatives to curve radicalism were branded antination which led to the suicide

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of Rohit Vemulla and the arrest of Kanhaiya Kumar. Simultaneously, Jammu and Kashmir became a military Armageddon after the execution of a rebel leader, Burhan Wani.

The aforementioned instances are just the some of the myriad flash points in the recent grand dissertation of being an antinational in the Republic of India.

On the other end, being antigovernment majorly comprises of criticising the government or revolting against it. People often take nation and government to be one and the same, notwithstanding the fact that there are actual charges in criminal law for antigovernment activities but none for the antinational ones, saving for extremities like terrorism and spying. *Sedition* and/or *political dissent* together boil down to being the main ingredients of any antigovernment vendetta. Laws, however, do not exist for anything but sedition. The law on sedition, **Section 124A**[995] **of the Indian Penal Code, 1860**, says:
"Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

This law, which is used in all the purported cases of sedition and/or being antinational, nowhere makes an explicit reference to either of these terms.[996] Without a hint of doubt, the wordings of this Section have been intricately crafted to protect the government from all kinds of resistance. It doesn't even take the State in its entirety or the country in consideration— just the ruling party at the time. In the Indian subcontinent today, sedition is a crime— albeit it ought not to be so in our constitutional order. Acts like that of treason and those pertaining to national security are offences according to our penal code.

Being unpatriotic or antinational, on the other hand, are not crimes per se. So charging an antinational with sedition should effectively be ultra vires, irrespective of the procedures being followed in the Republic of India today. The Constitution, by propounding the Freedom of Speech and Expression,[997] guards the rights of its citizens to have antinational and unpatriotic views and ideologies, and peacefully propagate them. These rights are subject to laws that impose reasonable limitations on them in view of India's security and integrity.

The sedition law itself is extremely challenging and is worded very loosely so as to chip away at one's freedom of speech. This remnant of the colonial era is in a frantic need of revision. The vagueness of Section 124A has led to it heavy misuse in order to end dissent, with the uncalled-for arrest of victims spanning from agitating students to cartoonists; all of this, while paying no heed to the fact that

[995] Indian Penal Code, 1860: S. 124A
[996] The Indian Express. (2016). What is Section 124-A under which one is charged with sedition?. Available at: https://indianexpress.com/article/india/india-news-india/what-is-section-124-a-under-which-one-is-charged-with-sedition/ [Accessed 20 Aug. 2018]
[997] The Constitution of India: Art. 21

Supreme Court interpreted sedition something more than mere sloganeering.[998] It is imperative to strike down this law, simply on the contention that no political party should be entitled to such absolute safeguards from criticism, regardless of whether it apprehends insurgencies.

At this very moment, no law exists for antinational promulgations; however, there are certain laws addressing antinational activities akin to espionage, like Sections 3, 5, and 9 of the Official Secrets Act, 1989. Earlier, there used to be a few laws, namely the *Terrorist and Disruptive Activities (Prevention) Act*, and the *Prevention of Terrorism Act*, both of which after coming into play were repealed, owing to the ensuing power play of the government and subsequent abuse of supremacy. They undermined fundamental rights of the citizens, by allowing custodial detention without charges and making custodial confessions admissible[999]. Their nexus was terrorism and they were India's boldest initiative to battle terrorism, disband terrorist organisations, and liquidate terror funding.[1000]

To reiterate, an antinational is someone who is opposed to the concept of nationalism— the idea that a group of individuals sharing some common bonds form a territorial community— and ergo is also opposed to the national interest. There do exist, notwithstanding, reasonable and intellectual foundations for negating the authenticity of the basis of nationhood, and good contentions critiquing the idea of national interest.

The charge of antinational is commonplace in our country. A primal point here is that there is no law in India that specifies what 'anti-national' means, or in what ways it comprises of a crime, or what penalties it must draw. This is largely because, strictly speaking, being antinational does not mean going against the nation per se, but against being a particular kind of nationalism.[1001] Lately, common people like Dalit students, Adivasis, human rights activists, religious minorities, beef eaters, homosexuals, and labour activists, are being tagged as antinational rebels, simply because they dare to espouse a different idea of the nation they aspire to better.[1002]

But there are some cases wherein one may appear anti-national while trying to be antigovernment. These involve backing anti national elements merely because you share antigovernment sentiments with them. Antinational conducts include spying, illegal smuggling, espionage, terrorism, sloganeering et cetera. Someone defaming or disrespecting the national anthem, national song, national bird, or national animal and/or making statements which question the veracity and communal harmony of the country can be termed as antinational ab initio. The bottom-line is, as long as you don't challenge the

[998] Tharoor, S. (2018). Opinion: Set Kanhaiya Free. Dissent Is Not Anti-National.. NDTV.com.
[999]hrw.org. (2018). India: POTA Repeal a Step Forward for Human Rights. [online] Available at: https://www.hrw.org/news/2004/09/22/india-pota-repeal-step-forward-human-rights [Accessed 20 Aug. 2018].
[1000]Rediff.com. (2018). It is goodbye to POTA. [online] Available at: http://www.rediff.com/news/2004/sep/18spec1.htm [Accessed 20 Aug. 2018].
[1001] Gabriel, K. and Vijayan, P. (2018). There is no law in India that specifies what is anti-national, or in what ways it constitutes a crime. [online] counterview.org. Available at: https://counterview.org/2016/03/09/there-is-no-law-in-india-that-specifies-what-is-anti-national-or-in-what-ways-it-constitutes-a-crime/ [Accessed 20 Aug. 2018].
[1002] Sampath, G. (2016). Who is an anti-national?. The Hindu.

integrity of the country or any such thing which causes social unrest, you are free to oppose the government.

Sedition refers to a conduct akin to speech and organisation, which tends to result in uprisings and insurgencies against the established order. It oftentimes includes incitement of hatred, insurrection and resistance against the State. Political dissent is an expression meant to convey dissatisfaction with the governing body and takes the form of vocal criticism or civil disobedience.[1003] These conducts are primarily inclusive of protests, demonstrations, peace march, protest march boycotts, riots, strike, street theatre, effigy burning, sloganeering, memes et cetera.

Our nation is the entirety of the entity known as India as outlined by the Constitution. It is inclusive of the whole of Indian citizens, the area they occupy, the media and the State, i.e., its three organs. The government is just a small part of the nation, not the other way round. This does not mean someone holding anti-national opinions is criminal, unpatriotic, seditious, and treasonous. It is important not to juxtapose these terms.

In a true democracy, like that of the Republic of India, it is not just people's right but also a duty to criticise the government's policies. To attempt to choke the dissent that is rife, in the name of patriotism, is to choke democracy. This uncalled-for jingoism has never done anyone any good and shall prove to be fatal for the very underpinning of the country's foundation. The real *Deshdrohi* or antinational is not one who legitimately dissents against the governing body's policies— he is one who offers violence in the name of a bogus crusade for nationalism and in doing so acutely undermines the spirit was what he claims to defend.[1004] Jingoism or extreme patriotism is detrimental to a healthy State.

Rectification of 124A of IPC is the pressing need of the hour. It requires the amassing of public opinion against the impugned governmental measures. But any such step stands the risk of attracting 124A itself. It so happens that several Supreme Court judgements have instated the applicability and ambit of this section and limited the same to only those situations wherein the accused has incited hostility. But regardless, this particularly diabolical law leaves much room for interpretation.

In **Bilal Ahmed Kaloo v. State of Andhra Pradesh**,[1005] the accused was charged with sedition, after he compelled communal hatred among the Muslims, with the object of liberating Kashmir from India. The Judge said that the charges framed against the appellant in no way indicated that he did anything against the government, which is the very premise guarding the allegations enumerated in 124A. While these acts are antinational and establish contempt against the country, the prospective conviction

[1003]National Coalition Against Censorship. (2018). Political Dissent. [online] Available at: https://ncac.org/issue/political-dissent [Accessed 20 Aug. 2018].

[1004] Suraiya, J. (2016). Don't confuse anti-government with anti-national. [online] Times of India Blog. Available at: https://blogs.timesofindia.indiatimes.com/jugglebandhi/dont-confuse-anti-government-with-anti-national/ [Accessed 22 Aug. 2018].

[1005] [1005] Bilal Ahmed Kaloo v State of Andhra Pradesh, (1997) 7 SCC 431: 1997 SCC (Cri) 1049: 1997 Cri LJ 4091: AIR 1997 SC 3483

wouldn't sustain. This was one of the first judgements of its kind which clearly laid out the difference between antinational and antigovernment, thereby rendering them unequal for all judgements thereafter and gave way to a just *precedent*.

In Hyderabad University, crisis followed when a students' union exhibited sympathy for Yakub Memon, whose execution has already been questioned by many legal connoisseurs. *Akhil Bharatiya Vidyarthi Parishad*, a radicalised right-wing student-run party, led the discrimination of this student body by calling it antinational. Eventually, its leader, Rohit Vemulla under immense pressure and threats, committed suicide.

In Jawaharlal Nehru University, something along the same lines happened when a group of students protested in support of Afzar Guru, whose execution has been subject to much debate and controversies. Kanhaiya Kumar, the leader of the group, was later arrested.

Both these apprentices were vocal critics of ABVP, and thus were slapped with the accusations of inspiring a hatred they did not engender.[1006] Independent thought, unconstrained reflection, right to dissent, and free speech in institutions of higher education are indispensable to the democratic character of India.[1007] Now that petitions have been signed, awards have been returned and protests have been marched— what else can liberals catapult on the mindless furthering of a mechanical, monotonous nationalism?

Vemulla tried to bring together minorities and Kumar wanted to unite the students and labourers against ABVP's conflict-ridden affairs. As a matter of fact, Kanhaiya Kumar was later given bail because it was discovered that the video that showed him propounding slogans against the country was doctored. But considering that the accusation against him was that of sedition, how could he have been arrested in the first place when his alleged actions did not constitute anything antigovernment? This shows the nonchalance of the State administration when it comes to acknowledging the difference between antinational and antigovernment.

Instead of getting offended by every other idea, we should recognize that India is not so frail that a handful of careless slogans can destruct it. But undermining the democratic ethos that the country boasts of can impact it essence and exhume the injustices that our freedom-fighters sought to wrestle seven decades ago. By interpreting dissent as antinational and effectively illegitimating it, the ruling party might risk betraying the founding idea of India.[1008]

[1006] Sampath, G. (2016). Who is an anti-national?. The Hindu.

[1007] Mathur, A. (2016). JNU row: Kanhaiya Kumar gets bail and a lesson on thoughts that 'infect… (like) gangrene'. [online] The Indian Express. Available at: https://indianexpress.com/article/india/india-news-india/kanhaiya-kumar-bail-jnu-delhi-high-court/ [Accessed 22 Aug. 2018].

[1008] Pai, N. (2016). Don't worry about anti-nationals. acorn.nationalinterest.in.

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Alas, this brings us back to square one. As educated and informed citizens of the country, we need to come to terms with the fact that government and nation are *not* the same entity, and thus their resistance is also not the same thing. Antinational and antigovernment are *not* one and the same— so to charge antinational activities for being antigovernment beats logic. Section 124A of IPC which entails sedition without even mentioning it is a bad law and needs to be revised for a narrower interpretation. In fact, if the lawmakers and rationalists deem fit, this century old law dating back to the colonial era should be done away with completely because it is digressive for our development as a free third wave country. To sum up, there is a light at the end of the tunnel, which happens to be a truly independent nation in terms of freedom of speech and expression, and we will make it there the day this nation and its people achieve real sovereignty, not fearing the government.

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INTERNATIONAL PARENTAL CHILC ABDUCTION: AN INDIAN APPROACH TO THE HAGUE CONVENTION, 1980

- *Athira Soman*[1009]

ABSTRACT

Ever since the rise of cases of International parental child abduction, India has been in a dilemma as to whether it should accede to the Hague Convention on the Civil aspects of child abduction 1980 ('Hague Convention'). When a child is taken by its parent without the consent of the other parent or against an order of custody from the court, it is commonly known as parental child abduction.

Due to the lack of legislation regarding this issue, it is difficult to bring back those children who have been taken. It has been proven that such an abduction affects both the children as well as the left-behind parent and may even hinder the growth of the child.[1010] Whether to accede or not, seems to be the main question. The paper deals with two aspects, Whether the Hague Convention is the only way forward for India and what are the other possible alternatives that India can take?

INTRODUTION

In the age of globalization, the world has become so small that transnational marriages are no longer a rare occurrence. But as a flip side to any coin, there are complications that come along with it. For instance the question of the custody of children in case of broken marriages. Especially with the rise in the rate of divorces around the world, the phenomenon of parental child abduction has increased.

Although there is no clear or extensive definition of this concept, there have been various attempts to expound it.

Law Commission of India, in its 218th report, stated that "International parental child abduction or removal can be defined as the removal of a child by one parent from one country to another without the approval of the other parent. Child removal, in this context, encompasses an interference with the parental rights or right to contact with the removed child. These acts by a parent when brought before a court of law have in the past created considerable amount of

[1009] Christ University, Bangalore

[1010] Aruna B Venkat, Parental Kidnapping: A child abuse, NALSAR Law Review Vol 5, No. 1, 140-169 (2010).

confusion specifically in the area of competence of courts with regard to jurisdictional aspects"[1011]

While in its 263rd report, the commission has explained that "Inter-spousal child removal can be termed as most unfortunate as the children are abducted by their own parents to India or to other foreign jurisdiction in violation of the interim/final orders of the competent courts or in violation of parental rights of the aggrieved parent." [1012]

Anil Malhotra, in his article, has stated that when intercontinental families break, it is but a common human reaction to return to one's own family and country of origin, often along with the children. If this is done without the approval of the other parent or permission from a court, a parent taking children from one country to another may, whether inadvertently or not, be committing parental child abduction.[1013]

As an illustration, if Mr X belongs to country A, Mrs Y belongs to country B, residing in country A and they have a child, Z, who is a citizen of country A (having been born there). In the instance of a divorce between X and Y, Z is taken to country B, by Y without the consent of X and against the court orders, it is said to be a parental abduction.

Hague Convention, 1980: Mechanisms

The Hague Conference on Private International Law with its Convention on Civil Aspects of International Child Abduction[1014] was concluded on the 25th October 1980 and came into effect on 1st December 1983. It is largely based on the premise that abduction is detrimental to the welfare of children and the Convention's provisions are designed to return the parties to the status quo preceding the abduction. As the name mentions, it deals only with civil aspects of this issue and does not deal with the parental abduction as a crime.

In spite of the various loopholes identified by various scholars, It is one of a kind global legislation that exclusively deals with the issue of International parental child abduction applicable in all of its contracting states for all children below the age of 16.

Article 1 of the convention clearly mentions its goal to be *"to secure the prompt return of children wrongfully removed to or retained in one Contracting State"* and "*to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."*[1015]

[1011] Law Commission of India, Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980), Report no. 218 (2009).

[1012] Law Commission of India, The Protection of Children (Inter-Country Removal and Retention) Bill, 2016, Report no. 263 (2016).

[1013] Anil Malhotra, To Return or Not to Return: Hague Convention vs. Non-Convention Countries; Family Law Quarterly, Vol. 48, No. 2, Symposium on Hague Convention on the Civil Aspects of International Child Abduction (Summer 2014), pp. 297-318. Published by: American Bar Association

[1014] Convention on Civil Aspects of International Child Abduction, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983).

[1015] Hague Convention, art 3

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According to chapter II of the convention, the contracting states are to constitute a 'Central authority' which would in its stead take cognisance of all cases related to parental child abduction. When there has been a 'wrongful removal' i.e "in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident."[1016] of the child, it must be reported to this authority, which would take action and all the necessary steps[1017] for the return of the child to its habitual residence within the course of one year. This is done by the cooperation between all the contracting states.

The convention true to its objective concerns itself only with the fast return of the child without regard being given to the merits of the case. As under Article 16 of the convention, there is a clear prohibition to courts going into the merits of the welfare of the child. In contracting states, it is almost an instantaneous process after the application has been filed to the Central Authority. The proceedings of the custody case only begin once the child is brought back to its habitual residence. This means that the approach of this convention favours the 'return of the child' policy over the 'best interest of the child' policy ergo its simple procedure.

Exceptions to return

Notwithstanding the fact that it is a return policy, in the rarest of the rare case, there are exceptions to it. When these exceptions are present, there are second thoughts on bringing back the child to its habitual residence.

Certain articles of the convention establish these exceptions to be the following,

a) If the petition for return has been filed after a year has passed and it is proven that the child has settled in its new environment. (Article 12)

In the case of Re C[1018], the British High Court ruled that "After the period of one year has passed from the time of child‟s abduction and the child had become settled, the court has no discretion to order the child‟s return under this convention."

b) failure to exercise custody rights and consent or acquiescence to the removal of the child. (Article 13(a))

In the case of Baxter v. Baxter[1019], the term consent and acquiesce was explained. Consent refers to the permission given before the child is removed whereas acquiescence refers to conduct after the removal. Consent can be established by statements or conduct hinting that a parent has consented to the removal and retention of the child, for either permanently or for an indefinite period of time[1020]

[1016] Hague Convention, art 5
[1017] Hague Convention, art 7
[1018] Re C. (Abduction: Settlement), [2004] EWHC (Ch) 1245 (Eng)
[1019] 423 f.3d 363, 371 (3d Cir. 2005)
[1020] Gonzalez-Caballero v/s Mena, 251 F.3d 789, 793-94 (9th Cir. 2001)

c) if the return would result in the exposure of the child to grave risk of physical or psychological harm. (Article 13 (b))

In Friedrich v/s Friedrich[1021] it was held that grave risk would include, child, being sent back to war-prone areas, famine or diseases and also serious abuse or neglect, and this indicates sexual abuse as well.

d) If a child of a certain maturity refuses to be returned.

e) If the return will cause a human rights violation of the child. (Article 20)

f) When the court confirms that it is absolutely not in the interest of the child, it will not order the child to be returned to its habitual residence i.e. The summary return mechanism may not be activated when there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place them in an intolerable situation. The defenses are coupled with discretion, founded upon a belief that, in certain situations, the child's interests may require more than its summary return.

The Indian Approach

India is a non-signatory to The Hague convention, due to the lack of legislation and non-applicability of any international convention, India has become a haven for child abductors.
According to the Annual Report on International Child Abduction, 2018, that is submitted every year by the United States Department of state[1022] (which acts as the U.S Central Authority), India has been listed under the countries that demonstrate non-compliance. And its statistics show that 90 per cent of requests for the return of abducted children remained unresolved for more than 12 months. It has also stated that Judicial action in custody cases in India has been slow, and Indian courts tend to default to granting custody to the taking parent. The lack of clear legal procedures for addressing international parental child abduction cases under Indian law makes it difficult for India to resolve these cases.[1023]
One of the remedies sought by parents when a child is wrongfully brought to India is the use of the 'habeas corpus' writ. A Habeas corpus is usually used to mandate the return of a person wrongfully detained by another i.e to produce the body in presence of the court. In the absence of any alternative legal means, this writ is used to acquire the return of the child to its habitual residence so that the appropriate forum can decide the custom case. But the downside of this method is that there is no assurance if the abducting parent will comply with the proceedings.[1024]

[1021] (Friedrich II), 78 F.3d 1060, 1069 (6th Cir. 1996)
[1022] in pursuance with THE SEAN AND DAVID GOLDMAN INTERNATIONAL CHILD ABDUCTION PREVENTION AND RETURN ACT OF 2014 22 U.S.C. §9111, ET SEQ
[1023] Annual report on international child abduction 2018
[1024] Lara Cardin, The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One, 20 Hous. J. Int'l L. 141 (1997).

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The Law Commission of India in its recommendations[1025] to the government has highlighted the principles of comity of courts, the best interest of the child, welfare of the child and condemned the practice of 'forum-shopping'. This was recapitulated in a recent case of Surya Vadanan v. State of Tamil Nadu [1026] where it was stated that the interlocutory orders from foreign courts were to be respected by the domestic courts when it had competent jurisdiction to decide child custody cases. Also that Indian courts can not proceed with the matter if it is already pending in a foreign court.

Lately, India has been under a lot of pressure to accede to the Hague convention. Somewhat heeding to this pressure, The Ministry of woman and children, drafted the "Civil Aspects of International Child Abduction Bill, 2016" which adheres to the Hague convention. But due to various reasons, India finally refused to become a signatory.

Indian Statutes on children

In the case of non-contracting states, the domestic law prevalent in the country are applicable. Indian family law is based on religion and hence varies across them. But none of them defines 'custody' and the concept of removal of children is largely linked to that of custody. In his article, Sai Ramani Garimella [1027], states that custody has been linked to the idea of guardianship i.e the bundle of rights vested in adults relating to the person and property of a child. Hence, even though, custody has not been defined, the Guardians and Wards Act 1890 ('GWA') defines a 'guardian' as a person having the care of the person of a minor or of their property or of both[1028].

The Indian courts, due to lack of a specific law regarding cross-border removal of children by parents, have relied on GWA and the Hindu Minority and Guardianship Act, to decide disputes relating to custody and guardianship of minors born or residing abroad. But litigating every single case for child custody is a very slow process and when it comes to the abduction of children, time is of the essence.

It is discernible that concerning parental child abduction cases, the Indian courts have not been consistent with its decisions. If some matters are decided with prime importance placed on the welfare of the child, some are based on the technicalities of various provisions of law and jurisdictional tiffs.[1029] Hence, precedents relating to these cases are ambiguous and non-uniform.

[1025] Law Commission of India, Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980), Report no. 218 (2009).
[1026] AIR 2015 SC 2243
[1027] Sai Ramani Garimella, International Parental Child Abduction and the Fragmented Law in India - Time to Accede to the Hague Convention, 17 Macquarie L.J. 38 (2017)
[1028] Guardians and Wards Act 1890 (India) s. 4(2).
[1029] Law Commission of India, Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980), Report no. 218 (2009).

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India's concerns

Various scholars, since the time the Hague Convention was designed, have commented on its limitations. Hence the distress respecting certain perceived gaps in the Convention. They include non-consideration of domestic violence within the exceptions, the threat of criminal law application against the abducting parent upon return with the child, and the absence of a safe harbour order for the abducting parent upon return of the child to the jurisdiction of the courts of habitual residence.[1030]

One of the main basis on which the Ministry of woman and child refused to enter into the Hague Convention was because there is no mention of domestic violence in the exceptions to return. Neeta Misra, in her article, wrote that 'The Hague Convention does not recognise domestic violence as a factor in parental abduction, the phrase is nowhere to be found in its text. It is also silent on globally recognised linkages between violence against women and violence against children, even when children are not the specific target of the violence. Women who leave often face the unenviable option of staying in a severely abusive environment, leaving without their children and going away, or leaving with their children. Each of these choices comes with tremendous costs and hardships that are overlooked when mothers fleeing violence are accused in courts of "jurisdiction shopping".'[1031]

She also states that most of the Hague cases were not of 'abduction' but were in fact of 'flights to safety'. She opined that 'Indian law reform needs to reflect current realities around the Hague Convention and not be pressurised by foreign countries into adopting a flawed law as is.'[1032]

In most countries, criminalisation of child abduction is common. For example, the Child Abduction Act, 1984 in the UK and The International Parental Kidnapping Crime Act 1993 (IPKCA) in the US which makes it a criminal offence to wrongfully remove a child with the intention of hampering the custodial rights of a parent. This means that even if the taking parent returns to the country of habitual residence, a criminal proceeding which may lead to imprisonment awaits them. But criminalising the abduction is not the answer and may even lead to further non-compliance by the abducting parents. Instead, there must be a 'safe harbour' orders prior to the parent entering the country of habitual residence in order to protect them and the children.

Other Non-signatories

Albeit being an international measure with the widest scope, not all countries are signatories to the Hague Convention. And the impediment remains that a large number of countries are yet to

[1030] Sai Ramani Garimella, International Parental Child Abduction and the Fragmented Law in India - Time to Accede to the Hague Convention, 17 Macquarie L.J. 38 (2017).
[1031] Neeta Misra; International Child Abduction And Domestic Violence: Why Children Are Sent Back To Violent Homes; Business world (Sep 1, 2016); http://www.businessworld.in/article/ International-Child-Abduction-Domestic-Violence-Why-Children-Are-Sent-Back-To-The- Violent-Homes/01-09-2016-105113/.
[1032] Id.

recognise this Convention and therefore remain exempt from its stipulations. Without any aid whatsoever, a parent is virtually helpless to obtain a child's return[1033].
The government can hardly do much to help these parents except directing them to follow certain procedures. It is only in rare occasions that intervention and diplomacy are practised by the government.

Middle Eastern Countries

These countries which are largely Islamic do not recognise the Hague convention mostly due to their cultural inhibitions. foreign laws and customs raise immense barriers between the foreign parent and the child. Being a Patriarchal society in its roots, the courts favour the men's rights over the woman's leading to the custody of the child being given mostly to the fathers.

Former Non-signatories

Countries which were previously non-signatories such as Japan, South Korea etc, have now become members of the Convention.
Japan before becoming a party, has been described as "a black hole from which no child ever returns" due to the Japanese tradition that family matters were not to be resolved in courts. Unlike the Islamic Countries, the foreign father is disadvantaged, due to the culture's lingering prejudice against foreigners and a strong belief in the mother-child bond.[1034] Japan too had refused to ratify the Convention for many years due to the concern for the Japanese victims of domestic violence.[1035] By ratifying the Convention, Japan had to completely reconstruct its family code.[1036]

POSSIBLE SITUATIONS

Accede to the Hague Convention

Although the convention took place in 1980, any country which is not a part to it can still become a signatory to the Convention[1037] due to its provisions. Albeit slightly behind its time, as mentioned earlier, the Hague convention remains to be the only standing international treaty that

[1033] Lara Cardin, The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One, 20 Hous. J. Int'l L. 141 (1997).
[1034] Id.
[1035] Yoko Konno, A Haven for International Child Abduction: Will the Hague Convention Shape Japanese Family Law, 46 Cal. W. Int'l L.J. 39 (2015).
[1036] Michelle Boykin, A Comparison of Japanese and Moroccan Approaches in Adopting The Hague Convention on the Civil Aspects of International Child Abduction, Family Law Quarterly, Vol. 46, No. 3, Symposium on Uniform Premarital and Marital Agreements (Fall 2012), pp. 451-469.
[1037] Hague Convention, art 38

attempts to resolve the issue of parental child abduction with a wide scope. Rather than the current state of affairs, the convention though not entirely satisfactory is definitely tolerable.

The Law Commission of India, in 2009, published its 218th report [1038] which highly recommended that the Indian government recognise the Hague Convention and accede to it. It advised that India should also try and incorporate the concept of parental child abduction in its family law following countries like Australia which have amended their family laws to utilise the Hague Convention.

In the first place, such a convention was designed to deal with the complexity that was brought by international involvement, especially that of jurisdiction. The issue of parental abduction of children across borders is not a matter that can be dealt with unilaterally. Hence, the only multilateral solution is the Hague convention due to the dearth of other international conventions regarding the same.

Due to its almost elementary mechanism, to deal with countries that have already ratified this convention, this is the best possible solution to ensure the protection of children from wrongful retention or removal in India.

Further, it has been argued in the 218th law commission report that 'the fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a foreign judge who is deciding on the custody of a child. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India.[1039]

Nevertheless, it is not only alternative India presently has and it must be with free will that any choice must be chosen.

The Protection of Children (Inter-country removal and retention) Bill, 2016

The Civil Aspects of International Child Abduction Bill, 2016 that was abandoned by the Ministry of women and children, when India recently refused to accede to the Hague Convention had been given a makeover by the Law Commission of India in it's 263rd report[1040] and renamed The Protection of Children (Inter-country removal and retention) Bill, 2016 in its recommendations.

[1038] Law Commission of India, Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980), Report no. 218 (2009).
[1039] Id
[1040] Law Commission of India, The Protection of Children (Inter-Country Removal and Retention) Bill, 2016, Report no. 263 (2016).

It is largely based on the Hague convention along with the principles of 'best interest' as stated in Convention on the Rights of the Child, 1989. It also clearly differentiated between the terms 'inter-country removal of children' and 'abduction' of children[1041] and states that
Hence this bill with all the recommended changes is definitely an alternative. It will provide for a much-needed legislation regarding parental child abduction which is so evidently lacking in India. The features of this proposed law are as follows:

1. The creation of a Central Authority for the performance of duties under The Hague Convention for securing the return of removed children by instituting judicial proceedings in the concerned High Court.
2. The appropriate authority or a person of a contracting country may apply to the Central Authority for the return of a removed child to the country of habitual residence.
3. The High Court may order the return of a removed child to the country of habitual residence but may refuse to make such an order if there is a grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to a court's refusal to return a child.
4. The High Court may refuse to return a child if the child objects to being returned, upon the court being satisfied that the child has attained an age and degree of maturity to take into account such views.
5. The High Court, before making an order of return, may request the Central Authority to obtain from the relevant authorities of the country of habitual residence a decision or determination as to whether the removal or retention of the child in India is wrongful.
6. The High Court, upon making an order of return, may direct that the person who has removed the child to India pay the expenses and costs incurred in returning the child to the country of habitual residence.[1042]

This law can also incorporate the defence of 'domestic violence'.

Making reforms to the family law system

Whether India accedes to the Hague convention or not remains secondary when there is a conspicuous need for a reform in the Indian family law system in order to incorporate the issue of international abduction of children by parents. And this clearly needs to begin with an unambiguous definition of the term 'custody'.
Indian Family law is entirely based on the religious texts and varies from religion to religion i.e. there is no uniform law that is applicable to every single citizen. While several discussions show

[1041] Id
[1042] Anil Malhotra, To Return or Not to Return: Hague Convention vs. Non-Convention Countries; Family Law Quarterly, Vol. 48, No. 2, Symposium on Hague Convention on the Civil Aspects of International Child Abduction (Summer 2014), pp. 297-318. Published by: American Bar Association.

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that a Uniform Civil Code for the entire nation is not feasible, at least a uniform law for the custody of children can be formulated.

Apply principles of the UNCRC

The most important principle of the United Nations Convention on Rights of Child is that of 'best interests of the child'. Granting that the interpretation of the principle of 'best interest of the child' varies from country to country, It is still one of the most accepted principles in the world when relating to matters of children.

A Central Authority

A Central Body dealing with the cases of international parental child abduction, not unlike the one proposed in the bill and that which is to be formed under the Hague Convention, can be instituted by the Government of India. This body can exclusively deal with such cases and assist the judiciary to come up with a uniform set of principles. It can perform similar functions as that proposed in the recommendations in the 263rd Law Commission report[1043] under section 6 of the Bill.

Developing a mediation system

The Ministry of Foreign Affairs of Japan ("MOFA"), developed an alternative dispute resolution (ADR) method tailored specifically for international child abduction cases.[1044] It aims at facilitating communications between the parties and help them reach an amicable resolution in international custody disputes.

The advantages of ADR win over its disadvantages. ADR can help avoid unnecessary conflicts between parties. Often, parties who end up in custody disputes have trouble communicating with each other. A trained mediator can facilitate effective communication between these embattled parties and avoid unnecessary conflicts. ADR is much quicker and more flexible compared to formal court proceedings. As long as parties agree on lawful measures, any custody arrangement is possible. Moreover, an agreement reached in ADR has the same legal effect as a court order.[1045]

Similarly, India too can focus on developing a mediation system suitable for the issues of parental child abduction, similar to those practised in domestic family courts. As such soft law application can, at times, be a better remedy.

[1043] Law Commission of India, The Protection of Children (Inter-Country Removal and Retention) Bill, 2016, Report no. 263 (2016).

[1044] The Hague Convention (Convention on the Civil Aspects of International Child Abduction), MINISTRY OF FOREIGN AFFAIRS OF JAPAN (June 19, 2014), http://www.mofa.go.jp/fp/hrha/page22e-000344.html.

[1045] Id

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CONCLUSION

It is apparent that India can not remain silent any longer in its present condition with regard to the rising global concern of International parental child abduction. Lara Cardin remarks that 'Clearly, signatory countries should put pressure on non-signatories to sign or accede to the Convention. In the meantime, nations should take steps to implement a substitute procedure. While this will not necessarily share equal success with the Convention, it may provide hope and peace to the left-behind parent.'[1046]

It is the duty of the government to protect the children, who are the future of this world and their primary caregivers. It is the right of both the parents to be able to interact with their children. It should not be left to the parents themselves to take actions for which they will have serious repercussions for i.e no parent should come to a state where they are left with no option but to take measures such as 're-abduction' which is a criminal offence. Hence, if not applying the international standard by acceding to the Hague Convention, some form of alternative is absolutely necessary.

[1046] Lara Cardin, The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One, 20 Hous. J. Int'l L. 141 (1997).

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GROWTH OF INTELLECTUAL PROPERTY LAW AND THE TRADE MARKS

- *Sumit Agarwala*[1047] *& Anuradha*[1048]

ABSTRACT

Intellectual property is a field of law that aims at protecting the knowledge created through human effort in order to stimulate and promote further creativity and safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Its purpose is to encourage new technologies, artistic expressions and inventions while promoting economic growth. Every manufacturer or trader who has built up a reputation for his mark is naturally jealous of protecting it against piracy by unscrupulous competitors. Protection of trademarks is necessary not only for honest trader bur also for the benefit of the purchasing public against imposition and fraud. Trade marks perform two critical functions in the market place: they provide assurance that goods are of a certain quality and consistency and they assist consumers in making decisions about the purchase of goods.

This paper aims to explain the concept of Intellectual Property Rights and their development at international as well as at national level, various agreements and treaties that have led to the growth of Intellectual Property Rights and the Trademarks law at both the level with their application in various leading case laws.

THE CONCEPT

Intellectual property to be defined means the legal right which is resultant of intellectual activity in the industrial, literary, scientific and artistic fields. There are two main reasons for which a country enacts the laws to protect intellectual property, being first, it gives legal expression to the moral and economic rights of inventors in their inventions and so gives the public, right to access those creations. Secondly, it aims to promote creativity and the dissemination and implementation of its results. It also aims to encourage fair trading which would help economic and social development.

The term 'Intellectual Property', denotes rights over intangible object of the person whose mental effort created it and refers to a loose cluster of legal doctrines that regulate the uses of

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different sorts of ideas and insignias. Intellectual property is the creative work of the human intellect[1049].

The subject matter of intellectual property has come to be internationally recognized as covering literary and artistic works, films, computer program, inventions, designs and marks used by traders for their goods and services and so on[1050]. There are several different forms or areas of law giving rise to rights that together make up intellectual property. They are copyright, right in performance, the law of confidence, patents, registered designs, design rights, trademarks and passing off, trade libel, etc.

ORIGIN & DEVELOPMENT

The origin and development of Intellectual Property Rights (IPR) under international law, dates back to 1833 with the adoption of Paris Convention, 1833, for protection of Industrial Property. The Berne convention was the first convention on copyright. Both the Conventions provided for the establishment of international secretariats and were placed under the supervision of the Swiss Federal Government. These secretariats were subsequently united and known as BIRPI. WIPO became successor to BIRPI[1051].

World Intellectual Property Organization- WIPO is a specialized agency of the United Nations since, 1974. WIPO carries out many tasks related to protection of intellectual property such as administering international treaties, assisting government agencies and privates sectors, the development of legislation and institutions, monitoring developments in the field and harmonizing and simplifying rules and practices
The Convention Establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on July 14, 1967 (Article 2(viii)) provides that "intellectual property shall include rights relating to:
- Literary, artistic and scientific works,
- Performances of performing artists, phonograms and broadcasts,
- Inventions in all fields of human endeavor,
- Scientific discoveries,
- Industrial designs,
- Trademarks, service marks and commercial names and designations,
- Protection against unfair competition,
and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

[1049] Law relating to property rights, V.K. Ahuja, second edition
[1050] Intellectual property law, p narayanan, 3rd edition
[1051] Law relating to property rights, V.K. Ahuja, second edition

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ORIGIN & DEVELOPMENT AT NATIONAL LEVEL IN INDIA

The western development of Intellectual Property Law has to a great extent influenced the development of Indian intellectual property law as the English people had brought the law into India. Hence, the Indian history of protection of intellectual property rights through legislative and judicial enactments has contributed a lot on its part in extending protection to the owners or licensees of trademarks who used to sought remedy under enactments like the Specific relief Act, 1877 amended in 1963 and under Sections 479 to 489 of the Indian Penal Code, 1860.

In the case of trade mark there are two types of rights: one conferred by registration under the trade and merchandise marks act 1958 now replaced by the Trade Marks Act, 1999 and the other acquired in relation to a trade mark, trade name or get up by actual use in relation to some product or service[1052].

In ***R.C. Cooper v. Union of India***[1053], the Supreme Court has very rightly described the definition of property in a very compendious form as it includes ownership estates and interests in corporeal things and also rights such as trademarks, copyrights, patents and even rights in personam capable of transfer and transmission. Intellectual property is an intangible right excercisable and asserted in respect of a material or tangible work.

In ***Gramophone Company of India Ltd. v. Birendra Bahadur Pandey***[1054], the Supreme Court has observed that intellectual properties are the brainchild of the authors, the fruits of labour and therefore considered to be their property.

MADRID PROTOCOL & AGREEMENT-

The Madrid scheme for international registration of marks is comprised of an agreement and a protocol. As per this scheme, common Regulations shall be applied to all international application filed under both the Madrid Agreement and the Protocol. It enables the International Bureau of World Intellectual Organization to proceed with the cases whose applications were filed on the bases of both agreements.

THE TRADEMARK LAW TREATY - 1994

In order to approximate and streamline the national as well as the regional trademark registration procedure, the Trademark Law Treaty (TLT) was entered upon. “The major part of the

[1052] Intellectual property law, p narayanan, 3rd edition
[1053] AIR 1970 SC 564: (1970) 3 SCR 530
[1054] AIR 1984 SC 667: (1984) 2 SCC 534

provisions of the Trademark Law Treaty pertains to the procedure before the trademark office which can be divided into three main phases: application for registration, changes after registration and renewal. The rules concerning each phase are so constructed as to make it clear what the requirements for an application or a specific request are"[1055].

Trade Related Intellectual Property Rights Agreement (TRIPS)

The concept of trade mark protection can be found in article 15to 21 of the TRIPs agreement which covers areas like: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The three main features of the Agreement are:

a. Standards

b. Enforcement

c. Dispute settlement

Other international conventions and treaties on the trade marks are:

i. Paris Convention for the protection of industrial property,1967
ii. Nice agreement concerning the International Classification of goods and services for the purpose of Registration of marks,1957, Amended on 1979
iii. Madrid Agreement concerning the International of marks on April 14, 1891 and revised at Stockholm on July 14, 1967
iv. Protocol relating to the Madrid Agreement concerning the International Registration of Marks, 1989
v. Trademark Law registry adopted at Geneva on October 27, 1994
vi. Regulations under the Trade Mark Law Treaty adopted at Geneva on October 27,1994
vii. The Vienna Agreement established on International Classification of the figurative elements of Marks, 1973

TRADE MARK LAW IN INDIA

The history of trademark in India goes back to the passing of the Indian Merchandise Marks Act, 1889 which was then followed by the Trade Marks Act, 1940. Later on the Indian Merchandise

[1055] "established under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks(1957)"

Marks Act, 1889 and the Trade Marks Act, 1940 was replaced by the Trade and Merchandise Marks Act in 1958 and also provided in section 129 that any document declaring or purporting to declare the ownership or title of a person to a trade mark other than a registered trade mark, was not to be registered under the Indian Registration Act, 1908[1056].

Further, as India became a party to the Agreement on Trade related aspects of Intellectual Property Rights (TRIPS Agreement), it became mandatory to bring our Trade Mark law in conformity with the provisions of TRIPS Agreement. Accordingly, the Trade Marks Act, 1999 was adopted which came into force on September 15, 2003. The 1999 Act repealed the 1958 Act and remedies foe passing off under common law are also available for unregistered trademarks[1057].

According to Trade Marks Act, 1999, Section 2(1)(i)(viii)(zb)- "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors or any combination thereof[1058], and
(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark[1059]; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark[1060].

A trademark or trade mark (represented by the symbol ™)[1061] or mark is a unique mark or indicator used, to identify in an unique manner the product or services to the consumer, by an individual, business organization or other legal, and to distinguish its products or services from those of other entities. A trademark is a kind of intellectual property, and typically a name, word, phrase, logo, symbol, design, image, or a combination of these elements[1062]. There is also a range

[1056] http://www.wipo.int/wipolex/en/text.jsp?file_id=128107
[1057] Law relating to property rights, V.K. Ahuja, second edition, p.278
[1058] https://indiankanoon.org/doc/1190072/
[1059] https://www.advocatekhoj.com/library/bareacts/trademarks/index.php?Title=Trade%20Marks%20Act,%201999
[1060] http://www.wipo.int/wipolex/fr/text.jsp?file_id=430542
[1061] The styling of trademark as a single word is predominantly used in the United States and Australia, while the two word styling trade mark is used in many other countries around the world, including the European Union and Commonwealth and ex-Commonwealth jurisdictions (although Canada officially uses trademark pursuant to the Trade-mark Act, trade mark and trademark are also commonly used)
[1062] Restatement (Third) of Unfair Competition § 9 (1995)

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of non-conventional trademarks comprising marks which do not fall into these standard categories[1063].

A trade mark is not only a symbol or a monogram or a logo as is generally understood; but can also be a word, a device, a letter or letters, a numeral or numerals, a picture or combination of all these elements. When a mark consists of two or more of these elements, it is known as 'composite mark'. "In ***Cadbury India Ltd. And others v. Neeraj Food Products***[1064] the Delhi High Court observed that the spirit, intendment and purpose of the trade mark legislation is to protect the trader and consumer against dishonest adoption of one's trademark by another with the intention of capitalizing on the attached reputation and goodwill."

A mark to be a 'trade mark' must be used on the goods vended[1065] as it acts as a prime instrument in advertising and selling the goods[1066] or should at least be used in such a manner so as to impose the visual representation to the goods.

A 'service mark' as distinguished from services of tailors, caterers, advertisers, insurers, construction agents and repairer,-communicators,-transporters-and-other personal services, doesn't fall under the category of trade mark as in these there is no buying and selling of goods is involved. However the Nice Agreement[1067] is followed by some countries for service mark registration which concerns with the international classification of goods and services. The name or trading style[1068] of a company,-firm,-association,-corporation-or-any-abbreviation thereof may also be a trade mark, if represented in a special and particular manner. Any trade mark may either be new i.e. proposed to be used or has already been used by the proprietor.

PRINCIPLES

The law of trademarks can be basically said to be based on three broad concepts as accepted word over. These being:
1. Distinctiveness-or-distinct=character,=or=capable of being distinguished.
2. Deceptive-similarity-or-similarity-or-near-resemblance-of-marks-and,
3. Same/description/or/similarity/of/goods.

[1063] http://en.wikipedia.org/wiki/Trademark
[1064] 2007 (35) PTC 95 (Del) at p.126
[1065] Herald Radford & Co. Ltd.'s application, 69 RPC 221
[1066] J.T. Mc Carthy, Trademarks and Unfair Competition, vol. 1, New York, 1973, p. 86
[1067] Nice Agreement of the 15th June, 1957, as revised at Stockholm on 14th July, 1967 and at Geneva on 13th of May, 1977 (WIPO 1981)
[1068] The Economic Times, 27th April, 1984

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FUNCTIONS OF TRADE MARK

Under modern business conditions a trade mark performs three functions:[1069]
a. It identifies the product and its origin
b. It guarantees its unchanged quality, and
c. It advertises the product. It is also a symbol representing business

To put in simple words trademarks inform the buyer about the product that is being offered to him as to does he knows about the product or similar product and also the source of the product to find out that whether the product which is is buying comes from a known or authenticated source?[1070]

According to McCarthy[1071] the following are the functions of a trademark in modern business:
a. To/identify one sellers/goods/and/distinguish-them-from-goods sold by others.
b. To/signify/that/all/goods/bearing/the/trade/mark/come from-or-controlled by a single source.
c. To /that all goods bearing the trade mark-are of-an equal level-or quality.
d. As/a prime instrument in advertising and selling the goods.
e. A/symbol-representing-the-goodwill-of-the-business-in-which-it is used. It-identifies-the goodwill.
f. It/creates an image to-the business-in which it is used.

Acts constituting Infringement with illustrative case laws-

In ***Lakme Ltd. v. Subhash Trading***[1072], plaintiff was selling products under the registered Trade mark 'Lakme'. Defendant was using the trade mark 'Like- me' for the same class of products. It was held that there was striking similarity between the words. The two words are phonetically similar. There is every possibility of deception and confusion being caused in the minds of the prospective buyers of the plaintiff's products. Injunction was made permanent."

Pepsico Inc. v Sunrise Beverages, there was Infringement of registered trade mark 7UP & SEVEN UP by the defendant, use of deceptively similar design and logo by defendant -- Visual, phonetic, ocular and structural similarity with the offending trade mark '7th UP'. Injunction granted.

In ***M/S Mitaso Appliances Ltd v. Joginder Singh***[1073], the plaintiffs were registered proprietors of the registered Trade Mark 'MITASO'; the defendants used the mark 'METASHOW'.

[1069] Industrial Property (WIPO) 1978, p.219
[1070] Sumat Prasad v. Sheojahan Prasad AIR 1972 SC 2488 at 2490
[1071] McCarthy on Trademarks and Unfair Competition, 4th Edition, Volume 1, Chapter 2.
[1072] 1996 PTC 567
[1073] 1995 PTC, 105

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Infringement was alleged on the ground that the two marks on the face of it were deceptively similar phonetically and any ordinary customer could be easily mislead in treating the goods of one as coming from the source of another. Injunction restraining the defendants from using the trade mark 'META-SHOW' was granted."

In ***United Decorative Pvt. Ltd v. Prem Traders***, the plaintiffs were a reputed manufacturer of dental cream COLGATE. Defendants used the mark COLLEGIATE which is phonetically similar to the plaintiff's mark with deceptively similar letters in white with the red background so as to cause confusion in the minds of the customers as pass off its products as COLGATE. Hence the mark was restrained through injunction."

In ***Amritdhara v. Satya Deo***,[1074] the Supreme Court observed that the ordinary purchaser would go more by the overall structure and phonetic similarity and the nature of medicine he has previously purchased or has been told about, or about which he has otherwise learnt and which he wants to purchase. The words 'Amritdhara' were held deceptively similar through registration of 'Lakshmandhara' were allowed on the basis of honest concurrent user."

In ***Centron Industrial Alliance Ltd. v. Gillette UK Ltd***[1075], the plaintiffs were registered owners of 7 O'clock for blades which was used extensively in India for a long period except for a few years due to special circumstances. The defendants adopted trademarks containing 7-up and 7 – baje with the device of a clock and get up and color scheme similar to that of the plaintiff's mark. Interim injunction granted by trial court confirmed by the Division Bench.

In ***B.P Amoco PLC v. John Kelly Ltd***[1076], plaintiffs registered trade mark consisted of heralding shading in green color as applied to the exterior surfaces of the depicted premises (petrol filling station in respect of petroleum products). Defendants used a dark green color for their filling stations with the letter TOP in lower case and other features. The plaintiffs used two trade marks (green mark and the logo and shield).

The question of resemblance and the likelihood of deception are to be considered by reference not only to the whole of the mark, but also to its distinguishing or essential feature, if any[1077].

In ***Brooke Bond v. National Coffee Traders***[1078], the defendants had copied the color scheme and design of the label registered by the plaintiff for coffee. Held infringement established.

[1074] 1963 SC AIR 449
[1075] 1998 PCT 288(Bom) (DB)
[1076] [2001] FSR 307
[1077] Saville Perfumery v June (1941) 58 RPC 147
[1078] (1977) ALT 772

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"In ***GTC v. ITC***[1079], the defendants, GTC had copied the roundel design with the intersecting rectangle with the words, "GOLD FLAKE" written across, the presence of three stars, the color scheme and the rectangular border lines in strips of red and tarnished gold, which formed the essential features of the plaintiff's label. Injunction was granted, although the defendants were registered proprietors of different labels containing inter alia the words "GOLD FLAKE""

If the use of a registered trade mark is such that the goods bearing the mark come to be known and identified by a particular word among the public, the use of such word by any other trader may constitute infringement[1080].

The question of infringement is a matter upon which the Judge must decide. He cannot abdicate the decision in that matter to witnesses before him. On the other hand, it is equally true that he must be guided in all these matters by evidence before him, and where the evidence is that there has been no confusion, that is a material fact which the Judge must take into account[1081]. Opinion evidence of what the public might think is in admissible, but the evidence of experts in a highly specialized trade is admissible. Prima facie view on likelihood of confusion may be modified by evidence to the contrary from knowledgeable persons[1082]. When the intrinsic similarities of the rival marks do not provoke the conclusion that in use one will approximated to the other, there should be evidence to show whether as a matter of experience the similarity has in fact rendered them likely to be confused[1083].

Infringement by passing off can occur only for a registered trade mark. Passing off is a tortious action. The object is to protect the goodwill and reputation of a business from encroachment by dishonest competitors[1084]. Here the meaning of passing off should be taken in the literal meaning, wherein the unauthorized user infringes the registered trade mark of the proprietor and thereby passes of his goods under the false trade mark. To understand the concept of infringement by passing off let us carefully examine a few case laws in this regard.

Ranbaxy Laboratories Limited v/s Universal Twin Labs[1085]

Here the plaintiffs are the registered proprietor of the trade mark VOLINI a medicinal and pharmaceutical preparation & an invented word as, registered under Class 5. The defendants commenced marketing under mark VONIGEL. It was held that the defendant adopted a clever disguise for passing off its own product VONIGEL, by infringing the registered trade mark of the plaintiff. There was deceptively similar color combination.

[1079] AIR 1992 Mad 253.
[1080] De Cordova v. Vick Chemical (1951) 68 RPC 103.
[1081] Electrolux v, Electrix (1954) 71 RPC 23 at 31
[1082] Sanrus (1937) 54 RPC 341 at 349
[1083] Goya v. Gala (1952)69 RPC 188 at 192
[1084] Law relating to intellectual property, Dr. B.L. Wadehra, fifth edition, p.179
[1085] 2008 (36) PTC 675 (BOMBAY)

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The word mark, color scheme layout and get up adopted by the defendant were held to be deceptively similar. So it was concluded that adoption of mark was not honest.

Hindustan Petroleum Corporation Ltd. v H.P. Oil Corporation Ltd[1086]
Plaintiff, Hindustan Petroleum Corporation Ltd is a large refining and marketing oil company having a large network of retail outlets, kerosene distributors and LPG dealership all over India. It has conceived and adopted "HP" logo, being abbreviation of its corporate name, as a trade mark which is registered.
Defendant with name and style of Hind Petro Corporation Ltd., subsequently it was renamed as H.P. Oil Corporation Ltd. adopting the letters "H.P." as its trade mark in carrying on the business in cooking gas in the State of Bihar. Plaintiffs registered their trade mark "HP" and adoption of same by defendant amounts to infringement .Held that the defendants were trying to passing off the goods by infringing the trade mark of the plaintiff. Hence an injunction was granted.

Asian Paints (India) Ltd v Balaji Paints & Chemicals & Ors[1087]
It was a suit for passing off and infringement of trademarks 'ASIAN'. Defendant infringing the mark by using the marks like `SUPER ASIAN' GREAT ASIAN' & `ASIAN GOLD' etc. with identical packing material. The suit was proceeded ex parte, held that the action of the defendant amounted to infringement and passing off. Hence damages to the tune of Rs. 3 lacks were awarded to the plaintiff.

A direct statement that the merchandise or business of the defendant is that if the plaintiff e.g. As in ***Lord Byron v. Johnston***[1088], it was held that an actionable wrong to seek to sell a publication by falsely putting the name of a well-known author on the title page may assume the imitation of plaintiff's goods or selling them under the same or similar name.

CONCLUSION

To conclude, it is "the objective of the trade mark to make the product of a manufacturer or trader be known to the public as his and thereby enable him to secure in course of time such profits as may accrue from the reputation which he may build up for his goods by superior skill, efforts and enterprise."[1089] For a purchaser the purpose of a genuine trade mark is that it gives an guarantee as of the make and the quality of the product that he is buying. The concept of trademarks and the law governing the use thereof owe their origin to business competition, practice and custom.

[1086] 2004 (28) PTC 362 (BOMBAY)
[1087] 2006 (33) PTC 683 (DELHI)

[1088] (1816) 2 Mer 29
[1089]https://www.researchgate.net/publication/255699107_Growth_of_Intellectual_Property_Law_and_Trade_Marks

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For earning the goodwill of any symbol or brand that is the trademark of a company, considerable amount of capital is spent in the form of advertisement as an outcome of which the symbol or mark gains popularity and reputation and at times it becomes the face value of the company and earns immense reputation. This in turn becomes the hallmark of quality and originality and is the best salesman of the brand.

Every manufacturer or trader who has built up a reputation for his mark is naturally jealous of protecting it against piracy by unscrupulous competitors. Protection of trademarks is necessary not only for honest trader bur also for the benefit of the purchasing public against imposition and fraud.

The purpose of registration of Trade Marks under the Trade Mark Act, 1999, plays a vital role in the sense that it gives upon the person registering, rights, legal in nature which are extensive in nature as compared to rights given under the common law and it give extensive right to them against infringement.

It is a legal right under the Trade Marks Act that an action against infringement of trade mark can be brought against the infringer. But the action against passing off of trademarks "has only been recognized by the Act. The Act merely lays down the procedure to be followed in such an action. The substantive part constituting the principles and the grounds for such an action still form part of the common law, from which it has been adopted."[1090]

Infringement action which is a statutory remedy has been adopted by the courts in the manner as has been laid down in the statute, the Trade Marks Act, 1999. The court faces no difficulty in deciding cases of infringement of the registered trade mark. The substantive part, the conditions which constitutes infringement, which do not amount to infringement, the tests etc and the procedural aspects like the jurisdiction of the courts, the remedies have been very clearly laid down in the statute. It is a statutory remedy and hence prevents the rights of the registered trade mark from being exploited by the unauthorized users. The law relating to infringement of trademarks is well settled and clear.

[1090] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335874

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TRANSGENDER RIGHTS, FROM PLIGHT TO FLIGHT: A LEGAL OVERVIEW AND SUGGESTIVE PAPER

-Anubhav Sharma.[1091]

INTRODUCTION

Transgender people this term elucidated in simpler terms means people who have a different sexual orientation than their assigned sex. Transgender is a broad term which is used to describe those whose gender, gender identity, or gender expression is in some sense different from, their assigned birth sex.[1092] Transgender or eunuch or Hijra are being part of society since time immemorial. One cannot part away from the society or point out any different existence of theirs other than any human being. Transgender subsist in past and traces can be found of their presence in society.

Presence of transgender or third gender in Hinduism can be clearly derived from the various ancient scripts. The Vedas (1500 BC – 500 BC) recognized that there are three genders according to one's nature or prakrti. It is also mentioned in Kama sutra (4th century) as tritiya prakrti. The pillar stone of Hindu law, Manu Smriti (200 BC- 200 AD) explains the origin of three sexes, and a third sex child is born when both male seed and female seed is equal and none shows prevalence as in a male child or female child respectively. The earliest Tamil grammar, the Tolkappiyam (3rd century BC) also refers to hermaphrodites as a third "neuter" gender (in addition to a feminine category of unmasculine males).[1093] In vedic astrology each gender is assigned a particular planet, third gender, tritiya prakrti is associated with Mercury, Saturn or referred as ketu. In the Puranas there are references to three kinds of devas; apsaras, gandharvas and kinnars. In Ramayana when Rama was ordered to go on a 14 years exile, Rama address all the crowd following him, as men and women to return back, among his followers hijras did not feel bound by this command and followed Rama towards jungle. Rama impressed through their loyalty sanctioned them power to bless all auspicious occasions. In Mughal rule Hijras experienced a high respectable position to guard mecca. It was during British period that they were exploited and pushed back to vulnerable conditions and an easy source to extort money and to exploit.

[1091] Anubhav Sharma- School of law, Christ University.
[1092] Dr. Sayantani Roy Choudhury ,Ms. Megha Bhutra ,Ms. Ekta Pathak. Social Inclusion of Transgender Population in India – Common People's Perspective.
[1093] M. Michelraj, 'Historical Evolution of Transgender Community in India', vol. 4, no. 1, Asian Review of Sodal Sdences, 2015

ADVENT OF TRANSGENDER ALIENATION IN SOCIETY THROUGH LAW

Law and society goes hand in hand, individualism never was successful in human society. It was very easy to mold the will of individual in a society through enactment of law irrespective of the nature and spirit of law. Law plays a dramatic role in a society which has significant impact over behavior and conduct of every particular being. Before colonial rule transgender lived a respectable life under Mughal and in Hindu and Muslim society. It was during colonial rule hijras were labeled as a deadly disease to a society of men and women.[1094]

Britishers treated them cruelly and disowned them of all rights to possess property and made law to criminalize them through Indian Penal Code 1860. Any sexual interact with transgender was criminalized in IPC through Section 377.[1095] During colonial rule hijras were considered as different caste or tribe in many parts of India by the colonial administration. The Criminal tribes act 1871 criminalized hijras.[1096] After this period the transgender were pushed away from the society and were alienated from any possession they ever had. This further led their downfall till they were totally excluded from society or their identity as a human being.

But eventually April 2014 Indian judiciary came with historic verdict that did not change a lot and will not be able to change the society or the lives of transgender in India but it still a major leap.

THE NALSA VERDICT

April 15 2014 the day that is inscribed in stone. This day Supreme Court passed a landmark judgment in the case of National legal Services Authority (NALSA) v Union of India[1097] and others that affirmed the constitutional rights and freedoms of transgender persons. A two judge bench composed by K.S. Panicker Radhakrishnan and Justice Arjan Kumar Sikri ruled that an individual have the right to self-determination of gender as male, female or third gender and legal recognition thereof.[1098] This is a significant verdict as transgender person had no existence before this judgment but after April 2015 they are recognized by the law and also as a Indian Citizen.

Laxmi Narayan Tripathi is founder member of Asia pacific transgender network and transgender right activist. As she elucidates that how NALSA came forth to file petition as PIL under Supreme Court. Laxmi was conducting a conference where former Chief Justice of India Justice Altamas Kabir was Chief Guest and during this event he was explained about the problems of

[1094] Dipayan Chowdhury & Atmaja Tripathy, Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India, 3(3) BRICS Law Journal 43–60 (2016).
[1095] M.P. Jain, Indian Legal History (Lulu Press, Inc., 2014).
[1096] M. Michelraj, 'Historical Evolution of Transgender Community in India', vol. 4, no. 1, Asian Review of Sodal Sdences, 2015
[1097] National Legal Services Authority v. Union of India, (2014) 5 SCC 508.
[1098] Spence Jones, Towards a Universal Construction of Transgender Rights: Harmonizing Doctrinal and Dialogic Strategies in Indian Jurisprudence, 4 Indon. J. Int'l & Comp. L. 91 (2017).

transgender. After when Justice Altamas Kabir retired he was allotted as chairperson of NALSA. Then with the help of NALSA and with support of Justice Altamas Kabir this petition was filed.

It is Interesting that 4 years prior to this verdict NALSA passed a GR around every district in India to follow and solve any grievances if transgender and to provide justice and comfortable position in a society but this effort went into vain. As the personnel due to the society stigma never addressed any issue of such kind, such lack of implementation led this initiative into dust.[1099]

Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.[1100] Supreme Court in NALSA verdict said that the term person in article 14 does not restrict its application to male or female. The court said that transgender person are also included in the term person and every fundamental rights from article 14 to article 21 is applicable thereof.

Therefore, by virtue of such opinion held by the Supreme Court, it is clear that citizens of India have right to gender identity. Also such citizens cannot be discriminated against, on the ground of gender, as such would be violative of the provisions under Article 14, 15, 16, and 21 of the Indian Constitution.[1101] Court also protected one individual gender expression invoked by article 19(1) and held "no restrictions can be placed on one's personal appearance or choice of dressing subject to the restrictions contained"[1102]. And on personal liberty court held that 'the gender to which a person belongs to be determined by the person concerned.'[1103] The court placed whole list of obligations upon center and state, which directed to take affirmative steps in protection of transgender rights.

"It is declared that:

***(1)** Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part **III** of our Constitution and the laws made **by** Parliament and the State Legislature.*
***(2)** Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.*
***(3)** We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.*
***(4)** The Centre and State Governments are directed to operate separate*

[1099] Sarokaar - Recognition of Transgender citizens as Third Gender, Rajya sabha TV.
[1100] Article 14 of constitution of India- Right to equality.
[1101] Devina Das, The transgender Citizenry in India : Actors on a Flimsy Grounds and the Legal Lacunae.
[1102] NALSA vs UOI and others. AIR 2014 SC 1863.
[1103] NALSA vs UOI and others. AIR 2014 SC 1863.

HIV serosurveillance centers since Hijras/Transgender face several sexual health issues.
(5) *The Centre and State Governments should seriously address the problems being faced* ***by*** *Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.*
(6) *The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide those separate public toilets and other facilities.*

(7) *The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.*

(8) *The Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.*
(9) *The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life."*[1104]
These obligations were to compel the legislature to form a new legislation in order to provide proper protection of rights of transgender people. The court also declared that transgender peoples should be provided reservations and can be included as social and educationally backward classes.[1105]
Savitribai Phule when preached that women are equal to men and should be equally educated, then she faced huge revolt from the common masses and faced many assaults ranged from insult to throwing cow dung at her. This was within the colonial era and now we are independent nation, the liberation for women did not happen in a day it was the first remarkable stand taken by Savitribai that initiated such revolution. And now if we compare the same situation with this verdict, it cannot bring a change in a society in a day but it is the first step towards liberation of pitiful condition of transgender people.

THE YOGYAKARTA PRINCIPLES[1106]

In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.[1107] It contains total of 38 principles after addition of 10 more principles on November 2017.

[1104] NALSA vs UOI and others. AIR 2014 SC 1863.
[1105] Article 15(4) of Constitution of India.
[1106] Principles on the application of international human rights law in relation to sexual orientation and gender identity.
[1107] https://yogyakartaprinciples.org

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These principles contains mostly all the rights which should be given to an individual who are being deprived of basic human rights because of their sexual orientation and gender identity. From Principle 1 Right universal enjoyment of human rights to principle 38 The Right to Practice, Protect, Preserve and Revive Cultural Diversity, it contains all the needs and rights which is essential for an individual to be part of a society and peaceful existence as every other person around the world.

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL

In the Supreme Court verdict on NALSA vs UOI 2014, the court ordered to enact legislation for the preservation and protection of rights of transgender persons. First bill was introduced on 2016 which faced revolt and was not welcomed. 2016 bill deviated from Supreme Court's verdict. Hence, it was not passed and a standing committee report was made, which was the product of numerous consultations with the transgender community, demonstrates how a parliamentary report can, at its best, embody the struggles, hopes and aspirations of a marginalized community.

The Standing Committee on Social Justice and Empowerment (Chairperson: Mr. Ramesh Bais)[1108] submitted its report on Transgender persons bill 2016. It contains many pointers as to which the bill can be made more favorable and effective so that it can work better for uplifting of this marginalized community. The suggestions proposed by this report are

a) **Definition of 'transgender persons'**: The Standing Committee observed that this definition is against global norms and violates the right to self-determined gender identity. It recommended that the definition be modified to cover those whose gender does not match with the gender assigned at birth and include trans-men, trans-women, gender-queers, and other sociocultural identities. Further, transgender persons may choose to identify as 'man', 'woman' or 'transgender' irrespective of sex reassignment surgery (SRS) and hormonal therapy.
b) **Process of certification as a transgender person:** Supreme Court held that its once personal liberty to determine their sexual orientation and gender identity. And part 3 of this bill suggests that all transgender need to get certificate after examination and after that all their identity cards can be made or updated with the help of this certificate. It violates article 14 and 21 as court interpreted that it comes under personal liberty.
c) **CMO in the Screening Committee:** As per the Bill, the composition of the Screening Committee includes a Chief Medical Officer (CMO). The Committee recommended that the role of the CMO be clearly defined.[1109]
d) **Grievance redressal in establishments**: As per the Bill, any establishment with more than 100 persons is required to designate a person as a complaints officer. The

[1108] PRS Legislative Research, Standing Committee Report Summary The Transgender Persons (Protection of Rights) Bill, 2016
[1109] Ibid

Committee recommended that this requirement be extended to all establishments, irrespective of the number of employees. Further, the duties and responsibilities of the complaints officer should be specified.

e) **Family:** The Bill specifies that no transgender person shall be separated from parents or immediate family on the grounds of the transgender status, except by a court order, in the person's interest. The Committee recommended that the provision only apply to transgender children.[1110]

f) **Healthcare:** The Bill states that the center or state government will make a provision which includes (i) a comprehensive medical insurance scheme for transgender persons; and (ii) pre and post SRS and hormonal therapy counseling. The Committee recommended that the Bill specify that the medical insurance covers SRS, hormonal therapy and other health issues.[1111]

g) **Offences and penalties**: The Bill specifies a penalty of six months to two years' imprisonment with a fine for committing a variety of offences against transgender persons, such as (i) bonded labor and begging; (ii) denial of access to a public place or residence; and (iii) causing physical, sexual and economic abuse. The Committee recommended that there be graded punishment for different offences, similar to the Indian Penal Code, based on the severity of the offence.[1112]

h) **Other recommendations**: The Standing Committee recommended the inclusion of certain other provisions in the Bill, such as: (i) defining the term 'persons with intersex variations' to cover those who show variations in their sexual characteristics; (ii) granting reservations under the category of socially and educationally backward classes; and (iii) recognition of civil rights like marriage, partnership, divorce and adoption.

On monsoon session of 2018 after changes the bill was introduced in the parliament. This bill again was criticized. The revised bill had most of the recommendation but looked over two most important aspect .i.e.

- Firstly, no reservation was provided as proposed by the Supreme Court Declaring transgender person as Socially and Educationally Backward Classes. Supreme Court asked the government to provide 27% reservation from OBC in all educational institutions and in jobs. The bill again was silent on it, and no reservation provided. Transgender persons face "social exclusion and discrimination" in the Indian society. They are stigmatized for their gender identity and are also subjected to abuse both at their homes and in public places. They face custodial violence and abuse at places such as the police station. They are not allowed to enter malls, restaurants, workplaces, schools, etcetera. They are collectively called by such derogatory epithets such as *chakka* (which in sentiment means a eunuch). Because of this treatment, education and livelihood are real challenges for them.[1113]

[1110] Ibid.
[1111] Ibid.
[1112] Ibid.
[1113] Surabhi Shukla, Why the Clarification Petition Filed by the Union of India in the Transgender Case Is Incorrect in Law and in Bad Faith on the Question of Reservation, 22 Wm. & Mary J. Women & L. 585 (2016)

- Secondly, on the marriage, adoption and family matters relation to transgender, however. section 377 of IPC was decriminalized in Navtej Singh Johar vs Union Of India.[1114] It can be amended easily after this verdict.

EDUCATION AS A WAY OF UPLIFTMENT

Through education most of problem faced by transgender persons can be resolved. If observed a transgender person is excluded from family and forced to beg and pushed into prostitution as sex workers. They have no other option because society is afraid to give them jobs. Education can create jobs for them.

Transgender person studying together with other children will remove the false fear. To be part of society, educational institutions are the best and fastest way through which any person can be accepted. The right to education is a basic fundamental human right which paves the way for the enjoyment of all other rights.[1115] Education provides personality development by encouraging the empowerment and securing the freedom and dignity of the individual. International instruments and Constitution of India reflect the notion that everybody is entitled to the right of education. However, discrimination is not permissible in the attainment of this right. The pathetic condition of the community is because they are being denied of their basic and fundamental right to education. Discrimination against transgendered individuals starts from their family and it continues on their whole lives. This problem is not limited to higher education but is also prevalent at primary level. They have narrow ingress in taking the educational facilities due to the social stigma they carry with them.[1116]

Laws should be made for inclusion of transgender person's history in textbooks which will educate other about the transgender person and would make individuals understand that they are human beings. Society is afraid of transgender because an individual in a society knows so little about transgender community.

REASONS WHY TRANSGENDER SHOULD BE ACCEPTED IN EDUCATIONAL INSTITUTIONS

Transgender people are not a religious taboo and are normal human beings with different gender identity.[1117]

Inclusion of transgender person's history in text book is very essential because it will show that they are not something alien to society or religion. Transgender people plays significant role in almost every historical event.

[1114] W. P. (Crl.) No. 76 of 2016

[1115] Constitution of India, 1950, art 21A (86th Amendment) Act 2002.

[1116] Naresh Kumar Vats; Megha Purohit, Right to Education and Employment: A Step towards Empowering Transgender Community, 5 Kathmandu Sch. L. Rev. 113 (2017)

[1117] Alberto Arenas, Kristin L. Gunckel and William L. Smith, 7 reasons for accommodating transgender students at school, The Phi Delta Kappan Vol. 98, No. 1 (September 2016), pp. 20-24

It will remove the stigma of society as regular interactions will led to normalize the situation and will ease the tension in the society.

Education liberates thinking and makes people more acceptable with regard to change and allow people to think reasonably on the basis of right and wrong and not on religious or sentiments or superstitions.

EMPLOYMENT TO CURB THE PROBLEM

First ever official count of transgender persons conducted in India was in 2011 where the estimated amount is 4.9 lakhs.[1118] However, the transgender activists claim the actual population is six times more than census reported. And among these 4.9 lakhs in 2011 up to 90% of transgender persons are in prostitution as sex workers.[1119] And under transgender bill 2018 the sex working transgender persons are criminalized. Where 90% of community is forced into prostitution it is hard to change or force transgender to stop their life as sex worker. And it is cumbersome to make society to accept or to keep them as employee.

As 90% are working as sex worker they get infected to Aids/HIV virus through unprotected sexual intercourse and through unclean, unhygienic hormone injections they use to develop more feminine features.[1120] If government provide them with employment reservations in various fields it will then provide them with better living standards and can provide them with medical assistance for their needs and diseases. Such propositions will encourage others from transgender community to come forth and live dignity full life where they are respected as they are.

CONCLUSION

According to Census result its 4.9 lakhs transgender in India as of 2011. But its 2018 the numbers are far more that what Census reported as many Transgender persons were not counted as they live in a place not accessible and mostly these Census personnel were not comfortable to visit their community. *It has been found that the Census data collection methodologies do not capture the entire transgender population in India due to the apprehensions of prejudicial reactions, differing terminologies employed and other factors in the data collection process. In order to efficiently curb the fore mentioned significant nationwide rights reforms are needed, so as to respect and protect the entire transgender population. Further, the gender recognition procedures should allow the application to self-identity*[1121].

If examined the current pitiful condition of transgender persons are not their fault or because they does not fit in our binary biological system of male or female. It is fault of our society

[1118] https://www.census2011.co.in/transgender.php.

[1119] Maninder Dabas, 90% Of Transgenders Are Forced Into Prostitution, www.indiatimes.com

[1120] Schaefer, Agnes Gereben, et al. "What Are the Health Care Needs of the Transgender Population?" Assessing the Implications of Allowing Transgender Personnel to Serve Openly, RAND Corporation, Santa Monica, Calif., 2016, pp. 5–10. JSTOR, www.jstor.org/stable/10.7249/j.ctt1d4txv6.9.

[1121] Devina Das, The Trans gender Citizenry in India: Actors on a Flimsy Ground and the Legal Lacunae.

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which led them to such detrimental state. It is fault of system which led to their exclusion from society. According to history they were always part of our society and if we are excluding them, then our history or our existence or our society is not complete.

Mona Varonica Campbell: A plus size transgender model graduated from NIFT with a PHD in her name. She owns a makeup label also.[1122] **Joyita Mondal:** First transgender judge of Lok Adalat in India. With a degree she was the first transgender to get a voter ID in her district in 2010.[1123] **Manabi Bandhopadhyay**: First openly transgender college principal in the country. She was also the first transgendered person from West Bengal to have a PhD.[1124] **Lakshmi Narayan Tripathi**: A trans right activist, who fought for India to recognize a third gender, giving many citizens the choice to identify as neither male nor female. She has also actively fought to repeal Section 377 of the Indian Penal Code. Few transgender role models who excelled in our society before the NALSA judgment, it shows that with so many atrocities around them they excelled. It shows us that they are nonetheless different from rest of male or female.

[1122] www.thehindu.com i-was-always-a-show-stopper, article19974448.ece
[1123] yourstory.com/2017/10/first-transgender-judge-india.
[1124] timesofindia.indiatimes.com, India's-first-transgender college principal.

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ENVIRONMENTAL LAW AND JURISPRUDENCE

- **Mahima**[1125]

ABSTRACT

There have been various legislations that have been formulated for various decades in order to preserve and protect the environment. The timeline from the Ancient time to the present date, the acts have been changed according to the need of the hour. The key ingredient of any implementation is the policy making of the legislature that must be taken into consideration in order to satisfy the obligation created, which has to be fulfilled by the government and the citizen through the Constitution of India.

The importance of the legislations can be seen in the various judgements given and their application, in order to restore the ecological balance, as desperate times called about for desperate measures. Hence these implementation and changes in law can be observed as path to accommodate with the changing times .Therefore in order to have a healthy involvement of jurisprudence in environmental law, one must understand the need of the hour and understand the various provisions created for the prevention of pollution of Air, Water, land and Nuclear energy.

Therefore it is very important for one to be aware and lay down the various environmental issues and analyse the solution through the various acts and Articles that are present , so that the polices further made are according to the need, and not for the sake of laying down the laws.

INTRODUCTION

The protection of environment has been viewed seriously not only today but has been mentioned in ancient texts like Manu Smriti, Katyana and Brihaspati Samhita. These ancient texts have prescribed punishments to those who have inflicted any harm upon the environment. The wise ancient sages had realised that the entire existence of man was dependent on the blessings of nature. Hence it is interesting to note that the ancient society was very conscious about the impact of the surrounding environment and mankind.[1126]

The Development of science and technology and the increasing population in the world brought about tremendous changes in the environment balance. These changes upset the ecological laws, thereby causing a chaos in the society. Environmental law has to derive its strength from many other disciplines such as biology, biotechnology, ecology, economics, hydrology, medicine,

[1125] BA LLB (Hons.); School of Law, Christ Deemed to Be University
[1126] Indrajit Dube, Environmental Jurisprudence (polluter's liability) (1st edn, lexis Nexis, 2007)

political science, psychology and public administration. Therefore the various types of Environmental pollution that take place are soil erosion/degradation, air pollution, water pollution, solid waste, marine pollution, social factors, level of air pollution in the metro cities, noise pollution, noise levels in cities, health hazard, health effects, etc. Hence the emergence of Environmental law became more important. It is settled that environment law cannot be separated from politics and that this study requires the understanding of ecology and economics.[1127]

The major players being the judiciary and the civil societies in the environmental regulation, locus standi hence no longer remains a hurdle in the environmental cases in India due to the enormous growth of public litigation in India. Environmental law is a synthesis of principles, concepts and norms generated by other numerous laws, both national and international level. For the remedy of environmental harm the origin of tort has also been taken into consideration. The Supreme Court of India has tried to evolve the jurisprudence of strict liability for harm caused by industries engaged in hazardous activities. The attempt is thus to interpret Article 32 of the Constitution of India by holding that the provisions under it make it possible for the court to provide remedies[1128]. The close relationship between environmental law and Constitutional law can be seen through the judicial interpretation of the concept of right to life as including the right to clean and humane environment. Hence the paper gives light to the various provisions given by the Indian laws that were incorporated in reference to the protection of Environment through law[1129] and its genesis through the ancient times until today.

ENVIRONMENT LAW AND CONTITUTIONAL LAW

Many Civil society movements such as the Chipko Movement, Narmada Bachao Andholan, Silent Valley Movement, etc were indicators to protection needed for the environment. Hence three Articles play a major role in the determination of environmental degradation, that is, Article 21 under Fundamental Rights (Part III of the Constitution), Article 48(A) under Directive Principles of state Policy (Part IV of the constitution) and Article 51(A) (g) under Fundamental Duties (Part IV A of the constitution)[1130]. With reference to the Maneka Gandhi Case right to life included right to clean environment, hence a violation to degrade the environment would lead to the violation of Article 21. In 1970 as part of its preparation to participate in the Stockholm Conference 1972, the Government of India constituted the national committee for environment planning and coordination. The depletion of Natural resources, environmental deterioration and pollution has drawn serious attention of mankind. Hence to draw attention to this problem on a global level the Stockholm Conference was arranged. The primary duty of the committee was to recommend and advice the central government with respect to the need of the environmental protection and related aspects. In June 1980 the Central Government appointed the Tiwari

[1127] Thomas J Sschoenbaum, Environmental Policy Law (2nd edn, Oxford University press,1985)
[1128] Constitution of India 1950, a 32
[1129] P. Leelakrishnan, Environmental law in India (3rd edn, Lexis Nexis, 2008)
[1130] Constitution of India 1950

Committee to look into the environmental matters and recommend legislative and administrative changes in the environmental protection. As a result of which on 1st November 1980, the Ministry of Environment was created. In 2014 the same ministry was renamed to the Ministry for Environment, forest and Climate change. Three major anti-pollutants laws were enacted by the parliament as a part of the environment crusade, which was launched with the Stockholm Conference in 1972. These environmental Lex Specialis, namely Water (Prevention and Control of pollution) Act 1974[1131] (Water Act), Air (Prevention and Control of Pollution) Act 1981[1132] (Air Act) and Environment (Protection) Act 1986[1133] (Environment Act) were enacted with a view to combat environmental degradation and restore the clean environment. These acts played a very significant role because of the insertion of words such as 'prevention' and 'control'.[1134]

Article 48A[1135] prescribes responsibility on the state to preserve the environment and also deal with problems such as public health, agriculture and animal husbandry. Hence article 48A states the following: 'The state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.' In addition the procedural features of the constitution are provided in Article 252 and Article 253 of the Constitution[1136]. Also Article 268 of the Indian Penal Code[1137] states that: 'a person is guilty of public Nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right'.[1138]

Article 51A (g) in the Constitution of Indian states that: 'to protect and improve the Natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures'. This provision hence protects the bio-diversity of the country through places like wildlife sanctuaries, parks, etc and respects the flora and fauna, even protecting them. With these provisions there must also be an analysis of their uses in many cases and how Public Interest Litigation plays a major role in the justice system. Hence not only is the presence of the solution important but its application to environmental law by the judiciary plays a major role in environmental law Justice.

In the case of Ratlam Muncipality v. Vardichand[1139] the sewages were not kept clean by the Muncipality and the Muncipality was sued for not providing sanitary facilities and construction of public conveniences for slum dwellers on the basis that they had no financial ability to provide

[1131] Water Act, Act No. 60 of 1974
[1132] Air Act, Act No. 14 of 1981
[1133] Environment Act, Act No. 29 of 1986
[1134] Ibid 2
[1135] Constitution of India 1950
[1136] Constitution of India 1950
[1137] The Indian Penal Code, Act No. 45 of 1860
[1138] Ibid 2
[1139] Ratlam Muncipality v. Vardichand, AIR 1980 SC 1622.

for the sanitation. Supreme Court in this case held that under Article 21 that right to life does not mean mere animalistic existence but right to quality and dignified. Right to clean environment is an essential aspect of right to qualitative life. Hence priority must be given to ensure that cleanliness of the Muncipality area is guaranteed to every citizen. In another case a Public Interest Litigation was formed on the basis of a letter written to the Chief Justice of India explaining that there was illegal limestone mining in Dehradun. On this basis of Non-Governmental organisation was appointed to solve the matter. The Supreme Court held in this case that the right to environment ensures that sustainable exploitation of resources is done in a judicial manner. Exploitation of natural resources cannot be done in a manner that affects Human life.[1140]

In a landmark of the Ganga pollution, near Kanpur the Tanneries (where leather is processed) used to release untreated waste water into the river Ganga. A Public Interest Litigation was filed against these tanneries and was asked for the relocation of the same. The Supreme Court held that closing down of the industry will lead to a loss of job to numerous people in the area who work. The question of right to work over right to livelihood when under the question, right to safe environment is of a bigger importance. As the closing down the industry will lead to the loss of livelihood, but right to safe and clean environment, including safe water is more superior to right to livelihood.[1141]

In the infamous case of Union Carbide Company, or famously known has the Bhopal gas strategy, the Supreme Court's action for immediate relief in form of compensation to people in the Bhopal gas tragedy was turning point in the environmental law in Jurisprudence. It was laid down that anyone who is a part of the environmental damage that took place and was harmed; there must be immediate compensation to the victims by the state which did not include the compensation given by the offender. The offender had to give compensation separately and the states compensation will not be included in the relief paid.[1142] In the case of S. Jagganath v Union of India, aquaculture could be seen as a high yielding opportunity and the wetlands were the mangroves existed is where the aggressive farming is done to promote the growth of shrimps. Because of this farming the mangroves were getting destroyed. Hence it was laid down that the base line where the highest tide comes into place coastal zones I and II, no construction or agricultural activities can take place. All the coastal one regulations were ordered to be followed strictly and this judgement cans a see since of justification of accommodation of all the activities without harming the environment. Hence shrimp farming was not allowed in coastal zones I and II.[1143] From the following a cases a sense of security and protection towards the environment can be observed and the various domains of the environments can be seemed to protect under the

[1140] Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh, AIR 1985 SC 652.
[1141] M.C Mehta v Union of India, AIR 1987 SC 463.
[1142] Union Carbide Company v. Union of India, AIR 1990 SC 273.
[1143] S. Jagganath v. Union of India, AIR 1997 SC 811.

various cases that have been discussed. Hence the judiciary, legislation and executive are very serious about the implementation of the environment and seem to give it much more importance.

POLICY IMPORTANCE IN ENVIRONMENTAL LAW

In the last segment of the paper the various authorities in an environmental policy and the major issues that every environmental policy can be looked into. Firstly the Ministry of forest, Environment and climate change is a nodal point for formulation, Implementation and evaluation of the environmental policy in India. The ministry coordinates and over sees the major environmental law legislations such as the Wildlife protection act of 1972, Water Act of 1974, Air Act of 1981, environment protection Act of 1986 and other similar legislations. Secondly, the Central Pollution Control Board was created under the water act for the reason that it must promote cleanliness of streams, wells in different areas of the state by prevention, control and abatement of water pollution. The third authority in the In re Noise pollution law that was implemented to restrict the use of loud speakers and high volume producing sound systems.[1144]

From the all observations and cases we can come to the conclusion that a good policy leads to a good judiciary. Therefore it is very important for us to lay down major environmental issues that every environmental policy must look into before formulation.

The guidelines are[1145]:

1. Air Act of 1981

- Air pollution

2. Water pollution

- Municipal Sewage
- Waste management in industry such as chemical industry, thermal power station, metals, minerals processing industry, leather industry and sugar mills.
- Over use of chemical fertilizers and pesticides.
- Improper waste disposal.

3. Noise Pollution

- Land degradation
- Mining, deforestation, improper agriculture practice, soil aridity and alkalinity.
- Water and air erosion

4. Solid and hazardous waste

- Nuclear Fuel

5. Depletion of Bio- Diversity

[1144] In Re Noise Pollution Law 2005.
[1145] Bidyut Chakrabarty and Prakash Chand, Public Policy: Concept, Theory and Practice (1st edn, sage publishing, 2016)

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CONCLUSION

Therefore the race to save environment and the application of the environment policy is to mainly balance between the industrial progress and sustainable development. The paper gives an analysis of the importance of the jurisprudential application to Environmental law and the various provisions given under various laws for the sake of accommodating a clean and healthy environment. Hence, with the growth in technology and purchasing power, one must understand the importance of preservation. The government acts as a guardian under the Directive Principles of State Policies and has the obligation to protect the state, whereas the citizens have the obligation to help fulfil the protection of the environment through the Articles and the various legislations that have come into being since the Ancient time.

Therefore the various legislations adopted by the country throughout the years is a testament for preserving the environment and various judgements have been used in order to establish justice in the society. The policies therefore made are to be well discussed with the scholars of the particular area of the said publication so that the implementation is not far fetching. Therefore good policies and good laws go hand in hand.

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A COMPARISON OF PROSTITUTION BETWEEN NETHERLANDS, SWEDEN & INDIA

- *Ruth Sarah Koshy*

INTRODUCTION

Netherlands is known for its high tolerance to prostitution ever since it was a popular culture since 1413. The decree of 1413 from the city of Amsterdam typically stated, "Because whores are necessary in big cities and especially in cities of commerce such as ours – indeed it is far better to have these women than not to have them – and also because the holy church tolerates whores on good grounds, for these reasons the court and sheriff of Amsterdam shall not entirely forbid the keeping of brothels"[1146] Prostitution was legal since 1830 and was not a criminal offence. There was a law dating to 1911 which was in operation till 1980 forbidding the taking of profits from prostitution. However, there was no protection that was given to the prostitutes. In 1988, prostitution was recognised as a legal profession and the new law passed on 1st October, 2000 made prostitution clearly legal and legalised brothels. Article 250 states that it is forbidden to give an opportunity to prostitution[1147] of the Dutch Penal Code and Article 432 of the Criminal Code was removed to lift the ban. The main reasons for the legalisation was to improve the section as a whole and improve the position of the sex workers by licensing. Another reason is for the tackle of abuses by taking strict actions.

According to Radio Netherlands, in 1999 there were about 25,000 prostitutes working in 6000 locations in the Netherlands[1148]. A later study by the Dutch Ministry of Foreign Affairs in 2000 put the figure around 20,000 to 25,000. About 90% of the prostitutes are female while 5% are male and the other 5% are transgender[1149]. The majority of them coming from nations like Dominican Republic, Colombia, and Romania, Poland and Czech Republic and only 1/3rd of them are Dutch nationals[1150]

The prostitutes in Netherlands are treated as independent entrepreneurs and have to submit income tax declaration and pay taxes as the sex industry is governed by the normal labor laws of Netherlands. The responsibility of the policy regarding issues prostitution is with the Ministry of Security and Justice, Ministries of the Interior and Kingdom Relations, Social Affairs and

[1146] Chrisje Brants: The Fine Art of Regulated Tolerance: Prostitution in Amsterdam. Journal of Law and Society, 25, number 4, pp. 621–635. December 1998

[1147] Johannes C.J. Boutellier: Prostitution, criminal law and morality in the Netherlands, Volume 15, Issue 3, pp 201-211

[1148] "FAQ – Prostitution in the Netherlands | Radio Netherlands Worldwide". Rnw.nl. Retrieved 3 May 2012

[1149] Dutch Ministry of Foreign Affairs publication on Dutch Policy on Prostitution.

[1150] Dutch Ministry of Foreign Affairs publication on Dutch Policy on Prostitution.

Employment, Education, Culture and Science, Health, Welfare, Sport and Foreign Affairs[1151]. However, the responsibility of the enforcement of the existing laws is with the police, urban district council and municipal health authorities. Section 149 and 151(a) of the Local Government Act talks about municipalities that can impose regulations regarding legal forms of exploitation of prostitution by means of bye laws. The regulations on premises specify the minimum working area and govern safety and fire precautions. The regulations on the operations of brothels specify the status and position of the sex workers and also includes steps to prevent excess nuisance in the neighbourhoods[1152]. The police patrol the city to check on trafficking and each room is equipped with a panic button. The women undergo regular mandatory health checks and are encouraged to register their profession.

The law has specified the forms of prostitution which are legal. There are three types of prostitution which are looked into by this law. Firstly, legal (with a license) which includes window prostitution, brothels, private houses and escort services. Women should be of legal age and should be a legal resident of Netherlands. Secondly, legal (without a license) which includes prostitution at home which does not come under the licensing policy. The prostitute should be working alone and not commercially, commercial prostitution is illegal. Thirdly, illegal which includes escorting (without a license) street prostitution, illegal home prostitution and in massage parlours.

The prostitutes are provided health care and support by the city health services free or low cost medical cars and are informed about free or low cost clinic for STDs. The Prostitution Information Center (PIC), a charitable foundation founded by Mariska Majoor along with The Red Thread fights for the rights of working women and has been instrumental in influencing the recent changes in the Dutch prostitution laws[1153].The PIC sells books about prostitution, organises lectures and guides tours around the area.

However, the licensing policy has not been able to bring about a complete stop of abuse in the sex industry and women continue to be exploited through forced prostitution and human trafficking. A law proposal[1154] was introduced in the House of Representatives of the Netherlands in 2009 which was amended in 2010 which would ban prostitution below the age 21 years. The prostitutes should join a national register with the Chamber of Commerce. They would receive a registration pass with a photograph and a registration number.

The city of Amsterdam is one of the most heavily trafficked places in the world according to the United Nations Office on Drugs and Crime (UNODC). There has been several incidents of trafficking where 2 Nigerians were sentenced to 4 and 4½ years for smuggling 140 Nigerian girls aged 16-23 into Netherlands[1155]. At the end of 2008, a gang of 6 members were sentenced to a term of 8 months to 7½ years in what was the worst case of trafficking according to the

[1151] Dutch Ministry of Foreign Affairs: Dutch Policy on Prostitution
[1152] Dutch Ministry of Foreign Affairs: Dutch Policy on Prostitution
[1153] [1]http://www.amsterdam.info/prostitution/pic-amsterdam/
[1154] "Parliamentary documentation on proposal 32211". Zoek.officielebekendmakingen.nl. Retrieved 3 May 2012
[1155] "Nigerians jailed in Dutch 'voodoo curse' prostitution trial",Asia One, 4 December 2009

prosecutors where more than 100 girls were forced into prostitution[1156]. However, Netherlands is listed in Tier One of the Trafficking in Persons (TIP). Reports released by the United States Department of State is deemed to be fully compliant with the minimum standards outlined by the United States for the eradication of trafficking[1157]. Netherlands is a major source and destination for trafficked women and children for the purpose of prostitution and according to TIP Report, women and children from Nigeria, China, Bulgaria, Romania, and Poland are sexually exploited in Netherlands[1158].

THE LAWS IN SWEDEN

Prostitution in Sweden is unique because it is only illegal for the person who tries to procure such services and not to the person who is offering the service. This situation has been a direct result of Sweden passing its 'Kvinnofred' law in 1999. 'Kvinnofred' directly translates into the violence against women Act. This is the law which criminalises buying of sex. The Swedish government stated the following to explain the law;[1159]

'In Sweden prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem…gender equality will remain unattainable so long as men buy, sell, and exploit women and children by prostituting them.'[1160]

Sweden treats prostitution as a social problem and has made steps towards its eradication. Parts of the social funds are used to help prostitutes who want to get out of the profession.

'By prohibiting the purchase of sexual services prostitution and its damaging effects can be counteracted more effectively than hitherto…the government considers, however, that it is not reasonable to punish the person who sells sexual services. In the majority of cases at least, this person is a weaker partner who is exploited by those who want to satisfy their sexual drives.'[1161]

For a long time, the work against prostitution and trafficking in human beings has been a political priority in Sweden. The work is considered an essential part of efforts to create a contemporary and democratic society where full gender equality is the norm, and to recognise the right to equal participation of women and men, girls and boys, in all areas of society. In Sweden, it is understood that any society that claims to defend principles of legal, political, economic, and social equality for women and girls must reject the idea that women and children, mostly girls, are commodities that can be bought, sold.[1162]

In Sweden, prostitution and trafficking in human beings for sexual purposes are seen as issues that cannot, and should not, be separated; both are harmful practices and intrinsically linked. It is

[1156] "Six get heavy sentences in Dutch human trafficking trial",USA Today, 11 July 2008
[1157] United States, Department of State, Trafficking in Persons Report 2007 (Washington, D.C.: Office to Combat and Monitor Trafficking in Persons, 2007), http://www.state.gov/g/tip/rls/tiprpt/2007.
[1158] Department of State, 2007.
[1159] Violence and Sexuality in Swedish Democracy, Stockholm: Liber, 2002
[1160] Ministry of Social Affairs, 2001
[1161] Ministry of Labour, 1998, pg 55
[1162] Ministry of Industry, Employment, and Communications, 2004).

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understood that the purpose of the recruitment, transport, sale, or purchase of women and girls by traffickers, pimps, and members of organised crime groups within countries or across national borders is, in the overwhelming majority of cases, to sell these female human beings into the prostitution industry. Accordingly, it is argued that trafficking in human beings for sexual purposes will never be eliminated unless the international community also takes a vigorous stand and puts in place concrete measures against prostitution and sexual exploitation. In fact, as early as the first decades of the 20th century, pioneering Swedish feminists, in their efforts to combat prostitution and the traffic in women and girls, illuminated the link between the international trafficking in women and the position of women and girls in society.[1163]

The initiative to criminalize the prostitution buyers originally came from the Swedish women's movement. Feminists analyzed women's position in society, including how men used some women and girls for prostitution purposes. In agreement with other feminists worldwide, they concluded that prostitution was another patriarchal tool of oppression that has deleterious effects on the women and girls who are induced and kept in prostitution, as well as an extreme form of male violence used to control female human beings as a class. Since the beginning of the 1980s, Swedish feminists have consistently argued that men who buy prostituted women should be criminalized and that the women and girls in prostitution should be seen as victims of male violence who have a right of assistance to escape prostitution.[1164]

The National Rapporteur for Trafficking in Women at the National Criminal Investigation Department (NCID), Kajsa Wahlberg, is responsible for the collection of data related to investigations and convictions for trafficking crimes in Sweden and for reporting annually to the Swedish government about the trafficking in women in Sweden. In her reports published in 2003 and 2004, she noted that there are clear indications that the Law has had direct and positive effects in limiting the trafficking in women for prostitution to Sweden.[1165]

According to victim testimonies, pimps and traffickers prefer to market their women in countries such as Denmark, Germany, the Netherlands, and Spain, where the operating conditions are more attractive, where the buyers are not criminalised and where certain prostitution activities are either tolerated or legalised. In addition, Detective Inspector Kajsa Wahlberg mentioned that the Latvian police have concluded that Latvian traffickers do not sell women in Sweden because of the negative effects of the Law on their potential business. In its 2004 report, the NCID concluded that the law that prohibits the purchase of sexual services "continues to function as a barrier against the establishment of traffickers in Sweden"[1166]

[1163] Interview with Dr. Sundqvist, "Österns kvinnor revoltera mot kvinnohandel - Intervju med Alma Sundqvist" 1932, p. 1.

[1164] Densmore (1973): When men say to us, "But aren't you already liberated?" what they mean is, "We said it was okay to let us f* you.....What more could you want?" The unarticulated assumption behind this misunderstanding is that women are purely sexual beings, bodies and sensuality, f* machines. Therefore freedom for women can only mean sexual freedom. (p. 111)

[1165] The Swedish National Rapporteur was appointed by the Swedish government in 1998 following a joint declaration of the European Union (The Hague, 1997)

[1166] (NCID, 2004, p. 35)

Clearly, the Law functions as a deterrent. Traffickers are choosing other destination countries where their business is more profitable and not hampered by similar laws.[1167]

THE LEGAL STATUS OF PROSTITUTION IN INDIA

Prostitution in India is not illegal by itself but related activities such as kerb crawling, soliciting in public places, managing brothels, pimping, pandering and prostitution in hotels are crimes. Prostitution is legal only if the exchange of sexual services for money is carried out in the private residences of the prostitute or others[1168]. The report published by the Ministry of Child and Child Development showed the presence of 3 million prostitutes in India with majority of them entering the business within the age of 18 years[1169] [1170]. There has been about 50% rise in the number prostitutes between 1997 and 2004[1171].

The acts that govern prostitution in India are the Suppression of Immoral Traffic in Women and Girl Act [1956], Prevention of Immoral Traffic Act [1956] and the Immoral Traffic (Prevention) Act [1956]. The ITPA, the main statute dealing with sex work does not criminalize prostitution but punishes the acts of third parties facilitating prostitution such as pimps or brothel owners. The sections of the Indian Penal Code dealing with criminalising prostitution are:

- Section 366A:- Procuration of minor girl
- Section 366B:- Importation of girl from foreign country.
- Section 369:- Kidnapping or abducting child less than ten years with intent to steal from its person.
- Section 372:- Selling minor for purposes of prostitution, etc.
- Section 373:- Buying minors for purposes of prostitution, etc.

The legal authorities concerned with the enforcement of the laws pertaining to prostitution include the local police station, the Commissioner's Office, the Social Security Section and the Crime Branch.

There are organisations working for the rights and empowerment of the prostitutes. The earliest and the most celebrated of them is the Durbar Mahila Samanwaya Committee (DMSC) in 1995 in Kolkata and the other one being SANGRAM in 1992 in Sangli which led to formation of Veshya AIDS Muqbala Parishad (VAMP) in 1996. These organizations are mainly devoted to the distribution of condoms. These organisations have initiated other programmes such as formation of a cooperative society or cultural wing, educational programmes for women and

[1167] (Detective Inspector K. Wahlberg, personal conversations, April 18, 2002)
[1168] http://wcd.nic.in/act/itpa1956.htm
[1169] Around 3 mn prostitutes in India UNODC, May 8, 2007
[1170] BBC report on number of female sex workers in India BBC News.
[1171] Prostitution 'increases' in India BBC News, July 3, 2006

their children, health awareness programmes, and notably a self-regulatory board attempting to act as a principal arbitrator of the sex industry[1172]

The main reason for the women entering the prostitution industry in India is the search for a basic livelihood by the women and poverty. Women also enter into sex work for part time. The women arrive at brothels in festive seasons for extra money as there is a lot of demand and young girls enter urban brothels to pay dowry and cease to be prostitutes after marriage[1173].

However, the major problem of prostitution in India is the stigmatization of the prostitute and even their children in schools and workplaces[1174]. They are denied the rights available to all citizens irrespective of what they do for a living. The sex workers are denied the freedom from physical and mental abuse, the right to education and information, health care, housing, social security, and welfare services. This stigmatization of sex workers extends to medical and health care. The medical and paramedical staffs have a callous, indifferent and often humiliating attitude towards the prostitutes[1175]. They are embarrassed with irrelevant questions and are refused treatment claiming them to be AIDS carriers.

The other problem is that nearly two out of five female sex workers (FSW) are infected with AIDS and those not infected carry more than 50 times increased risk of getting infected during their lifetime[1176]. Moreover the nature of the profession requires avoiding unnecessary public contact and thereby denying access to adequate health care social support thereby making them vulnerable to STDs[1177].

The trafficking of women is also a problem in the prostitution industry and India is placed in Tier Two of the United Nations to combat trafficking. There are about 1 lakh to 2 lakhs trafficked Nepali girls in India[1178] and about 5000 to 10000 Nepali women are trafficked into India each year[1179]. This industry also has a corrupt side to it and the police are paid monthly payments of ₹2000 to ₹5000 depending upon the size and the profits of the brothels. The brothel owners pay about ₹1000 to ₹ 2000 to the police in order to release the sex workers arrested by the police.

Now another striking problem with prostitution in India is the moral aspect of it. Prostitution and homosexuality have consistently been considered as areas beyond redemption, with stringent and swift enforcement. Now prostitution in a lay man sense again has arguments for and against it. Pro prostitution activists saying that it is exercising ones right to work and expression while those against prostitution calling it a modern form of slavery and hence a violation of human rights of the individual . In India, it is seen in the latter sense. It is no doubt that India for many

[1172] Anagha Tambe:Organisation of Women in Prostitution in India
[1173] Rohini Sahini and V. Kalyan Shankar: Economics of Sex Work in India.
[1174] Meena Saraswathi Seshu: Surfacing Voices From The Underground
[1175] National Commission for Women 1997, 'Societal Violence Against Women and Children in Prostitution,NCW,New Delhi.
[1176] http://timesofindia.indiatimes.com/india/In-India-two-out-five-female-sex-workers-are-HIV-positive/articleshow/12271596.cms
[1177] United Nations Programme on HIV and AIDS
[1178] Mukherji KK, Muherjee S. (2007): Girls and women in prostitution in India Department of Women and Child Development, New Delhi, India
[1179] Koirala A, Banskota HK, Khadka BR: Cross border interception – A strategy of prevention of trafficking women from Nepal. Int Conf AIDS :15. 2004, Jul 11–16

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hundreds of years have been a patriarchal society and according to the male idea of society- a woman must be chaste and anything in contravention to this would make her a 'whore' or 'harlot'. A woman basically, cannot, will not and must not use the sexual organ to make money or as a site of work. They cannot leave the profession because of the fear of being stigmatised and also the threat of violence from third parties. Their only option thus becomes to continue in the profession. Generations of women have become prostitutes because they have no way to get out of it and it is their way of life.

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HOHFELDIAN ANALYSIS ON THE RIGHT TO EDUCATION IN INDIA: AN EMPHASIS ON RIGHTS AND DUTIES TOWARDS EDUCATION

- ***Sanjay Reddy***[1180]

Introduction:

Law is a system of rules that are enforced through social institutions to govern the behaviour of individuals/citizens[1181]. Law is a measure to curb crimes or any act which will infringe the right of an individual. Every person has a right vested in him/her and that right is against the entire world[1182]. It is thus the duty of the rest of the world to respect that right and any breach of that right has a sanction by which the person who breached the right will be punished. This was a famous theory given by *H.L.A. Hart*[1183].

Jurisprudence is the name given to a certain kind of investigation into law, investigation on subjects such as abstracts, general and theoretical nature which seeks to lay bare the essential principles of law and legal words[1184]. In other words, it is the study of the origin of law. It covers every aspect of law starting from the basic concept of right. Scholars in jurisprudence are called as legal theorists. Jurisprudence gave rise to the different schools of thought[1185], namely,

(i) Positivist School of Thought
(ii) Naturalist School of Thought
(iii) Realist School of Thought

The positivists believed that law is given only through statutes and any other source of law cannot be regarded as a law[1186]. The positivist scholars were against the Natural School of Thought who believed that there are rational objective limits to the power of legislative rulers[1187]. One of the most famous and renowned positivist philosopher was H.L.A Hart, the philosopher who propounded the relationship between right, duty and sanction. Where on the

[1180] Sanjay Reddy, 3rd Year B.A., LL. B, School of Law, Christ (Deemed to be University), Bengaluru - 560029
[1181] PJ Fitzgerald, Salmond on Jurisprudence, pg. 9-11, (Sweet & Maxwell South Asian Edition, 12th ed, 2016)
[1182] Refer, H.L.A. Hart, "Definition and Theory in Jurisprudence",70 L.Q.R. 37 (1954)
[1183] H.L.A Hart was a British legal philosopher, and a major figure in political and legal philosophy. He was Professor of Jurisprudence at Oxford University.
[1184] Refer, A.H. Campbell, "A Note on the Word Jurisprudence" 58 L.Q.R. 334 (1942), and, PJ Fitzgerald, Salmond on Jurisprudence, pg.1, (Sweet & Maxwell South Asian Edition, 12th ed, 2016)
[1185] PJ Fitzgerald, Salmond on Jurisprudence, pg. 15-42, (Sweet & Maxwell South Asian Edition, 12th ed, 2016)
[1186] Austin, "The Province of Jurisprudence Determined (ed, Hart), pg.184
[1187] PJ Fitzgerald, Salmond on Jurisprudence, pg. 25, (Sweet & Maxwell South Asian Edition, 12th ed, 2016)

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other hand was *Lon Fuller*[1188], who was a famous Natural law philosopher. One of the most famous and highly important contribution by them to Jurisprudence was in light of the *Hart versus Fuller debate,* which took place in the early 19th century and it was published in the Harvard Law Review in 1958 on Morality and Law[1189]. Legal realism is a third theory of jurisprudence which argues that the real-world practice of law is what determines what law is; the law has the force that it does because of what legislators, judges, and executives do with it[1190]. The realist philosophers were totally against the Natural School of Thought. One of the main philosopher in Realist School of Thought was Justice Oliver Holmes, who also gave the Bad Man Theory[1191]. Thus, the concept of Jurisprudence has given rise to numerous Schools of Thought which are unique in their own way. In this research paper, the Hohfeldian analysis will be discussed and how the Right to Education is in consonance with the same.

The Hohfeldian Theory on Fundamental Legal Conceptions:

Wesley Newcomb Hohfeld (1879- 1918) was an American jurist. During his lifetime, he published a handful of law journal articles. After his death, the material forming the basis of Fundamental Legal Conceptions was derived from two articles in the Yale Law Journal, namely *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*[1192] and *Fundamental Legal Conceptions as Applied in Judicial Reasoning*[1193]. That work of his remains as a priceless contribution to the modern understanding of the nature of rights and the implications of liberty. To reflect his continuing importance, a chair has been named after him at the Yale University is named after him[1194].

The Hohfeldian analysis has given an entirely new dimension to the understanding of the term 'rights' and other major fundamental legal conceptions. In a general sense, rights refer to a legal, ethical or social principles embodied in a human[1195]. But the Hohfeldian analysis widened the scope of the term rights. This analysis laid down the concept of 'jural correlation' between various legal conceptions thereby making it noteworthy[1196]. Focusing in detail about this theory, his eight relations are right, privilege, power, immunity, duty, no-right, liability, and disability. They effectively form two groups of four linked concepts: right, no-right, privilege (no duty),

[1188] Lon Luvois Fuller, was a noted legal philosopher, a professor of Law at Harvard University for many years, and is noted in American law for his contributions to both jurisprudence and the law of contracts.
[1189] Hart, H. L. A. "Positivism and the Separation of Law and Morals". 71(4) H.L.R. 593-629 (1958) and, Fuller, Lon L. "Positivism and Fidelity to Law — A Reply to Professor Hart". 71 (4) H.L. R 630–672 (1958)

[1190] Salmond, Jurisprudence, pg. 15 (7th ed., 1924 by Sir John Salmond)
[1191] Holmes, "The Path of Law" (1896-97) 10 H.L.R. 461; Lloyd, Introduction to Jurisprudence (2nd ed.), 272
[1192] 23 Yale Law Journal 16 (1913)
[1193] 26 Yale Law Journal 710 (1917)
[1194] Raj Deepak Chaudhary, Hohfeld's Analysis of Rights and Duties (2nd Sept 2018), (https://www.academia.edu/29338633/HOHFELDS_ANALYSIS_OF_RIGHTS_AND_DUTIES)
[1195] PJ Fitzgerald, Salmond on Jurisprudence, pg. 215, (Sweet & Maxwell South Asian Edition, 12th ed, 2016)
[1196]Graham Ferris and Erika Kirk, Nottingham Law School, Fundamental Legal Conceptions by Wesley Newcomb Hohfeld (1946),pg.1, Yale University Press

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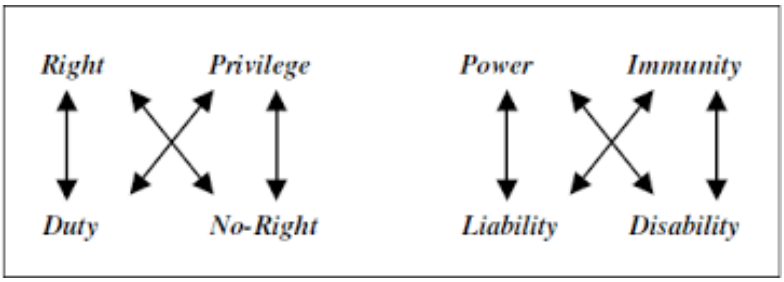
duty; and power, disability (no power), immunity (no liability) and liability. Within each group of four relations for each relation there is a correlative i.e. right duty, and there is an opposite i.e. privilege duty. Hohfeld basically explores the implications of "correlative" (i.e. right and duty), "correlative" means that each is the necessary and sufficient condition for the existence of the other and they are not identical. So: if right then duty, if no duty (privilege) then no-right; similarly, if power then liability, if no power (disability) then no liability (immunity). Once we accept "correlative" then everything else follows inexorably.[1197]



[1198]

Going into the detailed analysis of the concept, the terms right, duty, liberty and no right as given in the first diagram of the Hohfeldian analysis, can be explained with a simple example. Assuming that a person A owns a strip of land. He has an absolute right over the land and he has the right to do anything with that strip of land and that particular right is against the whole world. It is the duty of the rest of the world not to trespass the land owned by A. In the diagram, it is represented by the vertical line which is called as the Jural Correlative. Assuming that B, a neighbour of A, seeks permission from A to use his land in order to go through it to reach his destination on time. A gives permission as requested by B. In this instance, A gives the Liberty to B to use his property. At this point, A loses his right over the property and similarly, B loses his duty. The relationship between liberty and no right is represented by the Jural Correlative. The relationship between duty and no right; right and liberty is represented by the Jural Contradictions, which is the horizontal line. The relationship between duty and liberty; right and no right is represented by the oblique line which is called as Contradictions of the co-relatives.

The second diagram of Hohfeld explains the relationship between power, liability, immunity and disability. Let us take the example of a Prime Minister of a country. A Prime minister of a nation has the power to take crucial decisions which can be binding on the citizens of a nation and if it is so, the liability is on the part of the citizens to follow and abide by it. This is shown in the Jural Co-relative of the diagram. Similarly, a Prime Minister has immunity, i.e. he is immune from being prosecuted. This concept is called as Sovereign Immunity. In such a situation, when a

[1197] Graham Ferris and Erika Kirk, Nottingham Law School, Fundamental Legal Conceptions by Wesley Newcomb Hohfeld (1946), pg. 4, Yale University Press
[1198] Expressing Hohfeldian legal concepts, traceability and ambiguity with a relation algebra-based information system, Masters Business Process Management & IT Faculty of Management, Science and Technology Open University in the Netherlands, Azar Lalmohamed,

Prime Minister possesses immunity, the rest of the world is disabled from prosecuting him. This is represented by the other Jural Correlative.

Moving further in the paper, it would be observed and analysed as to how the Right to Education in India is in consonance with the Hohfeldian Analysis and in the process of which the Right of Children to Free and Compulsory Education Act, 2009[1199] (herein referred to as Right to Education Act or the Act) would be observed as well.

Application of the Hohfeldian Theory to Right to Education in India:

In India, the Right to Education is a fundamental right[1200]. Such a fundamental right was established owing the analysis, observation and interpretations of various judicial precedents where the right to education of individuals faced several hurdles due to certain factors. Part III of the Constitution of India is considered as the heart of Constitution as it deals with the fundamental rights of the citizens and before the establishment of a specific statute, the Right to Education came under the ambit of Article 21[1201] which deals with the Right to life. These cases acted as a catalyst by which Right to Education was made as a Fundamental Right. In addition to this, the Right to Education Act which was enacted in the year 2009, which came into force on 1st April 2010. This Act guarantees free and compulsory education for all children between the age of 6-14.

Comparing the Right to education with that of the Hohfeldian analysis, it is the right of a citizen of our country to receive education and it is the duty of the State to uphold this right. This could be analysed light of two famous judicial precedents, namely, Unnikrishnan v State of Andhra Pradesh[1202] and Mohini Jain v State of Karnataka[1203].In the case of Mohini Jain v State of Karnataka, the plaintiff Ms. Mohini Jain, who hailed from Meerut, U.P., approached a private medical college in the state of Karnataka seeking admission for the course of MBBS. She was demanded to pay a sum of Rs. 60,000/- as tuition fee as she did not hail from the State of Karnataka. Whereas, the students admitted in from the state of Karnataka were charged a lesser fee. Ms. Jain filed a writ petition under Article 32(1)[1204] of the Constitution of India with a right to move to Supreme Court with appropriate proceedings. In this case, it was the right of Ms. Jain to receive education and the state had the duty to uphold the right. This case was a landmark case

[1199] Right of Children to Free and Compulsory Education Act, 2009

[1200] Constitution of India, Article 21A - "Right to Education - the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".

[1201] Constitution of India, Article 21 – Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to a procedure established by law."

[1202] Unnikrishnan v State of Andhra Pradesh, AIR 1993 SC 2178

[1203] Mohini Jain v State of Karnataka, AIR 1992 1858

[1204] Constitution of India, Article 32(1) - "Remedies for enforcement of rights conferred by this Part:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed".

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which happened in the year 1992 and it for the first time inducted the concept of right to education in the Indian Judiciary system.

In furtherance, another landmark judgement in relation to the right to education is the case of Unnikrishnan v State of Andhra Pradesh. This case was in relation to a challenge by certain private professional educational institutions to the constitutionality of State laws which regulate capitation fees charged by such institutions. The Supreme Court held that the right to basic education is implied by the fundamental right to life under the ambit of Article 21, when read in conjunction with the directive principle on education that is Article 41[1205]. The Court was of the view that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45[1206] which provides that the state is to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of fourteen.

The Court ruled that there is no fundamental right to education for a professional degree that flows from Article 21. It held, however, that the passage of forty-four years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under the age of fourteen into one enforceable under the law. After reaching the age of fourteen, their right to education is subject to the limits of economic capacity and development of the state (as per Article 41). The state responded to this declaration nine years later by inserting, through the Eighty-sixth amendment to Constitution, Article 21A, which provides for the fundamental right to education for children between the ages of six and fourteen thereby inducting the right to education under the ambit of fundamental rights[1207] under Part III of The Constitution.

In order to take a step further, the Right to Education Act was enacted in the next decade. The Right to Education is a right which is guaranteed by the United Nations Convention on the Rights of the Child (herein referred to as UNCRC or the Convention)[1208]. UNCRC was enacted in the year 1989 on the 40th anniversary of the United Nations Human Rights Council. Under

[1205] Constitution of India, Article 41 - "Right to work, to education and to public assistance in certain cases- The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

[1206] Constitution of India, Article 45 – "Provision for free and compulsory education for children. - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

[1207] Enacted in the Constitution of India by the Constitution (Eighty-Sixth Amendment) Act, 2002.

[1208] "The United Nations Convention on the Rights of the Child, or UNCRC, is the basis of all of UNICEF's work. It is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights treaty in history."- UNICEF United Kingdom (https://www.unicef.org.uk/what-we-do/un-convention-child-rights/)

Article 28[1209] of the UNCRC, every child has a right to receive fundamental and elementary education. India has ratified this particular convention and thus the Right to Education is a step forward in all means. By enacting the Right to Education Act, India became one of the 135 countries to make The Right to Education a Fundamental Right.

An insight on the Right of Children to Free and Compulsory Education Act, 2009:

The Right of Children to Free and Compulsory Education Act, 2009 was enacted by the Parliament in the year 2009. The Act provides among other things for the right of every child who has attained the age of 6 years to be admitted in a neighbourhood school and need to be provided free and compulsory education in such school. Every state is responsible for making such neighbourhood school available. All schools, whether state school, aided or unaided private schools will now have to provide free and compulsory education up to specified percentages of the total number of children admitted[1210]. Charging of capitation fees is prohibited nor can a child or her family be subjected to any screening procedure by a school[1211]. In keeping with Article 51A[1212], the Act casts a duty on every parent or guardian to admit or cause to be admitted

[1209] United Nations Convention on the Rights of the Child, 1989, Article 28:

"(1.) States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
(2.) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
(3.) States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods."

[1210] Prof. Vijay Kumar K, Right to Education Act, 2009: Its implementation as to Social Development in India, pg 50-51, (2012)

[1211] Right of Children to Free and Compulsory Education Act, 2009, Section 13,
"No capitation fee and screening procedure for admission:
(1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.
(2) Any school or person, if in contravention of the provisions of sub-section (1),
(a) receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;
(b) subjects a child to screening procedure, shall be punishable with fine which may extend to twenty-five thousand rupees for the first contravention and fifty thousand rupees for each subsequent contravention."

[1212] Constitution of India, Article 51A - "Fundamental duties- It shall be the duty of every citizen of India-
(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) to uphold and protect the sovereignty, unity and integrity of India;
(d) to defend the country and render national service when called upon to do so;
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

his or her child or ward, as the case may be, to an elementary education in the neighbourhood school.[1213]

CONCLUSION

In light of the observations and analysis made in regard to the Right to Education and the application of Hohfeldian Analysis to it, it could be noted that there exists a right to compulsory education to children of all classes up to the age fourteen, and in correlation to which there exists an inherent duty not only on the State but also on the parent and guardians of the children. This duty which is enshrined on the parents and guardians is not fulfilled by the majority of them, especially in the lower strata of the society owing to the aspect of forced child labour so as to gain their daily bread[1214], and also the majority of the population in the lower strata of the society are unaware of such rights and duties. Owing to this act of theirs there is a violation of the rights of the children to education. On the other, as mentioned above, the State has a duty to provide the children with compulsory education in correlation to the existing right to compulsory education to the children up to the age of fourteen. Despite the existing legislation there are exists a lot of drawbacks with regard to the implementation of the laws and regulations, thereby infringing the rights of the children. Therefore, to conclude there is need for a strict and stringent implementation of the laws relating to the right to education as a whole and specifically the right to free and compulsory education. In addition to such implementations, there is a need for spreading legal aid and awareness regarding such laws, rights and duties to all the citizens of India thereby not allowing them to sleep over their rights.

(f) to value and preserve the rich heritage of our composite culture;
(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
[(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.]"

[1213] Right of Children to Free and Compulsory Education Act, 2009, Section 10, "Duty of parents and guardian: It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school."

[1214] Dr. M.V. Mani Verma, Right to Education Act, 2009- History and Salient Features, International Journal of Multidisciplinary Advanced Research Trends, Pg 160-167 (2014)

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THE NEED FOR POLLUTION REGULATIONS FOR MINING IN INDIA

- ***Partheshwar Singh***[1215]

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I hereby declare that I, Partheshwar Singh, am the author of this research paper. The text reported in the project is the outcome of my own efforts and no part of this project assignment has been copied in any unauthorized manner and no part of it has been incorporated without due acknowledgement to their rightful sources and source persons. I authorize School of Law, Christ University to lend this research paper to other institutions or individuals for the purpose of scholarly research.

SCOPE

This research article will highlight the issue of pollution regulations, or lack thereof, in relation to the mining industry in India, and how the circumstances this industry has lead itself into requires special attention with regards of the undesirable discharge the mining process creates, that leads to environmental degradation. Furthermore, it seeks to propose suggestions on the regulations that can be placed that help prevent excessive environmental degradation.

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LIMITATION

During the course of validation and analyzing the sources the researcher has used, it was observed that the literature available on this subject was not only minimal, but also scattered and unorganized. The researcher will be working with only the available information and attempt to emphasize relevant issues pertaining to this topic. In this paper the researcher seeks to cover only the environmental concerns caused by industrial mining, its effects and methods of retaliation to the undesirable consequences to it.

RESEARCH QUESTION

1) Whether the prevailing legislations adequately cover the pollutive discharge that is unique to industrial mining.
2) Why must industrial mining discharge be dealt with specificity?
3) Why hasn't there been a legislation for the same so far?

LITERATURE REVIEW

Industrial mining in India is one of the biggest contributors to the Indian economy. Unlike Luxury Mining, that concerns itself with extraction of resources such as gold, diamonds, etc., Industrial mining is concerned with extracting ore and fossil fuel. These extractions are vital for development of Indian economy as they play in instrumental part of production sector, exports, as well as development of business in virtually every field. However, despite such dependence on the mining industry, the respective authorities have limited themselves to creating standards and regulations concerning only the labor, business and subsistence aspects of mining. The fact that industrial mining contributes vacuously to air, water and land pollution has been conveniently disregarded. Despite extensive research, there is little to no literature available that directly addresses this subject. In the case of [1216]M.C. Mehta vs Union of India and Ors. the Supreme Court itself recognized that the damage caused by non-sustainable mining process is not only severely damaging to the local ecology but is also irreversible. The problem faced here is very peculiar as, despite mining being a dying industry due to the non-renewable nature of the ores, the whole process of mining is, for the same reason also, very highly profitable. For this reason, it is theorized by the researcher, that the authorities seek to abuse the extraction process to make maximum possible profits. This is further supported by Jeemol Unni in her [1217]2016 Article. Furthermore, often compliance with institutional rules is also avoided by players in the mining industry, due to lack of state enforcement, as was pointed out in the case of [1218]DC Emta Coal Mines vs Pollution Control Appellate. In this case the accused refused to play the Rs 10 lakh that was required to build barriers to restrict pollution so to save costs. There is no question

[1216] M.C. Mehta vs Union of India & Ors., Case 4677 of 1985 [2004] (Supreme Court of India)
[1217] The Resource Curse (High Profit Mining and its Effects on the Locals) by Jeemol Unni, 2016, The Conversation
[1218] Dvc Emta Coal Mines vs Pollution Control Appellate, Appeal 43 of 2012 [2013] (Supreme Court of India)

that the mining industry in India is extremely beneficial as Anil Aggarwal in his [1219]2018 article states that mining contributes to employment, income and economic progress when done so in a proper manner, which is true. However, human greed and want of rapid revenue has resulted in cost cutting and lack of powerful restrictions and regulations which further result, invariably, in unaccounted and uncontrolled pollution and degradation of the local environment. THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981, does not mention any specific sections in regard to mining activity despite it causing heavy and concentrated spread of carbon emissions from the heavy machinery and debris from the mine craters. While THE WATER (PREVENTION AND CONTROL OF POLLUTION) CESS ACT, 1977 recognizes mining under section 2(c) and schedule I, it does not address mining specific pollution such as slurry and explosive chemicals such as Cyndie, Sulphur Acid, and ammonium nitrate. The problem of uncontained mining pollution can be contained by passing a special legislation that regulates mining and quarrying activity. It is essential that the legislation have limits as to the extraction quantity and machinery that each operation is allowed so as to prevent unnecessary degradation. The regulations must have empirical support as mining and quarrying is a dying industry and it is extremely important that the operations be compatible with sustainable development. Furthermore, mere licensing of mining machinery will not accomplish any positive result when it comes to pollution control as most major mining operations have strong political backing. For example, in India, the Jharjia Coal Field has caused the region local to it to have the [1220]lowest quality of air in India as measured by Air Pollution Index, calculated on the basis of Suspended Particulate Matter (SPM), SO2 and NO2 concentration, all due to the nature of coal mining and the machinery used for the same. There must be a restrictive, and not regulative, approach towards allowing use of certain kinds of explosives (depending on the ore mined) as well as the quantity per unit time of extraction. There is no question that the mining industry is the unsung hero of the aggressively developing Indian economy, however it is also an environmental evil paralleled by few others.

INTRODUCTION

Standard Industrial Classification states that the Mining Industry is a branch of manufacture and trade based on the extraction naturally occurring geological resources such as ores, fossil fuels, stones, clay, minerals, etc. Industrial Mining can be further divided into Coal Mining, Metal Mining, Non-Metallic Mining and Oil and Gas Extraction.

In India, the Mining Industry is the second highest contributor to the Gross Domestic Product of the country and is still growing rapidly in its contributions. In [1221]the last quarter of 2017 the

[1219] Agarwal A. (2018) View: India's Mining Industry should be Encouraged, Not Damaged the Economic Times
[1220] Pandey, B., Agarwal, M. & Singh, S., 2014. Assessment of air pollution around coal mining area: Emphasizing on spatial distributions, seasonal variations and heavy metals, using cluster and principal component analysis. Atmospheric Pollution Research, 5(1).
[1221] Tradingeconomics.com. (2018). India GDP From Mining | 2011-2018 | Data | Chart | Calendar | Forecast. [online] Available at: https://tradingeconomics.com/india/gdp-from-mining [Accessed 10 Sep. 2018].

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Mining Industry contributed to 892.66 INR Billion, which substantially increased in the first quarter of 2018 to 1151.85 INR Billion. Furthermore, reports of the Directorate General of Mines Safety state that in the year 1999 alone employed approximately [1222]1 million people.

[1223]In 2016-17 the Mining Industry contributed 2.25% of the Gross Value Added by all the Industries in India. Such a large economic burden makes this Industry one of the most important when it comes to the economic development of India. Due to its profitability the Mining Industry plays a very important role in the economy. [1224]The demand for minerals, metals, fossil fuels is of such a nature that it will never die.

However, the same can not be said for the substances mined themselves due to their non-renewable nature. A prime example of this is that of fossil fuels. [1225]India is projected to run out of oil by the year 2068, natural gas by 2069 and Coal by 2125. This means that the value of each of these increases per unit consumption. Therefore, it would be only logical that the Industry would squeeze every last drop of profit for as long as the resource lasts.

It is due to this highly profitable nature of the industry and major players often do not subject themselves to environmental regulations. An example of this would be that of the [1226]Chromite Mines in Sukinda, Orissa. This activity discharges a toxic substance known as Hexavalent Chromium (Cr+6) into the Damsala river, a tributary of the Brahmani river. As per a report by Orissa's Center for Environmental Studies and the Regional Research Laboratory in 1999 showed a high concentration of CR+6 in surface and ground water, sewage water as well as the soil and wastewater. Up until the last inspection in 2015, there has been little to no improvement. While some units now produce partially treated waste (Cr+3) it is still highly pollutive.

Evidence supporting cost cutting done in Mining industries is evident in the reports of S N Das, head of Inorganic Chemicals Division, Regional research Laboratory where it was stated that standard procedure to treat water with ferrous sulphate in Rs 70 per kg but these miners use ferrous sulphate only worth Rs 10 to 15 per Kg. Furthermore, Tata Iron and Steel Industry in Jamshedpur use pickle liquor which contains ferrous sulphate, Sulphur acids and toxic metals. TISCO has not disclosed this.

[1222] Mining Industry in India – An Overview, By the Directorate General of Mines Safety
[1223] Statisticstimes.com. (2018). Sector-wise contribution of GDP of India - StatisticsTimes.com. [online] Available at: http://statisticstimes.com/economy/sectorwise-gdp-contribution-of-india.php [Accessed 10 Sep. 2018].
[1224] CM, B. (2018). Global supply and demand of metals in the future. - PubMed - NCBI. [online] Ncbi.nlm.nih.gov. Available at: https://www.ncbi.nlm.nih.gov/pubmed/18654895 [Accessed 10 Sep. 2018].
[1225] Singh, S. (2018). How long will fossil fuels last?. [online] Business-standard.com. Available at: https://www.business-standard.com/article/punditry/how-long-will-fossil-fuels-last-115092201397_1.html [Accessed 10 Sep. 2018].
[1226] Downtoearth.org.in. (2018). Making India's mining sector socially and environmentally viable. [online] Available at: https://www.downtoearth.org.in/coverage/making-indias-mining-sector-socially-and-environmentally-viable-5828 [Accessed 10 Sep. 2018].

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POLLUTION CAUSED BY MINING

Industrial Mining in India, as recognized by the Sustainable Development Working Programme (SDWP) India, has some general effects across mining activity for all minerals. Surface mines are prone to producing dirt and dust due to blasting operations. Smelter operations produce heavy metals, Sulphur dioxide, and coal mining produces greenhouse gasses such as methane.

Furthermore, the SDWP in their reports mention that mining produces sulphide containing minerals that oxidise with water. This water may be in form of ground water in case of underground mining or even the moisture of the air above surface mines that affect life conditions around the area where the mine is located.

Mining also leaves scars on the surface of the earth. It requires the removal of top soil (the most fertile part of the surface) to extracts valuable minerals. However, these minerals don't exist on their own and have to be extracted from rocky mixtures by chemical or electrical processed. This leads to creation of untreated and valueless residue that is dumped back into the land. This in turn causes the concentration of the pollutive materials to increase drastically in the mining area. Finally, once the mining operation is complete the land is left barren as it is not fit for any other purpose. In India old mines are often used as landfills, this only escalates the concentration of contamination in the mined area.

EXISTING LEGISLATIONS

Despite there being an abundance of legislations on subjects relating to mines and minerals, as well and protection of environment, none of them address the issues of pollution arising from mining activity.

Legislations relating to mines and minerals:

- The Mines and Minerals (Development and Regulation) Act, 1957 - Deals with the leases as well as declaration of materials mined. Addresses Pvt. Public relation.
- Offshore Areas Minerals (Development & Regulation) Act, 2002 – Deals with offshore mines, and specifies central authority over the same.
- Mines Act, 1952 - Welfare legislation that deals with labor disputes and employment conditions.
- Mines Rules, 1955 – Health and Sanitation aspects of miners and their families.

Mentioned above are the major laws relating to mining and not a single one of them have any mention of pollutive repercussions. The researcher has made efforts to scavenge other [1227]Acts to find provisions for the same and has not found any legal provision to the same effect.

[1227] Ibm.nic.in. (2018). Mining Laws -. [online] Available at: http://ibm.nic.in/index.php?c=pages&m=index&id=89&mid=20946 [Accessed 10 Sep. 2018].

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Furthermore, environmentally inclined legislation such as the Air Act of 1981, the Water Act of 1972 and the Environment Protection Act of 1980 have no mention of pollution arising from mining activity. There is no reason as to why a legislation to this effect must be denied as the prevailing legislations allow for creation of State and Central Authorities to merely monitor pollution. Mining being so empirically important deserves special attention. The researcher theorizes that political influence has caused a halt in pollution restrictive laws in the mining industry evidence towards which can be seen by the political scams related to mining industry.

RECENT CONCERNS

The inadequacy of the general environmental legislations is often exposed in judicial pronouncements. While the number of cases concerning mines specifically is very low, there are plenty apt examples.

In the recent case of Dvc Emta Coal Mines vs Pollution Control Appellate Authority of West Bengal on 15th March 2013, the inadequacy of authorities set up under the Water Act of 1972 and Air Act of 1981 is specifically pointed out.

The facts of the case state that the Appellant was involved in mining business near the Hingal river. This river was essential to local livelihood as it was often diverted to create a supply of water for purposes of irrigation to make water available during the dry season. On compliance with the request of the local gram panchayat, the appellant created a dam 2 feet tall to divert the river. On enquiry made under the competent authority of the West Bengal Pollution Control Board set up under Section 4 of the Water Act of 1974. It was observed that the mounds used to make the temporary dam, usually made of sand, was overcharge from the mining activity carried out by the appellant in an attempt to discharge it. The overcharge hurt the natural composition of the river, causing a pollutive effect. The WBPCB stated to the appellant that a pollution cost of Rs. 10 Lakh would have to be paid.

On inspection of the bare legislation, the court held that the WBPCB did not hold any authority to direct such a payment under Sections 32, 33 and 33A. Such directions become enforceable only on the compliance of an order towards the same by a magistrate court. Therefore, the appellant was not liable to make pay the pollution cost. The court made it abundantly clear that the WBPCB was not authorized to charge such costs. This exposes the fact that prevailing legislations are not equipped well enough to deal with discharge specific to mining.

Another issue specific issue to regulate pollution in the mining industry is how complex the procedure is. No general law can adequately deal with all that occurs during a mining operation. This is evident in the case of [1228]Rural litigation and Entitlement Kendra Dehradun (RLEK) and others vs State of Uttar Pradesh. In this case the Supreme Court received a writ petition from RLEK about the mining activity regarding lime stone quarries in the Mussoorie Hills. It was

[1228] 1985 AIR 652

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stated that these mining operations caused health hazard by affecting the perennial water springs. The Bhargav committee was appointed to look into the matter.

The Bhargav Committee divided the mines into three types as per the adversity of impact of the mining operation.

a) Least pronounced adverse impact,
b) More propound adverse impact and,
c) Directed to be closed down.

The court felt that the mining operation affected the perennial water springs and weighed it against the industrial purposes. It was decided that 'C' type mines would not be allowed to carry out operation, the same was decided for a number of 'B' type mines as well. 'A' type mines were further divided on the basis of location, inside or outside city limits. Those operations inside the city limits were closed and another expert committee was appointed to look into the viability of operation.

This case is an apt example of the complexity involved in a mining operation in regard to the discharge, factors affecting the same as well as the type of degradation and victims. Any general law would not suffice due to the sheer number of resources that are mined in India and their individual conditions.

SUGGESTIONS

For the purpose of maximum efficiency, it is necessary that the policy so formed is flexible in nature. This is because different types of mining activity will require different types of regulations in different intensities. This may be because of factors such as size of the mine, machinery used, amount of fuel consumed by said machinery, amount of discharge, nature of discharge and contribution to local economy to name a few. The approach towards major aspects of the mining activity are stated below.

1) **Recognition of area (in case of new mining activity):**
   As of the date of writing this paper, there are no fixed procedures that must be followed to declare any piece of land or area suitable for mining. While there are safety regulations as well as procedures for attaining permission from the concerned authority there is no procedure that classifies the mining operation as desirable or undesirable. There must be an expert committee set up at the state level consisting of persons of experience in the field of sustainable development, environmental science and the mining industry. This is because the concerned authorities merely give permission based on the mere legality of the activity and does not have the required knowledge to determine the productivity and environmental effects of the mining activity. Furthermore, this committee will work in congruence with the State Pollution Control Board so as to facilitate smooth flow of necessary information and data for both bodies to adequately perform their tasks.

2) **Regulations regarding machinery:**
   This is perhaps most necessary in cases of open mining. This is due to the large amount of ash and dust that adds to the Suspended Particulate Matter present in the air. This causes severe air pollution and is fatal to the human condition. The ash and dust particles present in the air is large enough for the human nose to inhale but its composition is such that the respiratory system is not attuned to remove it from circulation causing major internal damage. Not only is it a health hazard to the workers but this also makes nearby areas uninhabitable. Much like motor vehicles, machinery used for mining is also run on fossil fuels such as diesel and petrol. However, while the Motor Vehicle Rules of 1989 illegalized use of leaded fuel, same can't be sad for mining equipment such as drills, crushers, bulldozers, cranes and even conveyer belts. Another reform that would also be suitable to machinery so used would be of banning use of outdated equipment that do not meet modern emission standards.

3) **Emission Standards:**
   As stated earlies there must be an expert committee set up state-wise that works in congruence with the State Pollution Control Board. These committees will be set up in each state so as to attain and apply data in the most effective manner in every mining area, as each area will have specific requirements. So, this expert committee will be tasked with determining the optimal level of pollution allowed, beyond which liability would be incurred.
4) **Liability:**
   The standards set by the expert committee in congruence with the State Pollution Control Board will have to have a limited retrospective effect when it comes to liability. This is because while enacting pollution control laws the devastation that has already been caused needs to be considered. The limited retrospective effect would allow for justice for those who have faced severe depredation. Such an approach would have an immediate sense of deterrence for any undesirable activity industrial actors would want to carry out. Furthermore, any action taken towards punishment that is not retrospective in nature would imply, selectively, criminal liability. Again, all actions that imply criminal liability will have to be specified by the authorities as repeatedly mentioned before.

CONCLUSION

The pollution caused by industrial mining is of great concern as evidence as well as the eye test suggests that the degradation of air, water and land caused by the same has remained unchecked for the entirety of the existence of the mining sector. Despite this there has been little to no effort by the legislative authority at the central level despite it being a subject under entry 54 of the Union List. This is a major concern as pollution caused by mining is unique in the sense that the damage it causes is not of the same nature as other industrial ventures.

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Till date there is not only a severe lack of awareness but also a severe lack of interest towards to same as the persons and authorities concerned with the mining sector have given primary priority to revenue and profit generation. This is because of the simple reason that there is no mechanism that provides either deterrence by means of punishment or by providing any incentive by means of tax reduction. There is simply no reason for players in the mining sector to be concerned with the effect of pollution caused by them.

Furthermore, the laws that do exist to regulate environmental exploitation that causes pollution are either inadequate or don't have objectives for the same, as backed by the evidences of cases such as those already mentioned. If the exploitation is allowed to continue at an unchecked rate, not only will the resources be overexploited causing inefficiency, but also lead to severe degradation of human environment as well as inconsistency with Articles 48A and 51A(g) of the Indian Constitution.

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LACUNAE WITHIN THE APPELLATE STRUCTURES GOVERNING SPECIAL ECONOMIC ZONES IN INDIA

- ***Anubhav Banerjee***[1229]

India, like many common law countries has its statutory laws based common law principles and constitutional fidelity. However, legislative oversight has resulted in laws contravening Principles of Natural Justice, and this article identifies the Special Economic Zones Act, 2005 as such an example. The statute (and its affiliated ordinances like the SEZ Rules, 2006) aims *prima facie* to create an efficient system to "provide for the establishment, development and management of the Special Economic Zones." It creates an appellate hierarchy at the National

Level (the Board of Approval), and the individual SEZ level (Approval Committee) to exercise an array of administrative functions.

However, this law overestimates the ability of this hierarchy to act on unbiased premises as it legally empowers the Development Commissioner to decide matters under Sections 15 and 16 of the Act; as both the ex-officio Chairperson of the Approval Committee and the ex- officio member of the Board of Approval at the national level, effectively allowing them to adjudicate from two tiers of an appellate structure. This article contextualises the principle of '*nemo iudex in causa sua*' in light of decisions of the Supreme Court along to prove the presence and operation of unjustified bias obstructing the dispensation of justice.

HOW ARE SEZ GOVERNED?

The creation of SEZs increased post the 1992 crisis, but began in the 1960s[1230], and the advent of the 2005 SEZ Act creates a new regime for the special management of these areas, under the following preambulatory principle:

> *"An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto."*

[1229] School of Law, Christ University, Bangalore
[1230] Palit, Amitendu and Bhattacharjee, Subhomoy, Special Economic Zones in India (2008), Anthem Press, ISBN 13: 978 81 905835 3 4

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The Act created a multi-tiered hierarchical system, with Section 8 empowering the Board of Approval (subsequently called the 'Board') which acts akin to a Central node of all powers and functions exercised in due course of operating and maintaining functional SEDs, with a nationwide jurisdiction; as well as an Approval Committee (subsequently called the 'Committee') under Section 13, which acts as the incumbent authority discharging various statutory functions at the individual SEZ level. Such a two tiered system is supplemented by the Act authorising personnel called Development Commissioners under Section 11, who act as the primary issuing authorities, as well as the interface between manufacturers / exporters and the State machinery operating at each SEZ. Collectively, the three entities form a federal-esque system, which mirrors the distribution of powers between Legislative and Executive bodies at the National, State and District Levels, an essential if implicit feature of the Constitution[1231] ; and the provisions of the act also create a system of appellate redressal mechanisms through Sections 15(3), 15(4), 16 (3), 16(4) of the Act, and through Rules 17(2), 17(3), 18, 19, and 66 of the SEZ Rules 2006. This implicitly appears to recognise the Principles of Natural Justice, as the sections themselves make it evident that persons applying for licenses under Section 15 or 16 of the Act, or for Letters of Approval under Rule 19(1) of the SEZ Rules (2006) must have their applications presented before the Approval Committee, and have the opportunity to be heard through appeals to the Board under Section 15(4) or 16(4) of the Act.

However, the nature of such a right does not hold up under the author's scrutiny, for the real presence of Natural Justice can only be proven if both *audi alteram partem* and *nemo debet iudex in sua causa* can be demonstratively proved to exist, for it has been previously established how they function as two enablers of the same right. Thereafter, the author contends that such does not happen for the Appellate Hierarchy governing Special Economic Zones in India, which can be reasonably inferred by the following observations of the Act, as well as the nature of powers enacted by the SEZ Rules 2006.

At first glance, the Development Commissioner acts as the primary interface between the agency of the state and those seeking to undertake business in the SEZs, being the authority capable of receiving applications to grant or alter licenses under Sections 15(1) and 16(1) of the Act, or for issuing Letters of Approval under Rule 19(1) of the SEZ Rules 2006. Upon the receipt of such orders, the Development Commissioner has been authorised to present the same applications (after checking for the validity of the applications under 15(1) or 16(1) or proposals for Letters of Approval under Rules 18 and 19 of the SEZ Rules 2006) before the Approval Committee, which grants the license after providing a chance for the admittance and validation of the request. The Approval Committee acting at the individual SEZ level has been authorised to have multiple members under Section 13(2) of the Act, with the Development Commissioner acting as the *ex-officio* Chairperson of the Approval Committee under Section 13(2) (a) of the Act, hereby acting in two different positions and thereafter discharging different functions under different

[1231] S.R. Bommai v. Union of India, (AIR 1994 SC 1918)

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capacities. A glance at the nuances of the functions discharged by the Development Commissioner as well as the Committee can be largely viewed as complementary, for they both discharge and authorise the actions taken by one another. It is however, important to note that the Committee effectively sanctions the actions of the Development Commissioner, despite being headed by the Development Commissioner themselves, which raises questions about the real nature of the bifurcation between the entities and the independence of the Issuing authority, as well as on the real nature of the ability of applicants to be given a chance at fair hearing, for they have to plead their case before the very same individual multiple times.

This is compounded by the composition and role of the Board, which is created at the National level to deal with macro-level decisions affecting multiple SEZs, along with providing a platform for appellate remedies to decisions taken by Committees at various SEZs. The Board is highly empowered under the Act to enact an array of functions under the laws governing its creation and functions, which indicative of the importance they should be accorded and the significance of their decisions. The Board is, however, composed to include the Development Commissioner as an *ex-officio* member under Section 8(2) (g) of the Act, effectively ensuring the presence of the Development Commissioner in all 3 tiers of the appellate bodies governing SEZs. This nullifies the need to create separate bodies, for they may struggle to differ in opinion or in their functionalities with regards to the authorisation and issue of licenses and letters of approval.

These provisions elucidate primarily how the Board of Approval is functionally inclusive of the Development Commissioner; and since legal obligations have been imposed upon the Board of Approval to accept and adjudicate appeals on licencing and letters of approval under Sections 15(4) and 16(4), it becomes an essential function of the Board to adjudicate such disputes, and therefore ascribes a quasi-judicial character to the Board of approval[1232]. Since the Development Commissioner is appointed as the *ex officio* chairman of the Approval Committee by Section 13(2a) of the SEZ Act (2005), further bearing administrative powers under the Act, as well as under Rules 18 and 19 of the SEZ Rules (2006); the fact that the Board can defer even *more* powers to them under Section 9(4) of the Act for "*effective and proper discharge of the functions of the Board"*, a Board to which is inclusive of their own membership, makes the transparency of the Board even more dubious, for they can legally empower their own members(the Development Commissioners) to enact any functions which they deem is necessary for the performance of the authority that confers this power upon them (the Board itself). This circular system of conferment of powers and the repeated presence of the Development Commissioner contravenes the principles supposedly enshrined within the Act and the SEZ Rules 2006, as the language of Sections 15(4) and 16(4) of the Act ensures that the Board must fairly adjudicate appeals if they are legally valid, and the Board must give all persons a fair opportunity to be heard.

[1232] A.K. Kraipak v UOI (1969 SCC 262)

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Furthermore, with an absence of circulars wherein the decisions taken by this Board are published for the study and scrutiny (as the Board of Approval is *not* a court of record, nor does it overtly identify as a judicial entity), it becomes more important for the Board, Committee and the Development Commissioner to be distinctly demarcated in their roles, for such an inclusion may act as contrary to the inviolate Principles of Natural Justice due to the clear manifestation of *nemo debet iudex in sua causa***.** India being a common law country, in order to substantively provide adequate reasoning for legal assertion, an exhaustive reference must be made to 'judge made laws' or judicial precedents; which act among the primary sources of legal validity, and often clarify the law of the land with respect to certain matters. In this regard, the author will examine whether the Board, Committee and Development Commissioner encompass the dimensions of wrongful bias in the decision making process.

AN EXPLORATION OF THE DIMENSIONS OF WRONGFUL BIAS IN INDIAN LAW

Wrongful bias vitiates the purpose of justice, for the proper manifestation of the same requires an absence of predispositions, inclinations or prior involvements in matters pertaining to the case. On the basis of works such as the Veil of Ignorance as part of John Rawl's postulates, the dispensation of Justice is said to properly occur upon the decisions of an impartial and neutral authority, who has neither the knowledge of the status of the person being tried, nor the knowledge of their own status in that same society[1233]. In modern laws, the presence of bias acts as an automatic disqualification of the ability of the entity in question, for their inability to reconcile with the quintessential Principles of Justice. Such denotes the need to avoid bias, for its presence in the decision making process is indicative of the lack of capacity of the body to resolve disputes in a fair and transparent manner; and furthermore, the developments in leading cases leaning towards a harmonious legal system demonstrates various dimensions of such wrongful bias.

In the *G Sarana vs University of Lucknow*[1234] case, the essential question before the court was not whether there was any actual bias in members of an administrative body exercising judicial functions, nor was the extent or presence of such bias material for the principle enacted in this case; it was to ascertain whether there was bias on 'reasonable grounds', which is a series of undefined principles which are inclusive of Human Probability and Ordinary Course of Conduct, insofar as to establish the intent and motive behind the actions taken by people. These reasonable grounds should be understood by the average person, and using ordinary logic any other person should be able to derive a similar result. Thus, more so than actual bias, it was deemed necessary to prove that no bias or inclinations in adjudication processes should be permitted, save those biases emerging from justifiable, qualified grounds.

[1233] Rawls, John A Theory of Justice (1999) Harvard University Press. p. 118. ISBN 0-674-00078-1. ; Rawls, John Justice as Fairness: A Restatement (2001) Cambridge, Massachusetts: Belknap Press
[1234] (1976) 3 SCC 585

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Furthermore, in matters necessitating adjudication emerging as a result of group deliberations in this case, a question was posed with respect to the autonomy of persons engaged in deliberations, wherein it was held that the members of said groups were not deemed to operate mechanically like computers, but each member was bound to have influence over the others due to the degree of social interactions between persons; a more so if the member is question had any special knowledge or skill regarding the matter, *ex-officio* or through the acquisition of some skill; for such a member's influence is deemed to be more subtle, and imperceptibly may direct the decisions taken by other members of the body due to their higher degree of understanding. These persons are deemed to hold enormous sway over the affairs of the Adjudicating authorities, hereinafter making their role in the decision process suspicious due to the nature and extent of their control, irrespective of whether such control manifests in reality.

The *Cantonment Executive Officer vs Vijay D Wani*[1235] supports such a verdict, for the case involves 3 members of an enquiry committee regarding the guilt of the respondent in an internal dispute, and these members were also acting as members of the Cantonment Board which exercised quasi-judicial functions and adjudicated upon the guilt of the respondent from a lower appellate tier. The court believed in the presence of a real apprehension of the bias of the judges existed in the instant case, for these judges had reviewed the accused at different appellate stages of decision making; and it was unfair to assume that there wouldn't be bias from these persons, as it was believed that their original decision was based upon their capacity to conduct and enact their powers. No individual would prefer their verdicts overridden by another authority, especially if they can act as members of such higher authorities and avert this action, and therefore, it was difficult to assume that there was an absence of bias in decision making if the same persons addressed the same dispute at multiple stages of an appellate hierarchy.

Supplementing the aforementioned cases, the *A U Kureshi v High Court of Gujarat*[1236] held that no judge should adjudicate a dispute in which he has previously dealt with in any capacity other than purely judicial natures and functions; additionally, any person operating on administrative functions should not have a role in the hearing of the same case on the judicial side. This restricts the encroachment of powers and duties by State functionalities into the domain of others, for the enactments and decisions must not be supervised by the same personnel as those dispensing quasi-judicial functions. This would create a circular authorization mechanism, wherein the persons committing breaches of state duty may be permitted to continue doing the same breaches by themselves due to these individuals holding rights and powers over both Quasi-Judicial and Judicial entities. This contravenes the essence of Natural Justice under Article 14 of the Constitution, which also protects the citizens from arbitrary actions and decisions by the State.

[1235] (2008) 12 SCC 230
[1236] (2009) 11 SCC 84

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In addition to the above cases, the *Ratan Lal Sharma vs Managing Committee Dr Hari Ram Higher Secondary School*[1237] classifies 3 kinds of bias for recognition and elimination; *Personal* (based upon the pecuniary relations between those involved in the case or the dispute resolution process) , *Pecuniary* (based upon the pecuniary relations between those involved in the case or the dispute resolution process) and Official (based upon the professional relations between those involved in the case or the dispute resolution process); and to hereby prove bias, there needs to be a reasonable apprehension in the minds of an intelligent person that a member of an administrative tribunal or body has also operated in a manner which materially impairs their ability to adjudicate this dispute as a fair, neutral entity; a bias is said to emerge when deciding the final verdict or decision, and such a bias need not actually manifest in the proceedings, but may provide apprehension in the minds of intelligent persons; so emphasis is used the determine not what *was*, but the problem *what appears to be* or *risks becoming*; and if either circumstance makes a reasonable person unable to trust in the decision making powers of the state, Natural Justice is said to be violated, even if such a violation is purely ethereal (so long as it can be validated in court).

Finally, the *Manak Lal vs Orem Chand Singhni*[1238] case reiterates a similar series of principles, wherein it was held that every member of a body or tribunal which has both administrative and judicial functions, while discharging quasi-judicial functions must only operate on judicial principles and proceedings and recuse elements from their executive powers, in order to remain unbiased and therefore capable of validly adjudicating the dispute in the quasi-judicial capacity alone.

The *Manak Lal Case* shows how the Board of Approval must operate on Principles of Natural Justice when hearing an appeal, and therefore cannot allow the Development Commissioner to sit on the same panel if he had passed a verdict in the Approval Committee, since the ordinary discharge of his functions appears to contravene the Constitution (under Article 14 and Article 311), thus the decision may be vitiated due to the operation of the '*nemo debet iudex in sua causa*' principle. The *AU Kureshi case* prevents the Development Commissioner from acting as a judge and passing quasi-judicial decisions on a case wherein he has been previously involved as an administrative authority. The newer *Ratan Lal Case* shows how there can be a reasonable apprehension that the Development Commissioner, having discharged his administrative functions along with the Approval Committee in passing the original order, would be interested in influencing the final verdict of the Board of Approval in favour of the original decision passed by the Committee, which is a judicial function, which is enough to show bias.

The *Cantonment Executive Officer case* shows how the Development Commissioners need not constitute a majority in the Board of Approval or have any authority or position in the Board of Approval (eg. Chairman) to be able to influence the verdict, their very presence and prior

[1237] (1993) 4 SCC 10
[1238] 1957 AIR 425

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experience / expertise in the matter elevates their default standing and influence with the remainder of the committees, and therefore it can be assumed that even one member of the Board of Approval would be trying to have their observations accepted at the higher appellate level. Finally, the *G Sarana Case* describes how such a wrongful bias can be inferred from the actions of the Development Commissioner in trying to pass the same order in the Board of Approval as he had passed in the Approval Committee due to human probability; and since the case states that each member of a group discussion has the potential of influencing the others, and the Development Commissioner in particular has more knowledge about the client's case on account of both having extra administrative powers through the Act and the Rules, as well as being the Chairman of the Approval Committee which acts as the lower appellate body. Therefore, this case allows for the belief that the Development Commissioner is in a position to influence others more subtly and has a greater predisposition to do so than normal circumstances.

CONCLUSION

A cumulative reading of all aforementioned cases leads to an elaborate, yet definitive indication that the Appellate hierarchy of the Board of Approval, Approval Committee and Development Commissioners is highly suspect due to the repetition of the presence of the Development Commissioner in all 3 stages.

In this regard, it would appear that the Nature of all the aforementioned Appellate structures would be compromised due to the prolific presence of potentially wrongful bias, for the Specialised roles and information of the Development Commissioners gives them an edge in the understanding and interpretation of the various applications for licenses and letters of approval; which compounds their already substantial influence over the remaining members of the Board, which may have even conferred extra indeterminate powers upon the Development Commissioner under Section 9 of the Act. This allows them to almost dictate terms to their peers, and there is no certainty that they would be willing to overturn their own orders as *ex* officio members of the Board of Approval, passed either acting under their own capacity as Development Commissioners, or as *ex officio* Chairpersons of the Approval Committee, for doing such will equate to admission of incompetence, which is unacceptable and may result in subsequent removal of the persons from the post.

This vitiates the very purpose of Justice, as neither principle of Natural Justice can actually be recognised; *nemo debet iudex in sua causa* is quite literally violated, with the same person being authorized by the Act to analyse the validity of their own cases while addressing disputes and adjudicating on appellate matters; and *audi alteram partem* as seen in the language of Provisions such as 15(4) and 16(4) of the Act is effectively nullified, as the right to be heard becomes a sham when done before the same person at multiple iterations and multiple tiers of said appellate structure, rendering any chances for fair hearing useless if there is even a suspicion of bias held by the Development Commissioner who has already been proven to have valid and vested reasons to be biased.

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Therefore, the lack of Natural Justice in the SEZ Act 2005 read with the SEZ Rules 2006 appears to be *ultra vires* the mandate of the Constitution, which enforces the need to abide by due process of law (Article 21), the need to avoid arbitrariness (Article 14), as well as the need to prevent the undue deprivation of one's rights without a chance to be aware of the reasons for such deprivation paired with the right to be heard with respect to such reasons (Article 311). Such a breach fails to maintain fidelity to the shared principles and history that is maintained between Common Law States, and is in need of serious recalibration, even more so given the absence of circulars or notices regarding the intricacies of the hearings and meetings between the entities, rendering it difficult to acquire any real information regarding the extent of the harm caused due to these improprieties in the law.

It is difficult to elaborate on the nature and extent of such a recalibration, for it involves a substantial array of amendments to the existing laws in such manner and form that the legislative intent behind the enactments is not discarded; for the Act in itself follows a valid purpose, and was enacted lawfully as per procedure, which does not equate to Colourability of the enactment due to the absence of illegality in the purpose and procedure of law[1239]. The removal of the Development Commissioners as *ex-officio* members of the Board of Approval, and relegation of their status to be similar to *amicus curae* may be a method to ensure the valid transmission of the information held by the Development Commissioner to the Board though the form of material evidence or professional opinions, while preventing them from influencing the voting procedure or the decision making process itself. In addition to this, alterations to the procedure for acquiring licenses or letters of approval, to allow direct submissions to the Approval Committee, without having to use the medium of the Development Commissioner, which will make the issuing and primary admitting authority the same, reduce the amount of red-tapism, while also ensuring the Development Commissioner can discharge various functions and continue to act as an interface with the manufacturers / traders who wish to conduct business in the SEZs.

Irrespective of the actual solutions themselves, it will be essential to reconfigure the Act to remain consistent with the Principles of Natural Justice, because the author concludes that in its present form, the authorities governing the Special Economic Zones in India are acting beyond the scope of the Constitution by violating these aforementioned principles, namely *audi alteram partem* and *nemo debet iudex in sua causa*. Such deviance is impermissible, for the Constitution functions similar to the *Grundnorm* and acts as the repository of all rights, duties and functions of the Indian State, Polity and Citizenry, and to permit the continuation of such deviance is to commit an arbitrary act which causes a continual deprivation of rights without reasonable chance of being heard before a valid forum. Preservation of Justice has been the goal for most civilized societies, and such must be continued in the Modern Indian legal system.

[1239] MSM Sharma v Shri Krishna Sinha 1959 AIR 395

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ANTI- DEFECTION LAWS

- *Simran Chawla*[1240]

INTRODUCTION

The Constitution of India is essentially a social record with a political philosophy, intended to realize incredible changes in the financial structure and to accomplish the goals of national solidarity and security. It gets its power from the general population and has at its base a value system. Its introduction or the preamble discusses the power of individuals, majority rule, commonwealth, equity, freedom, balance and crew guaranteeing the nobility of the individual and the unity and uprightness of the country.

After the initiation of the Constitution, be that as it may, it did not take years for political functionaries to give a false representation, to a great extent, to the expectations of the composers. Particularly after the departure of Nehru, the nation saw a sharp decrease in political quality and appropriateness and a political defilement of sorts. The most exceedingly awful type of corruption that arose on a monstrous scale on the Indian Political Scene was the absconding of legislators, whether independently or in groups. The corrupt floor crossing was only a disloyalty of the electorate and undermining of the political organs of the state. The desire for influence, position and cash was clearly behind such abandonments or defections.

"Political defection" is a political phenomenon in which a representative who is elected as a member of a particular party, changes his fidelity or obedience. The representative does this without giving his resignation.

There are various MLAs and MPs, who never leave a chance of changing their allegiance just for the lure of money or a higher position. Such representatives are known as "defectors". When the situations like changing of a party or changing of group, shifting of loyalty, fidelity, fealty and obedience from one party to another is termed as "defection". This situation is likely to arise within the legislative chambers. This situation is also known as "crossing of floors".

BACKGROUND

To remove this atrocity of defection, Rajiv Gandhi (the then Prime Minister of India), proposed a bill. After various discussions over the bill, it was passed by the Parliament. As a result, the Anti-defection Act was introduced through the 52nd amendment, and came into existence on 1st April, 1985.

[1240] Amity Law School Noida

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During the time of multi-party democracy in 1950s and 1960s, the implications and the heat of defections could not be felt. However, the issues of various defectors were not addressed immediately. Therefore, it took further 17 years to pass the Anti-Defection Law in 1985.

Under 52nd amendment of the constitution, the Tenth Schedule was added in the Constitution in the year of 1985. It provides for the provisions as to disqualification on the grounds of defection.

52nd Amendment Act

Under this Act, the articles 101,102,190 and 191of the Constitution were amended. It laid down the process by which the representatives may be disqualified on the grounds of defection.

This new Schedule was added in the Constitution regarding vacation of seats and disqualification from the membership of Parliament or State Legislatures.

For the disqualification of the members from the House of the Parliament, there are following grounds under which the member can be disqualified:

1. If a member, intentionally, resigns from his post or gives up from the membership of any party or a group on whose ticket the member has been elected to the House.
2. At the point when the member does not vote or abstains from voting in the House. If the member has taken earlier authorization, or is supported by the gathering inside 15 days from such voting or abstention, the part should not be precluded.
3. If any nominated member joints any political party after the expiry of a half year from the date on which he sits down in the house.

Also, a member would be disqualified who joined a political party, if he has been elected as an "independent".

Exceptions

However, the above disqualification will not apply in following cases:

1. If a member goes out as a result of a merger of his original political party with another political party with the condition that 2/3 of the individuals from the governing body party have consented to such merger.
2. If a member, after being elected as a speaker or chairman or any presiding officer, gives up on the membership of the party to which he is a current member, or in case does not join that party or becomes the member of any other party.
3. If a member who has abandoned his post of a speaker or a chairman could re-join the party even if he has resigned the post.

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The Constitution 91st Amendment Act (2003)

There was an exemption given to the one-third of the defectors, that, from any political party, they shall not be disqualified under the defection law. Now, two-thirds of the members of a political party have to be in favour of the 'mergers'. This is a necessary condition for it to make valid in the eyes of the Law.

The amendment has also provided that any member who is disqualified under the Anti-Defection Laws can neither be appointed as any Minister nor can hold any remunerative post in the political party from the period of disqualification.

The members under Anti-Defection Laws have to now resign from their legislative membership. The member will stay disqualified till the term he is re-elected to a House or till the time of expiration of the House. In case of defect, they have to undergo either of these situations, depends on whichever is earlier.

Also, this amendment restricts the size of the Council of Ministers to aid and advice the President.

The decision of the speaker or the chairman shall be final in any case if the question arises as whether a member of any political party can be a subject to the disqualifications under the Anti-Defection Law. In any case, if the speaker or the chairman is the subject to disqualifications under this law, then the decision shall be given to the members of such House.

The presiding officers of the House are required to make rules for offering impact to the provisions of the schedule. It is mandatory for the House to approve these rules for further proceedings. When these rules are wilfully infringed then they may be treated as the privilege of the House and be punished accordingly.

PROVISIONS

There are various provisions to combat "the evil of political defections". These provisions are:

- If a member or the Parliament or State legislature voluntarily quits the party can be disqualified from whichever party he belongs to.
- A member of a particular party cannot abstain from voting or even cannot vote against his party, else he can be disqualified.
- A member cannot be the subject to disqualification on the grounds of abstinence from voting if he has taken up the prior permission from his respective political party. It should be done before 15 days of the voting.
- If a member of any political party is voting in the session without the prior permission of his party, then the member can be disqualified on this ground.

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- If a nominated member joins any political party after six months from the date he presumes his position shall be disqualified in the Upper House.
- It will not be considered as the case of defection if two-third members of any political party merge with another political party.
- A member of any political party who is disqualified under this Act will not be provided any office of profit.
- Under Anti-Defection Law, the size of the Council of Ministers gets restricted. Since it shall not exceed the strength of 15 per cent of the total members of the State Legislature and the Lok Sabha.
- If a member of any political part has been alleged under the Anti-Defection Law, the Speaker can take the action against it.
- For the implementation of these laws, the chairperson of the State Legislature is responsible and is permitted to frame the rules.
- If a member of any political party joins any party after defection then he shall be disqualified on the grounds under Anti-Defection Law.

If the party of any member merges with that of any other political party under this law, then the member shall not be the subject under the grounds of disqualification.

If any presiding officer of the State Legislature or the Speaker of the two houses i.e. Rajya Sabha and the Lok Sabha, or the deputy chairman, quits their original party then the cannot be disqualified on the grounds of this law.

A member of any political party, who is the subject of disqualification under Anti-Defection Law, can challenge the orders of the Speaker in the Court.

CHALLENGES AND INTERPRETATIONS

Under the Anti-Defection Law, several questions arise. The Courts and the presiding officers were the only ones who were answerable and accountable to all those questions. The three main questions that arose were:

Question 1: Does the law intrude on the right of free speech of Legislators?

In the year of 1992, this issue was looked after by a five-judge Constitution bench of the Supreme Court. The Supreme Court states that "the Anti-Defection Law seeks to recognise the practical need to place the proprieties of political and personal conduct and all these are above certain theoretical assumptions".

It was also stated that no law can violate any rights and freedoms of the democratic public. Also, the basic structure of the Parliamentary Democracy cannot be challenged or there cannot be any lapse in this doctrine.

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Question 2: How can a member of any political party resign "voluntarily"? What all constitutes "voluntarily"?

There were various judgements and orders which say that if a member of any political party opposes or insults his party publically, he can be liable under different charges and have to resign from his existing party there and then. Also, news reports can be used as evidence under this purpose.

Question 3: Can the verdicts of presiding officers be challenged?

The law states that if any presiding officer is giving a decision then that will be considered as final and will not be a subject of any judicial purpose. It was stated by Supreme Court that there will not be any judicial intervention on the decision of the presiding officer unless any other presiding officer or he himself gives the order. The final decision is the subject to be appeal in the High Court or Supreme Court.

There were few more issues for consideration and those are:

Issue 1: Should the law be legitimate for all votes or just for those who decide the steadiness of the administration?

The main intention of the law was just to determine "the evil of political defections" by the members of State Legislatures just for the benefits or the lure of money. Also, according to a report, it was seen (last year) that the loss of the membership is hardly a penalty for the members just before the time of the general elections. In case of the dissolution of the House, there is a great loss of significance. On the other hand, the issues which are not even related to the stability of the Government can also be affected with the voting behaviour. There is a chance that a member may not be able to give his expression to the fullest, of his actual beliefs and the interests of his Constituency. Thus, it can lead to a case of confidence or no confidence motion.

This change was recommended by a committee on electoral forums of that time, namely, "Dinesh Goswami Committee" in the year of 1990. But contrary to this, the Law Commission proposed that the political parties issue whips when the Government was in peril.

Issue 2: Should the law apply to the pre-poll alliances?

The method of reasoning, that a delegate is chosen based on the party's program, can be stretched out to pre-poll alliances. This change was a mere suggestion of the Law Commission along with a condition that the partners belonging to these alliances will inform the Election Commission about it prior to the elections.

Issue 3: Should the judgement be made by the presiding officers?

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With the passage of time, this issue was raised by several MPs and MLAs. The Dinesh Goswami Committee, the Election Commission and the Venkatachaliah Commission, the committee on the review of the Constitution (2002) proposed that the verdicts should be made, on the advice of these commissions, by the President or the Governor. This would likely be the procedure for disqualification on grounds of office of profit.

At present, many legal provisions exist related to these issues without any ambiguity.

CASE STUDY

A petition was heard in the case of the "Kihotto Hollohan v. Zachilhu and others[1241]" under which the Tenth Schedule introduced by the Constitution Act, 1985 was challenged.

This amendment is referred to as Anti-Defection Law. Under this law, the Court has the rules that if a member is alleged to be disqualified by the speaker's order of disqualification on such grounds then the subject is a matter of Judicial Review. Some of the best lawyers of the Nation were chosen to be the part of the counsel to study the case with utmost proficiency.

Various contentions were raised under this case. Out of which, the most important was the violation of the basic structure of the Fundamental Rights of the Parliamentary Democracy. The fundamental dispute was that each parliamentarian must have the privilege to take after his own particular soul and feeling of judgment and not really with the strategy of his political party.

From the very beginning, there arose a big question which was, "Would there be any immunity given to a member of any political party who is a defector for the lure of money or benefit?"

The majority decided the case in favour of the constitutional validity. It was stated that with the passage of time, the Constitution has become flexible enough to provide the compulsions or provisions over the arising issues. The freedom of speech is a birth right to every citizen but not an absolute right of a member of any party who can publically say this that he will vote against his party. If a representative has taken up a label then he should reciprocate it to the party.

The abstention of this right as a result of disqualification is a reasonable restriction since it is in the interest of public morality. Political defection in lure of money or the office is a corrupt being practice in the Nation.

The minority held that there is a violation of the basic structure of the Constitution.

The next question in the consideration requires ratification that whether the 'para 7' of 'Tenth Schedule' stands constitutionally valid or not?

[1241] AIR 1993 SC 412

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The Supreme Court struck down 'para 7' of 'Tenth Schedule' which provided that the decision of the Speaker on the disqualification of any member shall be final. Also, no Court could examine its validity.

The court, reacting to this, has attested that as a settled standard of statutory development an arrangement can have no repercussion on the elucidation of the primary order. The minority also point out and said that the para 7 is the integral part of the amendment and cannot be severed from the tenth schedule.

Another major contention was on the 'para 6' of the 'Tenth Schedule' which talks about the "finality clause". It excludes the jurisdiction of the Court and immunes the speaker from the Judicial Review.

In India, this area of the Tenth Schedule is considered to be the non-justifiable part, since, a dispute related to the judicial review exists. The Speaker or the Governor, an independent authority which does not belong to the same party, gives the final decision for the defectors of any particular party.

The judgement, regarding this particular issue, focuses on the judicial power. It states that if a judicial power is given under any statutory authority the power of that authority extends only to the framework of the given provision and not beyond that. Until, the decisions fall within the purview of the provisions, they will be considered as final. The Court restricts its powers when it comes to the judicial review.

If in case the decision is illogical in terms of provisions and the liable appeals in to the upper Court then the same would be beyond the boundaries of the judicial power and will be a subject to the jurisdiction of the appreciated Court.

The main purpose of the Anti-Defection Law is to curb defections. The Anti-Defection Law, when it was passed, was a striking advancement in the Indian situation, yet now with the progression of time certain escape clauses appear to have risen in the law, trading off its adequacy.

Another issue, which was the biggest hindrance in the case, was that the Speaker does not often exercise his/her powers in determining whether the person is liable or not for the act of defection.

There has been scepticism in the minds of the public that the Speaker at times takes the decision in respect with their political expediency. Because of this, the adjudication of the Speaker becomes extremely impartial on the disqualification of the defectors with particular grounds. It was said by the Supreme Court that the Anti-Defection Law has stirred up many more controversies than it has solved.

Any member, set up by a political party, thereafter getting elected in the House of Legislature and dislodged by the party for any reason, becomes an "unattached member" of that particular

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party. In response to this, there arises one more question, that, in case if he joins another political party and incurs the same and gets disqualified from that party, then will he be punished under the Tenth Schedule?

The Supreme Court answered that question in the affirmative. The Court stated that the same benchmark is to be applied in the situation if the member gets independently elected for one more time.

In the event that the present framework is to proceed, the Supreme Court needs to accept considerably the extensive power of the judicial review over the decision of the Speaker under the Anti-Defection Law, under the formulation of Kihotto Hollohan Case.

One part of the Anti-Defection Law should be brought up. Prior to the beginning of the Tenth schedule a 'political party' was never perceived under the Constitution yet now their reality is recognized under the Anti-Defection Law.

COURT'S INTERVENTION

All procedures in connection to any inquiry on disqualification of any individual from a House under this Schedule are regarded to be procedures in Parliament or in the Legislature of a state. No court has any Jurisdiction over it. This was along these lines struck around the Supreme Court. At present, the Anti-Defection Law comes under the judicial review of courts.

CRITICAL ANALYSIS OF ANTI-DEFECTION LAW

The Anti-Defection Law has empowered political parties to have a more grounded grasp on their individuals, which ordinarily has come about into avoiding them to vote for the lure of money of ecclesiastical birth. It additionally gives solidness to the administration by anticipating movements of party fidelity and guarantees that candidates elected with party support on the basis of party manifestoes stay faithful to the party. Be that as it may, it has likewise come about as its unintended result i.e. the diminishing to a specific degree the part of the MP or individual from State Legislature. It has concluded into absence of useful level headed discussions on basic strategy issues. The whip has turned into being more effective and must be followed in all conditions.

REFORMS REQUIRED IN THE ANTI-DEFECTION LAW?

The Anti-Defection Law has to adopt various reforms so as to remove the critiques from the law itself. These reforms are:

- There should be a check on the judicial review of the Speaker or the Chairman or any independent authority outside the political party. This point has been critically appraised various times, since it forces public to think that the Speaker may be biased towards making the decisions due to political expediency.

- According to a report, the phrase "voluntarily giving up" is unsuitable in various situations and circumstances. It has been said that this phrase is vague and it needs comprehensive revision.
- Political parties should constrain issuance of whips to occurrences of when the legislature is in peril.

It can be presumed that hostility to Anti-Defection Law should have been corrected to be in consonance with current actualities and conditions. In any case it depends more on the legal interpretation of such law. The danger of debasement or corruption and bribe is yet to be cured which is no place managed in the Tenth Schedule. The power given to the Speaker can be practiced discretionarily as his decision will be considered as final. Along these lines, in a way, all rights are being given away to parliamentarians, which should not be the situation in a democratic country like India.

CONCLUSION

Political defection is a process or a phenomenon of voluntarily leaving a political party for personal benefits. These benefits could be in any form like lure of money, upper position in the House, popularity etc. Any member who leaves the party to get into some another party is known as a "defector". The representative practices this without giving his resignation. It is basically a disloyalty or unfaithfulness towards the nation. In simple words, it is the corruption done for the well-being of oneself.

After various discussions over the bill, it was passed by the Parliament. As a result, the Anti-defection act came through the 52nd Amendment, came into existence on 1st April, 1985.

Under 52nd Amendment to the Constitution, the Tenth Schedule was added in the constitution in the year of 1985. It provides for the provisions as to disqualification on the grounds of defection.

There are various grounds under which a member can be a subject of disqualification. Like, if a member is intentionally or voluntarily leaving a party to step into the office of profits. Also, if a person abstains from voting for the party to whatever he belongs and publicise the fact the he wants to be a member of any other party.

Various exceptions exist, to these grounds of disqualification.

In 2003, another amendment took place in the constitution, namely, 91st Constitution Amendment Act. The members under Anti-Defection Laws have to now resign from their legislative membership. The member will stay disqualified till the term he is re-elected to a House or till the time of expiration of the House. In case of defect, they have to undergo either of these situations, depends on whichever is earlier.

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The decision of the Speaker or the Chairman shall be final in any case if the question arises as whether a member of any political party can be a subject to the disqualifications under the Anti-Defection Law. In any case, if the speaker or the chairman is the subject to disqualifications under this law, then the decision shall be given to the members of such House.

To every issue that is likely to be raise by any member or any individual, there are various provisions that are to be provided to them so as to practice a fair means of law. Several issues and questions were aroused in this case such as what constitutes voluntarily in giving up? What if the decision of the speakers be challenged?

There was a leading case named, Kihoto Hollohan Case, under which each and every issue and question has been properly taken into consideration and answered.

In the end, every law has its disadvantages along with the advantages and can be reformed only if the critical appraisal is properly observed and followed by the law makers.

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FEMALE GENITAL MUTILATION – A NEED FOR A SEPARATE LEGISLATION TO CURB THE PRACTICE

- *Niharika Avvaru*[1242]

ABSTRACT

Female genital mutilation, also sometimes known as "female circumcision", includes all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious, or other non-therapeutic reasons". It is widely practiced in African countries and few areas of India among the Shias. Millions of girl children are victims to this practice.

This practice is usually undertaken by a traditional midwife or a senior member of the house of community and is practiced with sharp objects like knife and blades which cause severe pain and takes a lot of time to heal.

This paper mainly highlights, what female mutilation is and why is it practiced. It further stresses on how it is a violation to human rights of women and various international agreements which help prevent such practices. These include, United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, African Charter on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child etc. Further this practice is a violation of Article 14 and 21 of the Indian Constitution.

The main reason why it is practiced is due to patriarchal norms and conservative and religious beliefs of people. They believe that it makes a girl 'pure'. It puts women to sever torture and makes her suffer from immediate like bleeding and long term effects including mental trauma.

There is a dire need to eliminate this practice.

INTRODUCTION

Female genital mutilation, also sometimes known as "female circumcision", includes all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious, or other non-therapeutic reasons".[1243] This definition was adopted by the WHO Technical Working Group Meeting on Female Genital Mutilation. This definition includes the physical, psychological, and human rights aspects of the practice. It is practiced for socio cultural reasons as opposed to medical reasons.

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[1243] Ronán M Conroy ,Female genital mutilation: whose problem, whose solution? http://www.jstor.org/stable/pdf/40699355.pdf?refreqid=excelsior%3A51cb8c1a7566ffb2b60688ea478825f3

The origin of this practice is this unknown but some scholars identify, Ancient Egypt as the first origin due to the discovery of incised mummies of the fifteen century BC. Other scholars also propose that this practice was practiced by the Romans to prevent their female slaves from pregnancy. [1244]

This practice is seen to be practiced very prevalently in African countries, parts of Middle East, Asia and the Pacific by ethnic and religious groups. It is also practiced among some immigrant populations in Europe, Australia, Canada and United States of America. Minority religious groups of India, among the Dawood Bohras, and the Muslim population of Malayasia and Indonesia also conduct this practice.

Female Genital Mutilation is practiced in these countries for three main reasons. The first one is "marriageability" of a women which observed this practice as a rite of passage to womanhood, as the girl approaches puberty and 'becomes a woman'. It serves as a proof that such women is a virgin before marriage and signifying their commitment to wealthy men of their society. It ensures" morality" of a women in matters of sexual activity which shows obedience and respect needed for marriage. Further it is believed that, such incision reduces the sexual desire or pleasure of a women and thus prevent them from indulging in extra- marital affairs.

The second reason that, it is a means of solidifying ones "cultural identity" and transition to being an "adult member of society." In few communities, this practice is seen as a "rebirth" and non compliance with this tradition would amount to social boycott from the community.

The last reason is to protect the health of the women. They believe that removal of the external genital organs 'cleanses' a girl and is more hygienic and will avoid unpleasant genital secretions and odours as she matures. It is further deemed a beautifying procedure, to remove 'masculine' aspects of a girl's or woman's body. In addition to this, many communities, believe that removal of these genital organs makes the women 'pure' and physical contact of such part and the baby may be catastrophic for fetus during birth.

Female Genital Mutilation is undertaken historically by a midwife or a senior member of the family or community (often a grandmother). But in present times, it is increasingly being performed in health care facilities by qualified medical personnel like nurses or practitioners.

VIOLATION TO HUMAN RIGHTS OF WOMEN

Female Genital Mutilation is recognized as a violation to human rights.[1245] Inter-African Committee on Traditional Practices (IAC) states that "*the practice also violates a person's rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death."*

[1244] Jewel Llamas, Female Circumcision: The History, the Current Prevalence and the Approach to a Patient https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf
[1245] Hans Raj Chauhan v State of Haryana, (2014)

There are various international agreements in place that are legally binding on the parties (States) and which prohibit the practice of female genital mutilation. They promote the rights of women and specifically address discriminatory traditional and religious practices. The Convention on the Rights of the Child protects the right to gender equality, and article 24.3 of the convention explicitly requires states to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children. Similarly, there are regional human rights agreements such as the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child which protect women and children against harmful traditional practices. Article 18 of the African Charter on Human and Peoples' Rights specifically requests states to "ensure the elimination of every kind of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."

Article 21 of the African Charter on the Rights and Welfare of the Child obliges United Nations Convention on the Elimination of All Forms of Discrimination Against Women state parties to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child. The Program of Action of the International Conference on Population and Development (ICPD) held in Cairo in 1994 also included recommendations in regard to female genital mutilation, which commit governments and communities to "urgently take steps to stop the practice of female genital mutilation and to protect women and girls from all such similar unnecessary and dangerous practices."

The Platform for Action of the World Conference on Women also included a special section on the girl child and urged governments, international organizations, and nongovernmental groups to develop policies and programs to eliminate all forms of discrimination against the girl child, including female genital mutilation.[1246]

The practice has immediate as well as long term effects on the female. The health effects of Female Genital Mutilation depend on the extent of cutting, the skill of the operator, the cleanliness of the tools and the environment, and the physical and psychological state of the girl or women. The WHO summarizes these hazards in this way: "*No health benefits, only harm"*[1247]

Female Genital *Mutilation* has no health benefits, and it harms girls and women in many ways. It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls' and women's bodies. Generally speaking, risks increase with increasing severity of the procedure.

The immediate effects include Immediate physical complications include hemorrhage and severe pain, excessive bleeding, swelling, inflammation in the genital areas etc and in some cases,

[1246] Efua Dorkenoo,Combating Female Genital Mutilation: An Agenda for the Next Decade Introduction http://www.jstor.org/stable/pdf/40003401.pdf?refreqid=search%3A26be7c7ac4ed70f08e1017e18191547b

[1247]WHO, Health risks of female genital mutilation (FGM) http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/

death. Acute urinary retention and infections are common. Injury to adjacent tissue of urethra, vagina, perineum, and rectum can result from the use of crude instruments.

The long-term complications include keloid scar formation, the formation of dermoid cysts and clitoral neuroma, dyspareunia (painful intercourse), chronic pelvic infections, and difficulties in menstruation as a result of partial or total occlusion of the vaginal opening, problems in pregnancy and childbirth etc. Apart from this, the female may face severe psychosexual and psychological mental issues like Post-traumatic Stress Disorder (PTSD) and depression. This might create a lifelong impact on her mentally.

Due to these health effects, it's a violation of the women's right to health, security, right to be free from torture etc. Female genital mutilation also amounts to exploitation of women.[1248]

TYPES OF FEMALE GENITAL MUTILATION

The WHO Technical Working Group came up with 4 types of female genital mutilation. Type I, known as clitoridectomy, includes partial or total removal of the clitoris and/or the prepuce ie, the skin that surrounds the clitoris. Type II, known as excision, includes partial or total removal of the clitoris and the labia minora (inner folds of the vulva), with or without excision of the labia majora (the outer folds of the skin of vulva). This is the most common type of female genital mutilation and constitutes to 80% of all the genital mutilation practices.[1249] Type III, referred to as infibulations, involves narrowing of the vaginal opening with creation of a covering seal by cutting and repositioning the labia minora and/or the labia majora, with or without excision of the clitoris. In this type, the raw edges of the labia majora are stitched together with thorns or silk, so that when the skin of the remaining labia majora heals, a bridge of scar tissue forms over the vagina. A small opening is preserved, by the insertion of a foreign body, to allow the passage of urine and menstrual blood to flow. Due to such foreign body, sexual intercourse becomes difficult and the opening needs to be cut and such women has to undergo gradual dilatation by her husband over a period of days, weeks, or months to allow for penetrative intercourse. This process is very painful, distressing and damages sexual skin. This can also be very harmful while giving birth to a child. This type is the most extreme form and constitutes to 15% of all the Female Genital Mutilation practices and is widespread in Somalia, northern Sudan, and Djibouti. And lastly type IV, is a new category that encompasses other surgical procedures, including manipulation of the genitalia for non-medical purposes. These include pricking, piercing, or incision of the clitoris and/or labia, stretching of the clitoris and/or labia, cauterization by burning of the clitoris and surrounding tissue, scraping of the vaginal

[1248] The Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors, (2000) AIR 988
[1249] Efua Dorkenoo,Combating Female Genital Mutilation: An Agenda for the Next Decade Introduction http://www.jstor.org/stable/pdf/40003401.pdf?refreqid=search%3A26be7c7ac4ed70f08e1017e18191547b

orifice, cuts into the vagina and introduction of substances into the vagina with the aim of tightening or narrowing the vagina. [1250]

FEMALE GENITAL MUTILATION IN INDIA

Female Genital Mutilation is practiced in India by a small community known as Dawoodi Bohra community. They are a Shia Muslim sect, Ismailis branch and their population is only about one million in size, with most settled in western India, and smaller communities in other countries.

The Bohras are regarded as modern and very well progressed. They are very educated and also encourage education of a female child. But they are still blinded by their customs and follow such a harmful and conservative practice. They practice Type-I and IV Female Genital Mutilation and it is called "khatna".

The Supreme Court of India, in a petition said, "The practice of 'khatna' or 'Female Genital Mutilation' or 'Female Circumcision' or 'khafd' also amounts to causing inequality between the sexes and constitutes discrimination against women. Since it is carried out on minors, it amounts to serious violation of the rights of children as even minors have a right of security of person, right to privacy, bodily integrity and the freedom from cruel, inhumane or degrading treatment. It violates the rights of the child and human rights.[1251]

This issue was further raised by Congress MP, Shashi Tharoor in the Lok Sabha on 20th July 2018. He proposed for a separate legislation to curb this practice. But Virendra Kumar, Minister of State women and child development, said that the existing laws of Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and Prevention of Children from Sexual Offences Act, 2012 (POSCO) etc are sufficient enough to provide necessary safeguards against this practice.

Section 319 to 326 of Indian Penal Code (IPC), 1860, provides for different degrees of bodily harm and hurt. And Section 324 and 326 provides for penalties of imprisonment or fine or both for acts "voluntarily causing hurt" and "voluntarily causing grievous hurt"[1252]. Further Female

[1250] Abantika Ghosh, Understanding female genital mutilation: the practice and the issues https://indianexpress.com/article/explained/understanding-female-genital-mutilation-the-practice-and-the-issues- fgm-4659216/

[1251] Hans Raj Chauhan v State of Haryana (2014)

[1252] Section 324 of IPC: "Voluntarily causing hurt by dangerous weapons or means.-- Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."
Section 326 of IPC: "Voluntarily causing grievous hurt by dangerous weapons or means.--Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or

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Genital Mutilation is not explicitly an offence under the IPC but a complaint can be filed under Section 326 of the IPC as it amounts to grievous hurt caused by weapons voluntarily.

Section 3[1253] of the POSCO Act, 2012 discusses penetrative, complete or incomplete, sexual assault which is insertion of an object into the vagina of a girl. This section needs to read with Explanation 1 of Section 375 of IPC which states that rape is committed if a sharp object in penetrated through the vagina or other private parts of a female.

National Policy for Children, 2013 brings upon an obligation on the state to take affirmative measures to provide safeguards to children to live with dignity, freedom and prevent customs, traditions to violate their rights, provide for rehabilitation and reintegration of victims. To ensure this, the state has the power to enact legislations, bring upon child protection system, like emergency outreach services etc.

An Integrated Child protection Scheme was launched in 2009, by Ministry of Women and Child development, aims to improve include health, education, judiciary, police, and labour, and other services for the protection of vulnerable children. Their objective is to provide institutions for counseling of children and protect them from situations of vulnerability, risk and abuse. Children's under this system enjoy privacy and confidentiality as well.

The lacunae in these laws is that, they don't address various other issues relating to Female Genital Mutilation including spread of awareness, penalizing those who abet, aid, propagate such practices, duty to report such cases and address on how victims to this practice can be rehabilitated and assisted.

The provisions of the IPC, mainly penalizes the prosecutor but doesn't specify the means of restoring the mental status of the victim. Thus, there is a need for a new law curbing this practice.

Organizations like SpeakOut on FMG, a group of Female Genital Mutilation survivors and lawyers, human rights NGO, have been a part of the PIL filed as part of the ongoing cases and prayed for a separate legislation to be drafted to provide guidelines for the relief, rehabilitation and protection of the victims and ban of this outdated practice.

ANALYSIS OF THE REPORT "A GUIDE TO ELIMINATING FEMALE GENITAL MUTILATION IN INDIA"

by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

[1253] Section 3(b) of POCSO: "Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person"

A report titled "A guide to Eliminating Female Genital Mutilation (FGM) in India" was conceptualized by Indira Jaising and written by Lawyers Collective Women's Rights Initiative (LCWR) and SpeakOut on FMG. Through this report, they highlighted the health impact, the socio-cultural reasons of such practice, the human rights violations caused due to it and recommend ways to eliminate it.

They also conducted study titled, "The Clitoral Hood A Contested Site", and found out that 75% of their daughters were still subject to this practice and suffered pain. 33% revealed that this practice has negatively impacted their sexual life.

The report recognized various justifications of this practice with included a religious dicta, an aid to female hygiene and as a means to control or reduce female sexuality. The perception of the Bohras, is that a girl who is circumcised does not get as aroused as one who is in 'qalfa' (meaning with a clitoral hood) or one whose clitoris is intact. Sexual desire in girls and women is viewed as something from which they need 'protection'. This perceived protection extends beyond protection of the girl herself to the protection of the whole family's reputation. According to them the clitoris is referred to as the 'Haram ki boti' or 'sinful piece of flesh', recognition of its biological role in women's orgasms. Removal of this part is viewed a means to abolish the girl's mind of impure and filthy thoughts and desires.[1254]

Disobedience or protest against such practice invoked social boycotting or ex-communication of the family from the community. This allures ostracism from relatives and friends, prevents one from participating in social and religious gatherings and meetings, prevents the marriage of their children into the community, and prohibits the burial of their body from being buried in the community burial ground. Due to such fear, such practice still exists.

To rectify such boycotting, Bombay Prevention of Excommunication Act, 1949 was enacted. This act prohibited excommunication of any member of community based on caste, religious creed etc and deprive a person of his property, to practice his religion etc. This was challenged in Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay[1255], where the Supreme Court held that excommunication was a legitimate practice and is protected as under Article 26 of the Constitution which provides for freedom to manage religious affairs. A review petition has been filed and it is still pending before the Supreme Court.

The Maharashtra government also enacted a legislation called Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016 to prohibit social boycott and regarded such practice as a punishable offence with an imprisonment upto 7 years or fine upto Five lakh rupees, or both. This Act doesn't target Bohras only but includes all communities.

[1254] Harinder Baweja, India's Dark Secret, Hindustan Times http://www.hindustantimes.com/static/fgmindias-dark-secret
[1255] AIR 1962 SC 853

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RECOMMENDATIONS OF THE REPORT

Definition

The report recommended for a modified definition ie, FGM/C be defined as "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons". Further it should, specifically exclude any necessary surgical procedure for the purpose of the girl's physical or mental health, or any post-partum procedure performed by a registered medical practitioner.

Who all should be penalized?

The report suggested that three categories of penetrators need to be penalized. The first category includes the parents of the daughters who encourage this practice. The second category includes the traditional cutters, midwifes or senior members of the family or medical professionals who conduct this practice. And the third category includes, those members who propagate such practice.

Masooma Ranalvi, a member of SpeakOut, highlighted that, in order to eliminate this practice, a systematic multi-pronged manner needs to be used along with the coordination and cooperation of all the government agencies, police and health professionals.

The report recommends for a new legislation to ban this practice and sought to make the offense "non-compoundable and non-bailable" with provision for harsh punishment. Further, the report further states: "It must be ensured that the girl child has the support of a robust system of protection once she/any other person on her behalf has complained of the offence, and that she can effectively realise her right to remedy, reparations and rehabilitation."

Further it is the duty of every teacher, medical professional and social worker to report to the nearest police station if they witness any such practice is performed on a girl.

Maintainability of the suit

It is recommended that a victim of FGM/C should be given at least three (3) years of time after the commission of FGM/C to file a complaint against those who subjected her to FGM/C similar to the provisions of the Prohibition of Child Marriage Act, 2006 where the parties can declare the marriage void within two (2) years of attaining majority.

As against this, the Samina Kanchwala, Secretary of the Dawoodi Bohra Muslim Women's Association for Religious Freedom justified their stance by stating that this practice was a religious belief and a ban on it would be a violation of Article 25 and Article 26 of the Indian Constitution.[1256] Further the defendants, led by Dr. Singhvi, explained that this practice was an

[1256] Ambika Pandit, No new law for now, it is POSCO and IPC to curb female genital mutilation

obligatory practice and indicated that "purity" which is one of the 7 pillars of Fatimid school, needs this practice to be conducted and acts as a necessity for offering prayers. And since it is an age old custom, it cannot be prohibited.[1257]

CAN FEMALE GENITAL MUTILATION BE CONSIDERED AS A RELIGIOUS PRACTICE AND BE PROTECTED UNDER ARTICLE 25 AND 26 OF THE INDIAN CONSTITUTION?

Article 25 and 26 of the Indian Constitution highlight the secular feature of India. It denotes equal status to all religions. The Indian Constitution guarantees and secures to all the people of India justice, social, economic and political equality of status of opportunity, and before law, freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality and further provides adequate safeguards for minorities, linguistic and religious.[1258] The State has no religion and State has to treat all religions and religious people equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.[1259]

Article 25 of the Indian Constitution[1260] provides the right to freedom of religion. It enumerates that all persons have free conscience to profess, practice and propagate any religion of their choice which is not against public order, morality and heath. And further provides for reforms and throwing open of Hindu religious institutions of public character.

The above article empowers that persons have the freedom to declare themselves or identify themselves with religious beliefs of a particular religion ie, profess any religion, freedom to practice any religion, ie, perform any rights, rituals, externalities attached to the religion and propagate[1261] the religion which includes preaching of your belief and philosophy that you believe in. But all these freedoms can be enjoyed only if it is not against public order, morality and health.

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https://timesofindia.indiatimes.com/india/no-new-law-for-now-it-is-pocso-and-ipc-to-curb-female-genital-mutilation/articleshow/65203182.cms

[1257] Mehal Jain, Female Genital Mutilation (FGM) Violates Preconditions Of Public Order, Morality and Health imposed under Article 25 and 26 of Constitution, Submits AG https://www.livelaw.in/female-genital-mutilation-fgm-violates-preconditions-of-public-order-morality-and-health-imposed-under-article-25-and-26-of-constitution-submits-ag/

[1258] Ranbir, and Karamvir Singh, SECULARISM IN INDIA : CHALLENGES AND ITS FUTURE https://www.jstor.org/stable/pdf/41856448.pdf?refreqid=excelsior%3A56263e831a61d47f71c9ee2b95401e4b

[1259] Bal Patil v Union of India, (2005) AIR 3172

[1260] Article 25 of Indian Constitution :
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

[1261] Stanislaus v State of Madhya Pradesh (1977) SCR (2) 611

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Further Article 26 of the Indian Constitution[1262] provides for freedom to manage religious affairs. It guarantees collective freedom of religion, subject to some limitations. It guarantees to every denomination or a section of it the right to establish and maintain institutions for religious and charitable purposes and to manage in its own way. It also provides the right to acquire and own immovable property and to administer them in accordance with law.

Both these Articles are subject to public order, morality and health. Protection under these Articles cannot be enjoyed if it is against public order, morality and health. Further they should also not violate any other provisions under Part III of the Indian Constitution which consists of the fundamental rights given to all citizens of India.[1263] These articles are further not absolute ie, the state has the power to regulate and formulate laws to ensure that there is peace and harmony in the society.

Considering the above explanations, Attorney General, K. K. Venugopal said that religious practice of Female Genital Mutilation is an immoral and inhumane practice and cannot be protected under Article 25 and 26 of the Indian Constitution. It causes irreparable harm to the girl child and also has long term health effects on the female body and therefore is against public order, morality and health and should be banned immediately.[1264] Further it is a violation of fundamental rights ensured under Article 14 ie, right to equality and 21 ie, right to life and personal liberty of the Indian Constitution.

CONCLUSION

Worldwide much progress has been made to minimize this practice, but efforts need to be taken to make sure this practice is completely stopped. Law and provisions need to be enacted to curb this practice and also focus on rehabilitation and protection to victims. This change can only be bought through the support of government organizations and development in education systems to bring about awareness in this subject. Alternate sources of income should also be provided to these ex-circumcisers who depend on this practice for their livelihood.[1265]

[1262] Article 26 of Indian Constitution
Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-
(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and (d) To administer such property in accordance with law.

[1263] Church of God (Full Gospel) in India v K.K.R. Majestic Colony Welfare Association and Others AIR 2000 SC 2773

[1264] Mehal Jain, Female Genital Mutilation (FGM) Violates Preconditions Of Public Order, Morality and Health imposed under Article 25 and 26 of Constitution, Submits AG
https://www.livelaw.in/female-genital-mutilation-fgm-violates-preconditions-of-public-order-morality-and-health-imposed-under-article-25-and-26-of-constitution-submits-ag/

[1265] Susan Bewley, Sarah Creighton and Comfort Momoh, Female genital mutilation: Paediatricians should resist its medicalisation
http://www.jstor.org/stable/pdf/20734534.pdf?refreqid=search%3A3ea559b8a0b236bfe9b664b9bb80d27a

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Further promotion of research on FGM, including its health consequences, particularly the impact of FGM on mental and sexual health more effectively can approach to its elimination.

Further organizing strong community outreach and family life education programs for all sectors of the public, including village and religious leaders, men, and young persons and organizing health camps and training centers to provide care and psychological support to victims of FGM can lead to its reduction.

Since this practice is very prevalent in Africa, it would be ideal for India to look into the ways in which African has taken to prevent this practice. Countries in Africa have used two ways to criminalize this practice at the national level – introduce a new law or amend the existing laws. Burkina Faso, Guinea and Senegal have amended the Penal Code to include provisions on FGM, whereas Gambia has amended the Women's Act. Nigeria has adopted a Violence Against Persons (Prohibition) (VAPP) Act in 2015, with one provision on the prohibition of FGM (article 6). Mauritania has adopted a Children's Code in 2005, containing one provision on the prohibition of FGM (article 12). Similarly, Guinea also adopted a Children's Code (2008) that criminalizes FGM (in articles 405–410), and a Reproductive Health Law (2000) prohibiting violence against women and children, including FGM (article 6 and 13).[1266]

Guinea-Bissau is the only country that has adopted a separate law relating to FGM. The law is titled as "The Federal Law to Prevent, Fight and Suppress Female Genital Mutilation"[1267] and was passed in 2011 (Law No. 14/2011).

The law places an obligation on the Government and its institutions to include funds in the General Budget of the States to combat FGM by supporting and promoting:

(a) information and awareness campaigns;

(b) the assistance and reintegration of victims of FGM;

(c) media campaigns;

(d) the training and capacity-building of opinion leaders and NGOs within communities; and

(e) greater cooperation between different human-rights organisations and religious and traditional leaders to denounce cases of FGM.

The law imposes penalties to the performers, with or without the consent of the victim, of imprisonment of 2 to 6 years. If it is performed on a minor, the imprisonment may vary from 3 to 9 years. If the parents or the guardians do not prevent this practice, they shall be punished with

[1266] Analysis of Legal Frameworks on Female Genital Mutilation in Selected Countries in West Africa https://wcaro.unfpa.org/sites/default/files/pub-pdf/UNFPA-ANALYSIS-ON-FGM-WEB.pdf
[1267] GUINEA BISSAU: THE LAW AND FGM https://www.28toomany.org/static/media/uploads/Law%20Reports/guinea_bissau_law_report_v1_(august_2018).pdf

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an imprisonment of 1 to 5 years. If it is performed with the intent to inflict physical or psychological harm, or threaten life, the punishment would be imprisonment of 2 to 8 years. In case of death, the imprisonment may vary from 4 to 10 years and those who assist or propagate shall also be punished in the same manner as the performers. Failure to report or prevent such practice to the police or judicial authorizes shall also be punished with a fine. These penalties also extend to cross border FGM practices.

It excludes FGM practiced for medical purposes. It says that medical intervention on femal genital organs may be permitted if it is to correct any anomalies. It instills a 'Special Duty of Care' on the medical professionals, requiring managers of health facilities and them to provide appropriate physical and psychological treatment to victims of FGM. It also requires that if anyone, by virtue of their professional qualifications, becomes aware that FGM has taken or will take place, he or she is required to report it to the appropriate authorities.

This law can be used by the Indian Parliament to enact a law banning such practice which includes penalizing those who abet, aid, propagate such practices, those who don't report such practice, rehabilitation and assistance to victims, etc.

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A CRITICAL ANALYSIS ON THE LAW OF ADULTERY IN THE INDIAN CONTEXT

-Merryl Mariam Biju[1268]

ABSTRACT

The act of adultery is an age old concept that has been categorized as an offence and brought under penalty for commission of such offence. Since the Penal Code of India was brought into existence nearly 150 years ago, the societal conditions of women were at the lowest level, hence helping them escape the liability of committing the offence. Over the years, and several changes in the society of the country, there have been many amendments made to laws to suit the current living scenario. However, the law of adultery, although being unconstitutional and gender biased, still prevails due to the legal backing it has from judicial decisions by the Courts. Although the initial aim of the legislature was to protect the interest of the women, it fails at doing so as the provision has a parallel of construing a woman's legal right, while granting the same to a man, hence depriving women of legal protection. This paper critically analyzes the provision for punishment of adultery and proposes a legal amendment in favour of both the sexes, bringing about the need for gender neutrality in the law.

INTRODUCTION

Marriages are considered as the building blocks of society, with its base of trust which is cemented intact. This sacred union of man and woman has been prevalent ever since different religions came into being. As the society progressed and various changes were made in technology, science, human intellect, and widened boundaries of thought, the societal institution of marriage began coming under attack. There evolved a number of sexual offences, with the offence of adultery being one among them. The consciousness of the person committing the offence of adultery, while violating the basic moral norms of the institution of marriage, hence destroying its sanctity, is what is weighed in a country like India, amounting to criminalize the act as a whole.

The term 'adultery' has its origin in the Latin term 'adulterium'. The term comes from the words 'ad' (towards) and 'alter' (other).[1269] Section 497 of the Indian Penal Code, 1860 perceives a consensual intercourse between a man, and a married woman without the consent or connivance of her husband, as the offence of adultery. "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty

[1268] School of Law, Christ University, Bangalore
[1269] Jovan Payes, "Adultery and the Old Testament", http://biblicalfaith.wordpress.com/2008/06/12/adultery and-the-old-testament/ accessed 10.09.2018.

of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor."[1270]

According to the section, adultery is committed only by a male third person who enters into sexual relations with the wife of a married man, hence intruding their institution of marriage. Here, the third person is considered as the adulterer or the initiator of the crime, while the wife is merely a victim to the setting, although it included her consent as well. The act of adultery is considered to be an invasion to the right of the husband over his married wife.[1271] The husband here, is the aggrieved individual who is given the right under law to file a complaint in order to prosecute the man who intrudes his marriage and physically uses his wife, or his chattel without his consent. It is hence brought into attention that the husband is the one in the Indian society with the power to control the sexuality of his wife, merely because his consent or connivance to such an act can negate the entire fulcrum of the offence, and happens to have no legal remedy whatsoever.

In order for an act to amount to the offence of adultery as under the Indian Penal Code:

1. There must be sexual intercourse with the consent of the woman.
2. Knowledge and reasonable belief that the woman is the wife of another man.
3. The husband of the woman must not have consented to the act and must be aggrieved.[1272]
4. The husband must have to complain about the sexual intercourse.[1273]

CONFLICTS WHILE ANALYZING SECTION 497

Section 497 of the Indian Penal Code, 1860 provides for the punishment for the offence of adultery. It penalizes consensual sexual intercourse of a man with a married woman, without the consent of her husband. The law covers only one aspect of adultery being committed by an unmarried man with a married woman and ignores the factors of probability. There is a clear distinction made between the consent given by a married woman and of that by an unmarried woman, or even by a widow. According to the provision, the penalty falls only upon the unmarried man who walks into an institution of marriage as the intruder. There has been no explicit or implicit mention on the offence being committed by a married man without the consent of his wife, or an unmarried woman or a widow being the adulterers. Since the offence can only be committed by a man with a married woman, the husband of the married woman is given the right under law to file a case and prosecute the man walking into his marriage. On the other hand, if the husband in a marriage is the one to have sexual intercourse with another

[1270] s 497 of the Penal Code 1860
[1271] Chandra Chhitar Loha v Mst. Nandu, AIR 1965 MP 268, 269.
[1272] Nurul Haq Bahadur v Bibi Sakina and others 1985 BLD 269.
[1273] Ibid pp. 4656-61.

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woman, either married or unmarried, then the wife is given no right to file a case and prosecute her husband or even the intruder of her marriage.

Constitutional Provisions that Stand Violated Through Judicial Decisions

The major contention is that the provision for the offence of Adultery stands in violation of Articles 14 and 15, hence questioning its constitutionality.

In the case of Yusuf Abdul Aziz v The State of Bombay and Husseinbhoy Laljee[1274] section 497 of the IPC was said to be ultra vires of the Articles 14 and 15 of the Constitution. Article 14 of the Constitution guarantees the right to 'equality before law' and 'equal protection of law'. The question of how women adulterers being ignored from penalty of commission of the offence arose in this case, hence violating the right to equality. The Supreme Court of India held that Article 14 is a general provision and is meant to be read while keeping in mind the other exceptions to fundamental rights. However, the presence of Article 15(3) of the Constitution provides for the State to be the authority to make any special provisions for women and children.

The argument that was raised here was that this provision was made only for the benefit of women and not for making it a sort of license for committing or abetting crime in any manner. The Court however did not agree with this, by saying that there were no such restrictions of cornering the provisions for the benefit and upliftment of women alone. Therefore, upheld the constitutional validity of section 497 of the IPC.

In the case of Sowmithri Vishnu v Union of India[1275] the Supreme Court again held that the provision for adultery did not violate Article 14 or Article 15 of the Constitution of India and laid down the following grounds in justification:

1. Section 497 only empowers the husband to prosecute the male adulterer, but does not empower the wife to prosecute the woman adulterer of her marriage. The Supreme Court merely considered this to be a policy of law, and since the offence is restricted to man alone while defining the offence of adultery, it does not violate any constitutional provision.
2. Section 497 fails in conferring any right upon the wife to prosecute her husband who has been unfaithful to her and committed adultery with another woman. The Court answered to this by saying that the law only considers the wife, who enters into an extra marital affair, is not an author of the crime but is the victim. The offence is generally assumed to be committed by a man and the legislature considers it to be an offence against the sanctity of marriage.
3. Section 497 remains silent in the case of the husband having sexual relations with an unmarried woman, thus giving him an implied consent under the law to have an extra

[1274] AIR 1954 SC 321.
[1275] Yusuf Abdul Aziz v The State of Bombay and Hussein bhoy Laljee AIR 1954 SC 321.

marital sexual relationship with an unmarried woman, and still not be held liable. The Supreme Court to this, stated that the law gives no such license to a married man to have illicit sexual relations with an unmarried woman and that only a specific kind of adulterous behavior had been considered as it was the most commonly happening kind. The husband could however be booked by his wife under civil law, for separation. It is for the law makers to reform the penal law as per modern times and it doesn't offend Article 14 or 15 of the Constitution of India.[1276]

In the case of V. Revathi v Union of India[1277] section 198(1) and 198(2) of the Criminal Procedure Code, 1973 had been questioned in terms of constitutional validity by a married woman. The petitioner, a wife, had contended that in the legal scenario, since the husband is given the right to prosecute his disloyal wife, so should the wife also be given the right under law to prosecute her disloyal husband when the offence of adultery is committed by him, disrupting their institution of marriage. The petitioner asserted that in so far as and to the extent, s. 198(2) of the Code of Criminal Procedure 1973 operates as a fetter on the wife in prosecuting her adultery husband, the relevant provisions is unconstitutional on the ground of obnoxious discrimination.[1278]

The Supreme Court while upholding these provisions held that the law does not allow either of the spouses, be it the husband or the wife, to prosecute each other for being disloyal under criminal law. In terms of the husband, the prosecution of his wife is not allowed under the law because it is assumed generally that the wife is not an adulterer but is merely the victim of the offence committed to her by an outsider of her marriage. On the other hand, in the context of the woman, there is a "reverse discrimination" that is made in her favour and there is no such discrimination made against women so far as they are not allowed to prosecute the actions of her own husband.[1279]

The judiciary, till date, fails in explaining certain things such as if the offence of adultery is a clear violation of the sanctity of the institution of marriage, and if the community is trying to protect the matrimonial home, then why is the prosecution for the offence only restricted to the complaints brought up by the husbands of the women alone. Also, section 497 has a proviso stating that any sexual intercourse with the wife, with the consent or connivance of her husband does not amount to the offence. This portrays that the sexuality of the wife, remains with the husband and if he decides on permitting an intruder to commit such offence upon his wife, there is absolutely no legal remedy as the offence is no longer one under the law.

[1276] ibid at1620-1621.
[1277] V. Revathi v Union of India AIR 1988 SC 835.
[1278] ibid at 837.
[1279] ibid at 838.

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Factors of Invidious Discrimination

Apart from the alleged justification of saving the 'sanctity of the institution of marriage', there is "no legitimate state interest which can justify its [the state's] intrusion into the personal and private life of the individual."[1280] The basic explanation given by the Supreme Court of India for upholding the provision for adultery is by stating that it protects the sanctity of marriage from both an outsider, as well as from within. However, the reasonable classification required to hold the provision justifiable under Article14 still remains in gray area, on how the Courts can back up the discrimination suffered by one class in particular.

Moreover, the notion that women are considered as the victims of the offence of adultery and are never taken into account as the adulterers, thus requiring the beneficial exemption under Section 497, needs to be critically examined. The question arises as to whether women, in the current status of living, really require this extra benefit. In such a case, feminist would agree that such an interpretation of the position of women in the society is demeaning and fails to consider them as equally autonomous individuals in society.[1281] The idea of benefit reaches back to the formulation of the Penal Code by Lord Macaulay, when the condition of women in this country[1282] had to be considered and they needed to be given an upliftment. A provision made in accordance with the conditions of the society over 150 years ago, still has been preserved for the worst.

There is a clear discrimination made in the law by the legislature on the grounds of sex, which is backed up with the pretext of "positive discrimination" to women and children, as per Article 15(3) of the Constitution. Women are not considered capable both physically or socially to commit such offence. This constitutional feature must strictly be restricted to limited cases such as disability or beneficiary empowerment in terms of unequal balance in society. The feature needs to be peculiar enough to differentiate women from men as a class wholly.[1283]

LEGAL REFORM NECESSARY

The act of adultery is not considered to be a criminal offence in most parts of the European Union.[1284] In the United States of America, the laws of adultery varies from one State to another. However, extremists exist in the Islamic countries like Pakistan, Afghanistan, Saudi Arabia, etc.,

[1280] Lawrence v. State of Texas, 539 U.S. 558 (2003). This decision ushered in scholarship considering whether the various state laws criminalizing adultery in the U.S.A. would consequently be rendered unconstitutional. See, e.g. Viator, supra note 6; Cass Sunstein, What did Lawrence hold? Of Autonomy, Desuetude, Sexuality and Marriage, UNIVERSITY OF CHICAGO JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 196 (2003).
[1281] See generally, S. Mayeri, Reconstructing the Race Sex Analogy, 49 WILLIAM & MARY LAW REVIEW 1789 (2008).
[1282] LCI 41st Report, supra note 40, at 326. See also, Yusuf Aziz [Bombay High Court].
[1283] Durga Das Basu, Commentary on the Constitution of India at 1796 (Wadhwa 8th ed 2007); See also, Srinivasan v. Padmasini,AIR 1957 Mad 622
[1284]Ruth A. Miller, The Limits Of Bodily Integrity: Abortion, Adultery, And Rape Legislation In Comparative Perspective at 122-23 (Ashgate 2007)

where punishment of death penalty is the maximum penalty for commission of the offence of adultery, following their Islamic religious laws.[1285] In India, the law of adultery dates back to over 150 years from now, where the social setting was thoroughly caste-based and nothing more.

The context today is different, be it in terms of societal or legal standings, section 497 is too old a law to comply with the changes taking place over the years of development. The section should be removed or struck down, for the mere reason that if the law promises to protect every one of its citizens, it must be able to do so without discrimination and unnecessary favouring of one particular sex as such. The recommendation is that the punishment for adultery must be made generalized to both men and women as there seems to be absolutely no valid justification for sparing the guilty from being treated alike.

"Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to believe to be the wife or husband as the case may be, of another person, such sexual intercourse not amounting to the offence of rape, commits adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both." [1286]

CONCLUSION

The Indian Penal Code, 1860 was formulated one and a half centuries ago, keeping in mind the due situation and societal status of the country back then. Women were suppressed, and were not given an individual view from the society. Women were considered as property and wife was considered the chattel of her husband. The provision for adultery was made in such a way that women could have been exempted from liability, as she would only have been the victim in every case, as their husbands owned them. However, even after the codification of the IPC, there have been a number of Acts passed were mainly aimed at relieving women from subordination and societal pressure, hence giving them empowerment to step forward.

Though Section 497 of the IPC, the constitutional spirit of gender equality is being destroyed. Women are no longer considered the chattel of men and a huge development has already been made in the setting of the society. The law of adultery definitely stands inconsistent with the happenings of the 21st century. The Law Commission in its 42nd Report sought to remove the exemption for women and make the law gender neutral.[1287] The Malimath Committee Report agreed as it failed to see the rationale in retaining the 'benefits' to women.[1288] These changes would rid the Supreme Court decisions of their moorings though, as spouses would no longer be

[1285] Daniel Ottosson, Legal Survey On The Countries In The World Having Legal Prohibitions On Sexual Activities Between Consenting Adults In Private (2006)
[1286] Parvez Ahmed and Rehena Parvin, The Law Relating to Adultery: A Critical Evaluation in the Present Social Context.
[1287] LCI 41st Report, supra note 40, at 327.
[1288] COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, at 191.

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"disabled from striking each other with the weapon of criminal law."[1289] The definition of the offence of adultery along with its punishment under the IPC must be relooked into and be granted a chance to be made amended, so as to meet with the needs of the current societal setting and capabilities of individuals.

[1289] V. Revathi, at para 4.

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CRITICAL ANALYSIS OF PHARMACEUTICAL INDUSTRY OF INDIA AND THE LAWS GOVERNING THE TRADE AND FLOW OF DRUGS

- Yash Vardhan Jain[1290]

INTRODUCTION

Currently, India's ascendancy as a 'global pharmacy' for low and middle-income countries cannot be disputed. From a situation of net-importer in the pre-1970 era, India is now currently a net-exporter of quality and cheap generic drugs across the world. Both in terms of bulk drugs and formulations production, India's drug manufacturing capacity and its capability to 'reverse engineer' is considered to be one of the first among developing economies. However, due to a crumbling and dilapidated public health care system, most of the drugs are either out of stock or the system simply does not have adequate resources to buy them. This has largely resulted in private sector takeover of health care system in the country. Due to this development, households are increasingly paying out-of-pocket for the purchase of health care and more so for drugs. India hardly has any social insurance cover for over one billion of its population. Hence, a substantial proportion of population is largely exposed to the drug market whose purchasing power is extremely low.

Manufacturing of spurious and substandard quality drug products is a fraudulent activity and their availability in the market is the life-threatening issue for the public health. In 2008, a pilot study performed in two major cities of India, Delhi and Chennai to explore the extent of substandard and counterfeit drugs available in market, under which it was estimated that 12 and 5% samples from Delhi and Chennai, respectively, were of substandard quality. In 2007-08 maximum instances were from Maharashtra and in 2008-09 Kerala was the leading manufacturer of the spurious and substandard drugs. In 2007 four deaths were reported in Maharashtra related to spurious drugs. While more serious results came in news when it was reported that 300 infants died in 2012 in Kashmir because of ceftriaxone substandard quality product which was used to treat pneumonia.

Poor quality drugs affect the health of the public. Spurious or counterfeit drugs are involved in both generic and branded products of every category throughout the world, which is growing and expanding its roots and thus emerging as menace. Standard quality obligations are related to a number of factors, including drug pricing, competition between sponsors, employment and

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market transparency. Responding to the spreading public health crisis of spurious or substandard drugs has led to the creation of transnational regulatory dimension.

It is subject to the economic rules of supply and demand and can be rapidly subverted by a change in the laws that make possible its existence. Because the legitimate business of selling prescription drugs is very profitable and highly regulated, opportunities for black-market entrepreneurship of these drugs exist in both developed and developing countries. Regulations that govern legitimate access to pharmaceuticals are set by state, national, and international bodies. India has circumvented international patent law by creating a national black market, thereby making it legal to copy a medicine that has been patented elsewhere as long as a different and unique manufacturing process is used. This has allowed the Indian people and other foreign buyers to access high quality medications at a fraction of the cost of the same medication in the USA or Europe, but the practice has understandably been criticised vigorously by multinational pharmaceutical firms and the World Trade Organization.[1291]

THE INDIAN PHARMA MARKET

The drugs prescribed by the doctors to cure a person's disease are unfortunately adulterated most of the times. According to the World Health Organisation (WHO), 35 percent of the fake drugs sold all over the world comes from India and it occupies the counterfeit drug market of nearly Rupees 4,000 crore. 20 percent of the drugs sold in India are fake. Drugs prescribed for cold and cough or a headache are mostly either fake or of poor quality.

A patient receiving an authentic drug for his disease has become a challenge these days. The unfortunate thing is that the administration is mostly aware of everything that is happening. According to the data produced by the Department of Food Safety and Drug Administration, more than 10 percent of the counterfeit drugs have been introduced into the market and 38 percent of the drugs are not effective as they are of low quality.

According to the work report submitted by the Department of Food Safety and Drug Administration, Uttar Pradesh, in the year 2015, around 5,150 drugs and 301 cosmetics product samples seized in the raid conducted in the last eight months by them were sent to the laboratory for investigation. The examination report of 4,723 of these samples was astounding. 506 of these drugs were found to be fake which establishes that more than 10 percent of the drugs found in the market are fake. Apart from this, only 2,902 of these samples were found to be effective as per the standards.[1292]

National Institute of Biologicals conducted a study across the country during 2014-2016 following the orders of the Ministry of Health and Family Welfare. During the survey, there were about 47,954 samples collected from the government hospitals, dispensaries, and pharmacies. More drugs of poor standards were found in the government hospitals as compared

[1291] "Article Information." INTERNATIONAL JOURNAL OF PHARMACEUTICAL SCIENCES AND RESEARCH, ijpsr.com/bft-article/regulatory-process-for-import-and-export-of-drugs-in-india/?view=fulltext.

[1292] "Home - PMC - NCBI." Current Neurology and Neuroscience Reports., U.S. National Library of Medicine, www.ncbi.nlm.nih.gov/pmc/.

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to the pharmacies in the market. While pharmacies in the market had 3 percent of the poor quality drugs, government hospitals had 10 percent. There were around 0.023 and 0.059 fake drugs found in the retail outlets and government hospitals respectively. According to the survey, there has been some improvement in the situation over the time.

Most of the fake drugs are made in extremely polluted atmosphere and the demand for these drugs is present all over the world, from South Africa and Russia to our neighbouring countries such as Myanmar and Nepal.

The standards created by the Pharmacy Council of India for setting up of pharmacy shops are also being regularly violated. One of the rules is that there should be a gap of at least 300 metres between two pharmacies. However, it is a common sight in India to spot two or three pharmacies right next to each other. The regular violations, which are the result of government's apathy or corruption, are proving to be harmful to the common people of India.

India is the largest manufacturer of generic drugs and probably 12-25% of the medicines supplied globally are contaminated, substandard and counterfeit. Being the world's largest manufacturers of active pharmaceutical ingredients and finished products, it is likely that India along with China could be the major contributors to spurious medications as per Patrick Lukulay, vice president of US Pharmacopoeial Convention's global health programs. In a report, it has been declared by the European Commission that 75% of the global cases of SFFC medicines originate from India.[1293] Indian Government officials initiated an investigation to scrutinize the drugs product which are supplying by India to Nigeria when India was accused along with other 29 Asian countries as the main originator of counterfeit drugs. On one side, India extensively interacts with the African countries in providing quality medicine at affordable prices, while on other side predictive blames were imposed on India and China for exporting the fake or substandard quality of antimalarial, antibiotics and contraceptives drug product to Uganda and Tanzania. In turn, India and China is denying for such blames. At present, Indian drug regulatory authority has taken various steps against the causes and they have put all their efforts to improve the drug regulation in the country.[1294]

India is considered as the main originator and distributor of SFFC drugs. However, no authentic evidences exist against the country according the data provided by the government and non-government agencies of India. Many researchers have investigated only individual drugs or narrow range of drug preparations and formulations. Currently, no large randomized studies of drugs quality have been done in India.

In the year 2000, it has been stated that around 35.0, 23.1 and 13.3% global sales of counterfeit medicines come from India, Nigeria and Pakistan, respectively and counterfeiting includes all therapeutic classes of drug and mainly antibiotics. A decade ago, Indian government officials estimated that 9% of the drug products were of substandard quality. Although according to Indian press media, 30-40% of the total marketed drugs are considered as spurious, but this data

[1293] PM's Speech in Surat while inaugurating the multi-specialty hospital and research center of Samast Patidar Arogya Trust, April 17, 2017.

[1294] "Home - PMC - NCBI." Current Neurology and Neuroscience Reports., U.S. National Library of Medicine, www.ncbi.nlm.nih.gov/pmc/.

is without any scientific confirmation. Under laboratory analysis, in a survey accomplished in 2007 by South East Asia Region Pharmaceutical (SEAR Pharm) Forum, a group of Pharmaceutical Associations of International Pharmaceutical Federation (FIP) and WHO, 10 743 samples were collected from 234 retail outlets. About 3.1% were estimated as spurious and 0.3% were out of pharmacopoeial standard. In 2007, 294 fixed drug combinations (FDCs) products were unlawfully available in the market since these were not approved by the Drugs Controller General of India (DCGI). In 2008, out of 1 83 020 chemist shops, 8418 chemist licenses were suspended or cancelled by the State Drugs Control Organizations on behalf of their trade with spurious drugs. According to CDSCO, estimation of the data during 2003-2008 indicates 6.3-7.5% of the samples were of substandard quality and 0.16-0.35% were encountered as spurious. In 2009, CDSCO reported that in 1995-96, 10.64 and 0.30% tested samples out of 32 770 were substandard and spurious, respectively, while in 2007-2008, 6.42 and 0.16% tested sample out of 42 354 were substandard and spurious, respectively. It was good achievement by the drug authority.[1295]

Nevertheless, in 2009, 24 136 samples of 62 brands of drugs product were collected in a nationwide survey to find those products which are covertly manufactured and thus to explore the extent of spurious drug in India. Samples were drawn from over 100 pharmacy outlets from various regions of India, which were belong to nine therapeutic categories of 30 manufacturers. Survey affirmed that only 11 products (0.046%) were spurious. Supplementary information revealed by the State Drugs Control Departments declared 1146 (4.75%) products were of substandard quality. Hereby, it can be observed from the government data that spurious drugs are at same level while there is a great decline in the number of substandard drugs from 10.64% in 1995-96 to 5.75% in 2008-09. These kinds of inspections and surveys by the government officials are some driving steps for the public safety. However, stringent actions are yet to be taken for the betterment of public health. Overlaying the effects of inferior manufacturing standards, deterioration with inactive or toxic fillers, re-labelling of time expired drugs and degradation during storage are closely associated with drug quality, which must be checked regularly by fast and efficient techniques.[1296]

RECENT REGULATORY MEASURES BY THE GOVERNMENT

In April 2017, Prime Minister Narendra Modi announced that the Government would establish a legal framework mandating doctors to prescribe medicines by their International Nonproprietary Name (INN) only. As per the Prime Minister, it is only with this measure that poor people would be able to access low cost medicines. This was confusing because the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 was already amended in 2016 to mandate that drugs be prescribed by generic names only by registered medical practitioners.

[1295] "India: Pharmaceutical Legal & Regulatory Environment." Food and Drug Law Institute (FDLI), 16 Nov. 2017, www.fdli.org/2017/10/india-pharmaceutical-legal-regulatory-environment/.
[1296] http://pharmaceuticals.gov.in/pharma-industry-promotion.

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However, to bolster the move to a generic market, the Government has been adopting various mechanisms for promotion of generic drugs through amendments in drug laws. To ensure quality of generic drugs approved by the State FDAs, the Union Ministry of Health (MoH) issued a notification in April 2017 requiring bio-equivalence (BE) studies to be conducted for all drugs (new or otherwise) for category II and category IV of the biopharmaceutical classification system. The draft NPP proposes mandatory bio-availability (BA) in addition to proposing to make BA/BE tests mandatory for all drug manufacturing permissions including renewals accorded by the State FDAs and the Central Drug Standards Control Organization (CDSCO), India's drug regulator. There is also a proposal to amend the labelling regulation under the Drugs & Cosmetics Rules 1945 (DCR) requiring printing the generic name in at least two font sizes larger than the brand name. Additionally, the draft NPP proposes that for single ingredient drugs (except patented ones), the manufacturer would be allowed to stamp only its name on the drug package and that public procurement and dispensing of drugs will be by generic/salt names only. [1297]

Heralding these regulatory changes, the CDSCO claimed that it had initiated various measures in the last two years to streamline the regulatory procedures by relaxing, rationalizing, and modifying the existing provisions of the DCR, which has resulted in accelerating the regulatory approvals without compromising the safety, quality, and performance of medical products. A separate, simplified, and extensive New Drugs and Clinical Trials (CT) Rules under the Drugs and Cosmetics Act, 1940 (DCA) that will codify all amendments to date is in the planning stages. In its efforts toward digitization and implementation of the e-governance scheme, MoH launched its online licensing system called SUGAM, which is being continuously expanded in a phased manner. In order to give impetus to the Government's "Make in India" initiative, emphasis is being placed on ensuring safety, efficacy, and quality of drugs manufactured in India by requiring submission of stability data and compliance of GMP/GLP practices. Additionally, there are deliberations for plugging the gaps in the sale of drugs including internet sales and for OTCs.

One of the noteworthy pieces of legislation that the Department of Pharmaceuticals (DoP) is spearheading is the Uniform Code of Pharmaceutical Marketing Practices (UCPMP). UCPMP was implemented effective January 1, 2015 as a voluntary code. The Code has provisions on gifts, hospitality, and travel that the industry allegedly extends to doctors as well as provisions on claims and comparisons, textual and audio-visual promotional material, and the conduct of sales representatives and the samples they provide to doctors. The Department is now proposing to make UCPMP statutory and mandatory under the Essential Commodities Act, 1955 along with penal provisions for companies violating the Code.

[1297] Sinjini. "Intellectual Property Rights in Pharmaceuticals." Academike, 14 Feb. 2015, www.lawctopus.com/academike/intellectual-property-rights-in-pharmaceuticals/.

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CENTRAL DRUGS STANDARD CONTROL ORGANISATION

The Central Drugs Standard Control Organisation (CDSCO) regulates the import and export of the drugs in the country, through 11 Port offices located in different parts of the country. CDSCO regulates the manufacture, sale, import, export, and clinical research of drugs in India.
The CDSCO also work through state authorities. While, the central authorities are responsible for approval of new drugs, clinical trials in the country; laying down the standards for the drugs control over the quality of imported drugs coordination of the state drug control organisations; the state authorities regulates manufacture, sale and distribution of drugs, licensing drug testing laboratories, approving drug formulations for manufacture, carrying out pre and post licensing inspections, for the drugs manufactured and marketed in the respective states.

INTELLECTUAL PROPERTY RIGHTS VIOLATION

After independence the non-availability or non-accessibility of important life-saving medicines led the government to appoint two committees to bring some viable changes in the pre-existing patent laws in India. The recommendations eventually led to the introduction of a new patent act of 1970. It covered only process patent in pharmaceuticals. The term of these process patents was only 7 years. This new law made Indian Pharmaceutical Companies quite enthusiastic and they started producing generic versions of expensive foreign medicines. This made Indian companies expert in 'reverse-engineering'. They started developing new drugs and this proved to be a boon for Indian pharmaceuticals field. The share of Indian sector of pharmaceuticals industry recorded a growth from 15% to near 18%. It made India self-sufficient in manufacturing of medicines and it became the exporter of bulk/active ingredients. India became net exporter of pharmaceuticals obtaining the 3rd largest position in terms of volume and 14th largest in terms of values. However, there are some views that Indian Patent Act, 1970 discouraged foreign drug companies to invest in India because they feared that the existing patent laws would not provide them enough protection leading to less profits. But the act was important because India was still developing in pharmaceutical fields and any act in favour of foreign companies would have proved fatal for the poor population for it would have been difficult for it to purchase expensive medicines.[1298]

EFFECT OF PRODUCT PATENT

The discontinuation of the "process-patent-alone" regime in case of chemicals has been a crucial change as regards patentable subject matter. 'Process patent' means that only the procedure or the method used to develop a particular drug would be patented and not the drug itself. Others could use different method to produce that drug. This gave rise to 'generic medicines'. In

[1298] More, Dr Sonali Ramakant. "Assessment of Impact of 'Drug Price Control Order 2013' For Essential Medicines in India." Journal of Medical Science And Clinical Research, no. 02, 2017.

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product patent now the product or the drug developed can be patented. Companies can no longer develop the same drug once it is patented. This involved removal of Section 5(1) of Patents Act, 1970 which provided for process patents in this field. This has meant that from January 1, 2005 product patent applications are being accepted and examined. Included in these product patent applications would be those applications that were made since 1995 using the "mailbox" provisions. It was feared that this might be detrimental to the system of medical care in the country. Their contention was that it might make certain life-saving drugs out of reach of the common man. Before third amendment took place Indian company freely manufactured expensive drugs by using different procedure and this made them experts in 'reverse engineering'.

Several studies have found that Indian companies adopted this new change very fast. They started investing in R&D. In fact, what is more fascinating is the dominance of Indian companies in retail market post-TRIPS. For 2007/08, of the 468 companies considered by orG-IMS5, only 46 are controlled by foreign companies accounting for 20 percent of the market. This is a distinctive feature of the situation in India. Of the 20 largest companies, 16 are Indian controlled (including cipla, Ranbaxy, Dr. Reddy's, Lupin, Sun pharmaceuticals, Piramal Healthcare and cadila Healthcare) and only four are MNCs. In contrast to the situation in the early 1970s, 39 of the top 50 companies today are Indian companies. The market share of MNCs has declined over the years, even after the introduction of product patent protection in January 2005 — from 23 percent in December 2004, to 22 percent in March 2006 and 20 percent in March 2008. In some cases it gave scope for foreign companies to open a subsidiary in India which will be managed by Indian company to sell their drugs. It also opened the scope of contract research. MNCs are now very extensively investing in India. MNCs have also started buying up Indian companies — the most notable being the acquisition of India's largest pharmaceutical company, Ranbaxy by the Japanese MNC, Daiichi Sankyo in June 2008. Other acquisitions of Indian companies include Dabur by Fresenius, Matrix by Mylan and Shanta Biotechnics by Sanofi-Aventis.[1299]

India is favoured the most because of its low cost in R&D. This strong performance of the generic industry in the global markets resulted from a number of its inherent advantages. It has been argued that Indian firms have lower costs – estimated to be one-eighth in R&D activities and one-fifth in manufacturing – as compared to the Western firms. The cost advantages are most pronounced in respect of lower fixed asset costs and labour costs, where the costs in India can be one-eighth of the cost in the US.

Therefore, what was feared previously didn't happen. Indian companies used this new change in their favour and became one of the most prominent parties in the manufacturing and distributing of drugs in the world.

[1299] "India: Pharmaceutical Legal & Regulatory Environment." Food and Drug Law Institute (FDLI), 16 Nov. 2017, www.fdli.org/2017/10/india-pharmaceutical-legal-regulatory-environment/.

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EFFECTIVE COMPULSORY LICENSING?

In the context of the on-going debate on the patent law reforms, a key issue, which is often glossed over, is that the compulsory licensing system is one of the essential pillars of the patent system. It has been well recognised that compulsory licenses are expected to play an important role in preventing abuse of patent rights that may arise when the patent holder tries to pre-empt entry of competitors using his statutory rights. The context for this issue has been provided by the Paris Convention. Article 5A of the Stockholm Act of the Paris Convention clarifies that "failure to work" or "insufficient working" of a patent constitutes an "abuse" of patent rights. Indian Patent Act in sec. 84 provides that, compulsory licensing can be granted only after expiry of three years from the grant of a patent in following cases:

i. Reasonable requirements of the public with respect to the patented invention have not been satisfied; or,

ii. The patented invention is not available to the public at a reasonably affordable price; or,

iii. The patented invention is not worked in the territory

While granting compulsory licenses, authority has to take some additional factors into consideration:

i. The nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensees to make full use of the invention;

ii. the ability of the applicant to work the invention to the public advantage;

iii. the capacity of the applicant to undertake the risk in providing capital and working the invention, and

iv. The efforts made by the applicant to obtain license from patentee on reasonable terms and conditions and that such efforts were not successful within a reasonable period.

Although, compulsory licensing can be used as an effective tool to combat anti-competitive practices, due diligence should be exercised while granting the same. This can discourage R&D by foreign pharmaceutical companies and thus, can have adverse effect on FDI. It should be granted in limited number of cases which were in desperate measures for the protection of public interest in large.[1300]

[1300] "Home - PMC - NCBI." Current Neurology and Neuroscience Reports., U.S. National Library of Medicine, www.ncbi.nlm.nih.gov/pmc/.

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PHARMACOVIGILENCE IN INDIA

Pharmacovigilance (PV) was officially introduced in December 1961 with the publication of a letter (case report) in the Lancet by W. McBride, the Australian doctor who first suspected a causal link between serious fetal deformities (phocomelia) and thalidomide, a drug used during pregnancy: Thalidomide was used as an antiemetic and sedative agent in pregnant women. In 1968, the World Health Organization (WHO) promoted the "Programme for International Drug Monitoring", a pilot project aimed to centralize world data on adverse drug reactions (ADRs). In particular, the main aim of the "WHO Programme" was to identify the earliest possible PV signals. The term PV was proposed in the mid-70s by a French group of pharmacologists and toxicologists to define the activities promoting "The assessment of the risks of side effects potentially associated with drug treatment".[1301]

PV is the science of collecting, monitoring, researching, assessing and evaluating information from healthcare providers and patients on the adverse effects of medications, biological products, blood products, herbals, vaccines, medical device, traditional and complementary medicines with a view to identifying new information about hazards associated with products and preventing harm to patients. The challenge of maximizing drug safety and maintaining public confidence has become increasingly complex. Pharmaceutical and biotechnology companies must not only monitor, but also proactively estimate and manage drug risk throughout a product's lifecycle, from development to post-market.

CONCLUSION

The pricing and regulatory changes established since 2013-14 and those that are being proposed will have significant impact on the pharmaceutical industry in India. With the general elections prior to May 2019, these pressures will continue to rise, not abate.

[1301] India, Think Change. "Majority of the Drugs Found in India Are Either Fake or Ineffective." YourStory.com, Yourstory, 6 June 2017, yourstory.com/2017/06/india-fake-drugs/.

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BONDED LABOUR THE CONTINUING MENACE: HOW TO BE SETTLED

- *Amber Tanweer*[1302]

"Children should have pens in their hands not tools". **IQBAL MASIH**

WHAT ELSE IS LEFT TO LEAVE BEHIND? The answer is quite easy and unambiguous. The practice of BONDED LABOUR.

Still prevalent…this act should be widely and deeply taken by all to rescue the citizens from this mental, emotional burden or torture.

Bonded labor, is a long-term relationship between employer and employee, which is usually solidified through a loan, and is embedded intricately in India's socio-economic culture that culture which is a product of class relations and a persistent poverty among many citizens. It is also known as debt bondage, it is a specific form of forced labor in which compulsion into servitude is derived from debt. Categorized and examined in the scholarly literature as a type of forced labor, bonded labor entails constraints on the conditions and duration of work by an individual. Not all bonded labor is forced, but most forced labor practices, whether they involve children or adults, are of a bonded nature. Bonded labor is most prevalent in rural areas where the agricultural industry relies on contracted, often migrant laborers. However, urban areas also provide fertile ground for long-term bondage. Characterized by a creditor-debtor relationship that a laborer often passes on to his family members, bonded labor is typically of an indefinite duration and involves illegal contractual stipulations. Contracts deny an individual the basic right to choose his or her employer, or to negotiate the terms of his or her contract. Bonded labor contracts are not purely economic; in India, they are reinforced by custom or coercion in many sectors such as the agricultural, silk, mining, match production, and brick kiln industries, among others. [1303]

Researchers of bonded labor in India seek to understand its long-standing practices through an examination of contemporary forms of labor coercion, their origins and relationships to poverty and inequality, and implications for policymaking.[1304] Child labor, agricultural debt bondage, and bonded migrant labor are persistent forms of modern slavery that fall under the Indian

[1302] Aligarh Muslim University
[1303] Ramesh Kumar Tiwari, Human Rights Law, 2011
[1304] www.maupatrafast.com

constitutional definition of forced labor. While child labor and bonded labor in India are typically addressed separately in the literature, many researchers focus on the causes and consequences of pervasive child labor in the world's largest democracy. Child laborers face major health and physical risks: they work long hours and are required to perform tasks for which they are physically and developmentally unprepared. Child labor is deeply entrenched as a common practice in many sectors and states, due in part to India's economic emphasis on exports in recent years.

According to a current estimate, a quarter of Indian children ages six to fourteen—roughly two hundred million children—are working, and a third of the remaining seventy-five percent are bonded laborers (Sooryamoorthy 1991: 31). [1305]The largest single employer of children in India is the agricultural sector where an estimated twenty-five million children are employed; and the second largest employer of Indian children is the service sector where children work in hotels and as household maids. An additional five million Indian children are employed in other labor-intensive industries. Bonded labour or bandha majdoori is one of the socio-economic evils of India. It is being practised from since ancient times and unfortunately, it is still continued to be practised in various forms.[1306]

Under this system, a person is given no or nominal numeration in return for his labour. It is also known as debt-bondage. This is because the bonded labour is generally demanded as a means of their repayment of a loan. This is an inhumane practice has been used by exploitative Zamindars or money-lenders as a trick to avail unpaid labour. Legal Restrictions and Enforcement The domestic legal treatment of individual labor rights, which are clearly articulated but seldom enforced, reflects India's blurry history with slavery. Article 23 of the 1949 Constitution of India outlaws both the trafficking of human beings and forced labor, but the legislation defining and banning bonded labor was only approved by Parliament in 1976. The Bonded Labour System Abolition Act of 1976 stipulates that the monitoring of labor violations and their enforcement are responsibilities of state governments. The Indian government has demonstrated a severe lack of will to implement this ban on bonded labor. Such pervasive non-enforcement may be attributed to several factors, including government apathy, caste bias, corruption, a lack of accountability, and inadequate enforcement personnel.

The Supreme Court of India has interpreted bonded labor as the payment of wages that are below the prevailing market wage or the legal minimum wage. As a response to complaints of human rights violations, the Court relies on Public Interest Law (PIL) whereby citizens are able to petition India's courts if they believe their rights, or the rights of their fellow citizens, are being denied.[1307] The Supreme Court's two major examinations of child labor in 1991 and 1997 resulted in PIL rulings that emphasized the role of poverty, and promoted children's education.

[1305] www.du.edu/korbel/hrhw
[1306] www.du.edu/korbel/hrhw
[1307] www.manupatrafast.com

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However, the Court refused to ban child labor outright, citing its role as a judicial and not a legislative body. The Indian government has not yet actively linked economic development to human rights violations at work. A recent government measure to raise the minimum wage for children exemplifies a lagging commitment to the eradication of child labor in particular, by essentially legitimizing children's work obligations and conditions. Nevertheless, the decision of the Supreme Court to establish a rehabilitation and welfare program for working children, in addition to the efforts of the National Human Rights Commission, have been instrumental in sensitizing policymakers to the serious problem of child labor.

The bonded labour system is one of the main characteristics of the feudal hierarchical society. The system was designed to enable a few socially and economically powerful sections of society to exploit the weaker sections of the society.

In India, the bonded labour is also an off-shoot of our caste-system. especially the person belonging to the so-called higher castes such as Rajpoot and Brahmins who are the exploiters and person belonging to the lower castes such as Sudras who are the exploited. Due to their weak economic and social-cultural within the society, the SC/STs, Dalits are forced to sell their labours for nominal or no remuneration to the village, landlords or moneylenders. Its practice continuing from ancient times and in some parts of the country is still prevalent. Other reasons are large families, poor education and lack of awareness among the backward people, it makes their condition worse. Sometimes the force or coercion is also used by powerful landlords to make a bonded labour contracts. Thus, basically, it is an exploitative practice root of which lie in vast inequalities and disparities existing in social, economic and cultural aspects of India.

Article 21 of the Constitution of India guarantees the right to life and liberty. The Indian Supreme Court has interpreted the right of liberty to include, among other things, the right of free movement, the right to eat, sleep and work when one pleases, the right to be free from inhuman and degrading treatment, the right to integrity and dignity of the person, the right to the benefits of protective labor legislation, and the right to speedy justice. The practice of bonded labour violates all of these constitutionally-mandated rights.[1308]

Article 23 of the Constitution prohibits the practice of debt bondage and other forms of slavery both modern and ancient. Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.

[1308] Jain, M.P., "Indian Constiutional Law", 1978 Ed.

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Begar is a form of forced labour under which a person is compelled to work without receiving any remuneration. Other similar forms of forced labour were interpreted the Supreme Court when it ruled in the *Asiad Workers Case* that:both unpaid and paid labour were prohibited by Article 23, so long as the element of force or compulsion was present in the worker's ongoing services to the employer. The Supreme Court also interpreted the term forced labour to mean providing provides labour or service to another for remuneration which is less than minimum wage. All labour rewarded with less than the minimum wage, then, constitutes forced labor and violates the Constitution of India.

The Supreme Court ruled that: it is the plainest requirement of Articles 21 and 23 of the Constitution that bonded labourers must be identified and released and on release, they must be suitably rehabilitated any failure of action on the part of the State Governments in implementing the provisions of the Bonded Labour System (Abolition) Act would be the clearest violation of Article 21 and Article 23 of the Constitution.[1309]

Article 24 prohibits the employment of children in factories, mines, and other hazardous occupations. Together, Articles 23 and 24 are placed under the heading "Right against Exploitation," one of India's constitutionally-proclaimed fundamental rights.

Article 39 requires the state to "direct its policy toward securing":

(e) that the health and strength of workers... and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

Bonded Labour System (Abolition) Act, 1976 purports to abolish all debt agreements and obligations arising out of India's longstanding bonded labour system. It is the legislative fulfillment of the Indian Constitution's mandate against *begar* and forced labour.It frees all bonded labourers, cancels any outstanding debts against them, prohibits the creation of new bondage agreements, and orders the economic rehabilitation of freed bonded laborers by the state. It also criminalizes all post-act attempts to compel a person to engage in bonded labour, with maximum penalties of three years in prison and a 2,000 rupee fine. The Bonded Labour System (Abolition) Act offers the following definition of the practices being abolished.

[1309] Menon, Meena, “Escape from Bondage”, The Hindu, September 7, 2003, New Delhi Ed.

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Salient Features of the Act

1) totally abolishes bonded labour

2) to identify and rehabilitate bonded labourers

3) identify certain scheme an committees to be formed at the district level

4) punishment of up to 3yrs imprisonment and/or fine

5) any attachment of property of bonded laborers stands cancelled form the date of enforcement of the act

6) employers not to evict the bonded labourer from the accommodation provided

Sec. 2(e) of the Bonded Labour System (Abolition) Act, 1976 defines bonded labour to mean any labour or service rendered under the bonded labour system. Under s.2(f) bonded labourer means a labourer who incurs, or has, or presumed to have incurred a bonded debt.

Sec. 2(g) "bonded labour system" means the system of forced, or partly forced labour under which a debtor enters...or is presumed to have entered, into an agreement with the creditor to the effect that,-

(i) in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by any document) and in consideration of the interest, if any, due on such advance, or

(ii) in pursuance of any customary or social obligation, or

(iii) in pursuance of an obligation devolving on him by succession, or

(iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or

(v) by reason of his birth in any particular caste or community, he would-

(1) render, by himself or through any member of his family... labour or service to the creditor, or for the benefit of the creditor, for a specified period or for an unspecified period, either without wages or for nominal wages, or

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(2) forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or

(3) forfeit the right to move freely throughout the territory of India, or

(4) forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent on him...

District magistrates/ district collectors, or deputy commissioners, in some states are responsible for enforcement of the Bonded Labour System (Abolition) Act. As part of his duties, he is required by the Bonded Labour System (Abolition) Act to identify all cases of bonded labour occurring in his district, free the labourers, and initiate prosecution under the act. He is also charged with making sure available credit sources are in place, so that freed laborers will not be forced into bondage again. Finally, the district magistrate is to constitute and participate in the functioning of a district-level "vigilance committee." The statutory functions of this committee are:

(a) to advise the District Magistrate . . . as to the efforts made, and action taken, to ensure that the provisions of this act... are properly implemented;

(b) to provide for the economic and social rehabilitation of the freed bonded labourers;

(c) to coordinate the functions of rural banks and cooperative societies with a view to canalizing adequate credit to the freed bonded labourers;

(d) to keep an eye on the number of offences of which cognizance has been taken under [the] act;

(e) to make a survey as to whether there is any offence of which cognizance ought to be taken under the act;

(f) to defend any suit instituted against a freed bonded labourer or a member of his family... for the recovery of the whole or part of any bonded debt...

Very few such vigilance committees have been formed, and Human Rights Watch knows of no district in which such a committee is currently operative.

References to rehabilitation of freed bonded laborers occur twice in the Bonded Labour System (Abolition) Act. Once in reference to the district magistrate's duty to "secure and protect the economic interests" of the bonded laborer (Sec. 11), and once in stipulating the vigilance committees' duty to provide for the "economic and social rehabilitation" of the bonded laborer (Sec. 14). The act itself, however, does not specify of what this rehabilitation should consist and

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left implementation of rehabilitation up to the state governments, and largely dependent on the initiative of District Magistrates.[1310]

In 1978, the Ministry of Labour launched a scheme that specified a "rehabilitation allowance" in order to assist state governments with rehabilitation. Under this scheme, the central government contributes half of the rehabilitation assistance allowance due to every freed bonded labourer, and the state where the bonded labourer resides pays the other half. The allowance, determined by a Ministry of Labour Planning Commission, was originally set at 4,000 rupees. In its *1994-95 Annual Report*, the Ministry of Labour stated that funds for rehabilitation assistance would be increased from Rs. 6,250 to Rs.10,000 for each bonded laborer, and that respective State Governments will undertake further surveys to identify bonded labourers as may still be in existence and report to the Government of India. The State Governments have also agreed to undertake selective follow-up studies to assess whether rehabilitated bonded labourers have relapsed into bondage and to set up Vigilance Committees, wherever they are not in existence.

Judical Activism regarding in *Sanjit Ray v. State of Rajasthan*[5], the SC restricted the state from extracting labour by paying less than the minimum wages in the name of public utility services, considering such amounts to forced labour and is violative of article 23 of the constitution. Therefore, labour must be compensated with wages even when they are under law compelled to render service in the larger public interest.

In *Bandhua Mukti Morcha v. Union of India*[6], the main issue concerned the existence of bonded labour in the Faridabad stone quarries near the city of Delhi. It was alleged that majority of the workers were compelled to migrate from other states, and turned into bonded labourers. The workers were living in sub-human and miserable conditions. A violation of various labour laws and the Bonded Labour System (Abolition) Act 1976 was alleged. The SC stated that before a bonded labour can be regarded as a bonded labourer, he must not only be forced to provide labour to the employer but he must have also received an advance or other economic consideration from the employer, unless he is made to provide forced labour in pursuance of any custom or social obligation or by reason of his birth in any particular caste or community.

Whenever it is shown that a labourer is made to provide forced labour, the court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is, therefore, a bondedlabourer. But unless and until satisfactory evidence is produced for rebutting this presumption the court must proceed on the basis that the labourer is a bonded labourer entitle to the benefit under the provision of the Bonded Labour System (Abolition) Act, 1976. The courts also recognized the right of

[1310] Seervai, H.M., "Constitutional Law of India," Vol 1,1983 Ed.

bonded labourers to live with human dignity. It read the Directive Principles of State Policy into article 21 of the constitution to make the right to live with human dignity fruitful to the working class of the country. The stand in the *Asiad case*[7] was reiterated that the state is under a constitutional obligation to see that there is no violation of any fundamental rights of person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. The Central government is bound to ensure observance of social welfare and labour laws enacted by the parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy.[1311]

In *Neerja Choudhary v. State of MP* the main issue in this case related to the effective rehabilitation of the released bonded labourers. The petitioners alleged that even after a lapse of a long time 135 labourers of the Faridabad stone quarries were not rehabilitated. They further alleged that it was the obligation on the part of the state government to rehabilitate the bonded labourers according to the provisions of the Bonded Labour System (Abolition) Act 1976 and it is the fundamental right of the bonded labourers under article 21 of the constitution. The petitioners therefore prayed for a direction to the state government to take steps for the economic and social rehabilitation of the labourers who were released from the shackles of bondage. The SC said that the plainest requirement of article 21, 23 that the bonded labourers must be identified and released and on release, they must be suitably rehabilitated. The act has been enacted with a view to ensuring human dignity to the bonded laborers and any failure of action on part of the state government, in implementing the provisions of this legislation would be the clearest violation of article 21, 23 of the Constitution. The courts also said that it is not enough merely to identify and release bonded labourers, but it is equally important that after identification and release, they must be rehabilitated, because without rehabilitation, they would be driven by poverty, helplessness and despair into serfdom once again.In *P. Sivaswamy v. State of A.P t*he courts found that the rehabilitation money payable under the Bonded Labour System (Abolition) Act, 1976 came down to Rs. 738/- per family. The Court observed that the assistance was certainly inadequate for rehabilitation and unless there was effective rehabilitation the purpose of the Act would not be fulfilled. Up-rooted from one place of bonded labour conditions the persons are likely to be subjected to the same mischief at another place, the net result being that the steps taken by the Supreme Court would be rendered ineffective.

In *Balram and others* v. *State of M.P.* the main issue was to determine whether the state and central governments had given the benefit of the scheme framed under the Bonded Labourers Act (whereby each bonded labourer was to be paid Rs. 6, 250/- as rehabilitation money) to some

[1311] Seervai, H.M., "Constitutional Law of India," Vol 1,1983 Ed.

3949 labourers in the state. The court directed that the Additional Collector and such, other officers who have been assigned the responsibility of supervising rehabilitation to ensure that the full amount intended for the freed labourers reaches them. Therefore, all such persons who were willing to have an account opened in their respective names for facilitating credit of the amount in such account shall have accounts opened and the money shall be credited in such accounts. The Union of India was also directed to release adequate funds under the Scheme to meet the liability under the Scheme framed under the Bonded Labour System (Abolition) Act, 1976 within four weeks to enable compliance of the directions now made. Similar directions were also issued to the State of Madhya Pradesh.[1312]

A public interest litigation was brought against the inhuman working conditions in the stone quarries in *Bandhua Mukti Morcha v. Union of India and others*[11]. This was primarily brought as the various directions given by the Apex Court in the 1984 petition brought by the same appellants had not been implemented by the various state governments. It may be noted that in this case a letter addressed to this Court complaining about prevalence of bonded labour system in Cutton, Anagpur and Lakkaarpur areas in Haryana, was treated as a writ petition under Art. 32 of the Constitution.The Court held that what is necessary is provision of a permanent base for residence of the labourers, at or near the work site. This would necessitate reasonable housing, supply of water, a reasonable provision store at hand, schooling facility, facility of a hospital, recreational facilities and attention to the law and order problem. The court directed the State of Haryana to attend to the needs of the workmen in a well-considered and systematic way and to provide them with the facilities mentioned above.[1313]

In *Bandhua Mukti Morcha v. Union of India and others the,* main issue involved was whether the employment of the children below the age of 14 years was violative of Article 24 and whether the omission on the part of the State to provide welfare facilities and opportunities deprives them of the constitutional mandates contained in Articles 45, 39(e) and (f), 21, 14 etc.?The Supreme Court while dealing with the issue held that while exploitation of the child must be progressively banned, other simultaneous alternatives to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person. Therefore the Court ordered the Government of India to convene a meeting of the concerned Ministers of the respective State Governments and their Principal Secretaries holding concerned Departments, to evolve the principles and policies for progressive elimination of employment of the children below the age of 14 years in all employments governed by the respective enactments mentioned in *M.C. Mehta's* case - To provide (1) compulsory education to all children either by the industries itself or in co-ordination with it by the State Government with

[1312] Basu, Kaushik. 2000. "The Intriguing Relation Between Adult Minimum Wage and Child Labour." The Economic Journal

[1313] Seervai, H.M., "Constitutional Law of India," Vol 1, 1983 Ed.

such timings as is convenient to impart compulsory education, facilities for secondary, vocational profession and higher education; (2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles. Periodical reported of the progress made in that behalf be submitted to the Registry of this Court.[1314]

Thus the Supreme Court set a new constitutional standard at a time when state on its part had completely neglected the human values. The court further remarked that the state government is under the constitutional scheme, charged with the mission of bringing about a new socio-economic order where there will be socio-economic justice for everyone and equality of status and opportunity for all.

Carrying out comprehensive and independent national surveys to identify the total number of bonded labourers in the country will only helpto curb this menace. These surveys should include breakdowns of *dalit* bonded labourers and those who have to provide forced labour for landlords.[1315]All local and national officials responsible for implementing the bonded labour laws must be properly trained and function effectively, so that they actively seek out cases of bonded labour and ensure immediate release and rehabilitation, in compliance with the law. Prosecutions must be initiated against all those who use bonded labour and against those who use intimidation and violence to retain people as bonded labourers. The number of successful convictions and sentences passed should be published, by state, on a regular basis.

Pressure states and districts to constitute and oversee bonded labour vigilance committees, as required by the Bonded Labour (System) Abolition Act, 1976 and ensure the active involvement of the Scheduled Castes and Scheduled Tribes Commission in the process of identifying, releasing, and rehabilitating bonded child laborers. We should launch a nationwide public awareness campaign regarding the legal prohibition of bonded labor. This campaign should explain in simple terms what actions are legally prohibited and what recourses and resources are available to bonded child laborers and their families.

The Bonded Labour System (Abolition) Act was enacted in 1976. Twenty years later, Human Rights Watch has found that the goals of this law-to punish employers of bonded labour and to identify, release, and rehabilitate bonded labourers-have not been met. The bonded labour system continues to thrive.The district-level vigilance committees, mandated by the Bonded Labour System (Abolition) Act and constituting the key to the enforcement of the act, have not been formed in most districts. Those that have formed tend to lie dormant or, worse yet, are comprised of members unsympathetic to the plight of bonded laborers.

[1314] Narendra Kumar, The Indian Constitution

[1315] Seervai, H.M., "Constitutional Law of India," Vol 1,1983 Ed.

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Whether for lack of will or lack of support, India's district collectors have failed utterly to enforce the provisions of the Bonded Labour System (Abolition) Act. The state of Tamil Nadu has an estimated one million bonded labourers; according to the North Arcot District Collector, these were the first charges ever brought under the act in Tamil Nadu.[1316]The mandated rehabilitation of released workers is essential. Without adequate rehabilitation, those who are released will quickly fall again into bondage. This has been established repeatedly, among both adult and child bonded laborers. Nonetheless, the central and state governments have jointly failed to implement the required rehabilitation procedures. Rehabilitation allowances are distributed late, or are not distributed at all, or are paid out at half the proper rate, with corrupt officials pocketing the difference. One government-appointed commission found that court orders mandating the rehabilitation of bonded laborers were routinely ignored.

Finally, the Bonded Labour System (Abolition) Act directs vigilance committees and district collectors to institute savings and credit programs at the community level, so that the impoverished might have access to a small loan during financial emergencies. This resource is crucial. Just as enforcement of the law against employers would work to terminate the demand for bonded labour, so would available credit work to end the supply. Nearly every child interviewed by Human Rights Watch told the same story: they were sold to their employers because their parents were desperate for money and had no other way to get it. For some, it was the illness or death of a parent, for others, the marriage of a sister, and for others still, the need to buy food or put a roof over their heads. In most cases, the amount of the debt incurred was very small.[1317]

The eradication of bonded child labor in India depends on the Indian government's commitment to two imperatives: enforcement of the Bonded Labour System (Abolition) Act, and the creation of meaningful alternatives for already-bonded laborers and those at risk of joining their ranks. In addition to genuine government action, it is essential that non-governmental organizations be encouraged by the government to collaborate in this effort. The government has the resources and authority to implement the law, while community-based organizations have the grass-roots contacts and trust necessary to facilitate this implementation. Furthermore, non-governmental groups can act as a watchdog on government programs, keeping vigil for corruption, waste, and apathy. The elimination of current debt bondage and the prevention of new or renewed bondage therefore requires a combination of concerted government action and extensive community involvement.

[1316] Seervai, H.M., "Constitutional Law of India," Vol 1, 1983 Ed.

[1317]Seervai, H.M., "Constitutional Law of India," Vol 1, 1983 Ed.

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Bonded labor is a continuing pernicious, and long-standing social menace and the tenacity of the bonded labor system must be attacked with similar tenacity; anything less than total commitment is certain to fail. The time has come to dismantle the structure of this crime and to root out from the deep hidden and throw away so far that it won't be able to strike in any hypocrites mind.

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ENFORCEMENT OF LAW TO CURB CRIMES RELATED TO CRYPTOCURRENCIES

- *Carol Elsa Zachariah*

INTRODUCTION

In 2009, a group of individuals, working under the name Satoshi Nakamoto,[1318] published a paper laying out the system for a proposed electronic currency.[1319]The paper sketched out the idea driving a totally new currency—not upheld by any administration or redeemable for any product—which could be circulated around various countries, missing the control of any legislature body. Other designers have since taken up the jobs of creating and advancing the stage. There are presently five center engineers, from four unique nations, who approach the Bitcoin source code, yet the code itself is published on the web and is accessible for all to download and inspect.[1320] For another rendition of the source code to produce full results, no less than 51 percent of the system must download the new form, along these lines guaranteeing that no progressions to the framework might be ordered without dominant part agreement. Bitcoin is bolstered by an published network of users and depends on cutting edge cryptography strategies to guarantee its steadiness and reliability.[1321] A Bitcoin is basically a chain of digital signatures (i.e., a series of numbers) spared in a "wallet" file[1322]. This chain of signature contains the important history of the particular Bitcoin so the framework may confirm its authenticity and exchange its proprietorship starting with one client then onto the next upon request.

A client's wallet comprises of the Bitcoins and it contains, an public key, and a private key. Public key is the deliver to which another gathering can send Bitcoins, and the private key is the thing that empowers the wallet's proprietor to send his own Bitcoins to somebody else. Satoshi Nakamoto featured what was seen to be a key issue with Internetcommerce: the need for trusted third parties—financial institutions such as banks and other non banking financial corporations—to deal with the job of payment processing and the costs forced by those third parties. After all, somebody must confirm the authenticity of payments which are processed to avert misrepresentation and double spending. To take care of this issue, Nakamoto recommended that

[1318] Joshua Davis, The Crypto-Currency, NEW YORKER, Oct. 10, 2011, at 62, for a thorough investigation into the true identity of Satoshi Nakamoto

[1319] Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, BITCOIN, http://www.bitcoin.org/bitcoin.pdf (last visited sept 10,2018).

[1320]Gavin Andresen, Bitcoin: The World's First Person-to-Person Digital Currency, BITCOIN TRADING (June 20, 2011), http://www.bitcointrading.com/pdf/GavinAndresenCIA Talk.pdf. The Bitcoin source code can be downloaded at https://www.github.com/bitcoin /bitcoin.

[1321] Nakamoto, supra note 14, at 1.

[1322] EUROPEAN CENT.BANK, supra note 1, at 23; Nakamoto, supra note 14, at 2; Andresen, supra note 16.

a disseminated system could go up against the job of payment processing, consequently decreasing the transaction costs to almost negligent amounts.[1323] This published system would keep running on the processing power of people's PCs, which they permit to be utilized in return for payment in Bitcoins. The Bitcoin network endeavors to guarantee the anonymity of each exchange, in spite of the way that every exchange must be published for verification. The structure of the system requires public diosclosure of each exchange so they might be validated, yet the identity of various users remain anonymous. This is quite similar to the manner in which a securities exchange discharges data about each exchange that happens, yet without releasing the identities of parties involved.

To conclude, Bitcoin is an unbacked, unregulated type of virtual currency that takes into consideration exchanges that are quicker, less expensive, and more anonymous than some other existing scheme. In numerous ways, it is the only invention which can be considered as the digital equivalent of cash.

FUNCTIONING

1. Public Ledger: Every single affirmed exchange from the beginning of a digital currency's creation are put away in a public ledger. The personalities of the coin proprietors are encrypted, and the framework utilizes other cryptographic strategies to guarantee the authenticity of record keeping. The record guarantees that relating "digital wallets" can figure an exact spendable equalization. Additionally, new exchanges can be checked to guarantee that every exchange utilizes coins which are currently in the possession of the spender. Bitcoin considers this public ledger a "transaction block chain." [1324]
2. Transactions: An exchange of assets between two advanced wallets is known as an exchange. That exchange gets submitted to a public ledger and anticipates affirmation. Wallets utilize a encrypted electronic mark when an exchange is made. The mark is a encrypted bit of information called a cryptographic mark and it gives a numerical confirmation that the exchange originated from the proprietor of the wallet. The affirmation procedure takes a touch of time (ten minutes for bitcoin) while "miners" mine. Mining affirms the exchanges and adds them to public record.
3. Mining: Mining is the way toward affirming exchanges and adding them to an public ledger. To add an exchange to the record, the "digger" must tackle an inexorably complex computational issue (like a numerical riddle). Mining is open source so anybody can affirm the exchange[1325]. The main "excavator" to understand the riddle includes a "square" of exchanges to the record. The manner by which exchanges, squares, and people in general

[1323] Nikolei M. Kaplanov, Comment, Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Against Its Regulation 5(Temple Univ. Legal Studies Research Paper,2012), available at; Andresen, supra note 16.
[1324] How Does Cryptocurrency Work? CryptoCurrency Facts, https://cryptocurrencyfacts.com/how-does-cryptocurrency-work-2/ (last visited Sep 20, 2018).
[1325] How Does Cryptocurrency Work? (for Beginners) CryptoCurrency Facts, https://cryptocurrencyfacts.com/how-does-cryptocurrency-work-for-beginners/ (last visited Sep 10, 2018).

blockchain record cooperate guarantee that nobody individual can without much of a stretch include or change a square freely. Once a square is added to the record, all associating exchanges are perpetual, and they add a little exchange expense to the excavator's wallet (alongside recently made coins). The mining procedure is the thing that offers an incentive to the coins and is known as a proof-of-work framework.

4. Adaptive Scaling: Adaptive scaling implies that digital forms of currency are worked with measures to guarantee that they will function admirably in both huge and smaller scales. Different measures are incorporated into digital coins to take into account adaptivescaling including restricting the supply after some time (to make shortage) and decreasing the reward for mining as more aggregate coins are mined.
5. Cryptographic: Digital currency utilizes an arrangement of cryptography (Otherwise known as encryption) to control the production of coins and to check exchanges.
6. Decentralized: Most monetary standards available for use are controlled by a centralized government so their creation can be managed by an outsider. Digital currency's creation and exchanges are open source, controlled by code, and depend on "peer-to-peer" systems. There is no single substance that can influence the cash.
7. Digital: Conventional types of cash are characterized by a physical protest (USD existing as paper cash and in its initial years being supported by gold for instance), however cryptographic currency is all advanced. Digital coins are put away in advanced wallets and exchanged carefully to other people groups' advanced wallets. No physical protest ever exists[1326].
8. Proof of-work: Most cryptographic forms of currency utilize a proof-of-work framework. A proof-of-work plot utilizes a difficult to-figure however simple to-check computational riddle to restrict abuse of digital currency mining. Basically, it's like a hard to comprehend "captcha" that requires loads of processing power.
9. Pseudonymity: Proprietors of cryptographic currency keep their digital coins in an encoded advanced wallet. A coin-holder's ID is put away in an encoded address that they have authority over – it isn't connected to a man's identity. The association among you and your coins is pseudonymous as opposed to unknown as records are available to people in general (and in this way, the records could be utilized to gather data about gatherings of people in the system).
10. Value: For something to be a viable cash, it must have value. The US dollar used to speak to genuine gold. The gold was rare and expected work to mine and refine, so the shortage and work gave the gold value. This, thusly, gave the US dollar value. \

RISE IN ILLEGAL ACTIVITIES WITH THE ADVENT OF CRYPTOCURRENCIES

Digital currency works comparably with respect to value. In cryptographic currency, "coins" (which are just openly concurred on records of possession) are created or delivered by

[1326] Chrisjan Pauw, How Cryptocurrency Prices Work, ExplainedCointelegraph (2018), https://cointelegraph.com/explained/how-cryptocurrency-prices-work-explained (last visited Sep 10, 2018).

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"excavators." These mineworkers are individuals who run programs on particular equipment made particularly to unravel confirmation of-work confounds. The work behind mining coins gives them value, while the shortage of coins and interest for them makes their value vary. Work offering an incentive to cash is known as a "proof-of-work" framework. The other technique for approving coins is called proof of-stake. Value is additionally made when exchanges are added to open records as making a checked "exchange square" accepts function also. Further, value originates from elements, for example, utility and free market activity.[1327]

The fast development in cryptographic forms of currency and the secrecy that they give clients has made significant administrative difficulties, including the utilization of digital currencies in illicit exchange (drug trafficinkg, hacks and robberies, child pornography)potential to support fear based oppression, launder cash, and stay away from capital controls. There is little uncertainty that by giving an advanced and anonymous installment instrument, digital forms of currency, for example, bitcoin have encouraged the development of 'darknet' online commercial centers in which illicit products and ventures are exchanged. The ongoing FBI seizure of over $4 million of bitcoin from one such commercial center, the 'Silk road', gives some thought of the size of the issue looked by enforcement agencies.

We locate that illicit movement represents a significant extent of the clients and trading action in bitcoin. For instance, roughly one-fourth of all users (25%) and near one-portion of bitcoin exchanges (44%) are related with illicit action. The evaluated 24 million bitcoin users utilize bitcoin essentially for unlawful purposes.

To give these numbers some relevance with the present scenario, the aggregate market for unlawful drugs in the US and Europe is assessed to be around $100 billion and €24 billion every year[1328]. Such correlations give a feeling that the size of the illicit movement including bitcoin isn't just important as an extent of bitcoin action, yet additionally in total dollar terms. The size of unlawful movement recommends that digital currencies are changing the manner in which bootleg trades work by empowering 'underground market internet business'. As a result, cryptographic forms of currency are encouraging a change of the bootleg market much like PayPal and other online installment instruments reformed the retail business through internet shopping.

As of late (since 2015), the extent of bitcoin movement related with unlawful exchange has declined. There are two explanations behind this pattern. The first is an expansion in standard

[1327] Sex, drugs, and bitcoin: How much illegal activity is financed through cryptocurrencies?, Oxford Law Faculty (2018), https://www.law.ox.ac.uk/business-law-blog/blog/2018/02/sex-drugs-and-bitcoin-how-much-illegal-activity-financed-through (last visited Sep 10, 2018).

[1328] Jason Bloomberg, Bitcoin: 'Blood Diamonds' Of The Digital Era Forbes(2017), https://www.forbes.com/sites/jasonbloomberg/2017/03/28/bitcoin-blood-diamonds-of-the-digital-era/#7e599a56492a (last visited Sep 10, 2018).

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and theoretical enthusiasm for bitcoin (fast development in the quantity of legitimate clients), causing the extent of unlawful bitcoin action to decay, in spite of the way that the total measure of such movement has kept on expanding. The second factor is the rise of elective digital forms of currency that are more misty and better at covering a client's action (eg, Dash, Monero, and ZCash). Notwithstanding these two elements influencing the utilization of bitcoin in illicit action, and in addition various darknet commercial center seizures by law enforcement offices, the measure of unlawful action including bitcoin toward the finish of our example in April 2017 stays near its record-breaking high.

There are numerous reasons why governments should need to consider an unregulated, virtual, and anonymous money. Past the hazard that one's residents may succumb to con artists and Ponzi rogues, Bitcoin offers critical open doors for the individuals who might launder cash, conceal salary from income tax authorities, or execute in unlawful goods.[1329] Additionally, in nations where the decision administrations implement strict control over the use of Internet(e.g., China, Saudi Arabia, United Arab Emirates), Bitcoin offers outlaw bloggers and progressives the capacity to pay for various services which are otherwise not easily available, for example, web publishing, without uncovering their real identities.

MONEY LAUNDERUNG AND TAX FRAUD

The relative secrecy of Bitcoin exchanges, and the speed and simplicity with which they can be done, makes the cash especially appealing for cash laundering.[1330] for instance, the BitLaundry site is expressly committed to the laundering of Bitcoins in return for a charge.[1331]

Moreover, the Silk Road, a site for acquiring illicit drugs, automatically mixed funds being saved before placing them into a client's account.[1332] According to the site's administrator, this made it for all intents and purposes difficult to interface a particular client's outside Bitcoin wallet to a Silk Road transaction. similar highlights that profit launderers additionally make it appealing to the individuals who incline toward tax evasion and will infringe upon the law to abstain from doing so.[1333] Though it is hazy how Bitcoin will be taxed,201 the obscurity of the Bitcoin framework makes proficient authorization profoundly illogical. Hence, there is noteworthy worry that Bitcoin could turn into a prominent tax haven.

SILK ROAD & OTHER SIMILAR MARKET PLACES

[1329]Intelligence Assessment, Fed. Bureau of Investigation, Bitcoin Virtual Currency: Unique Features Present Distinct Challenges for Deterring Illicit Activity (Apr. 24, 2012)

[1330] Robert Stokes, Anti-Money Laundering Regulation and Emerging Payment Technologies, 32 BANKING &FIN.SERVICES POL'Y REP. 1 (2013), and Danton Bryans, Note, Bitcoin and Money Laundering: Mining for an Effective Solution, 89 IND. L.J. 441 (2014), for a more thorough analysis of the money laundering risks associated with virtual currencies.

[1331] BitLaundry, and more information on its function and purposes, Additionally, there are a variety of Bitcoin "mixers" or "tumblers" that serve essentially the same purpose

[1332] Andy Greenberg, Follow the Bitcoins, FORBES, September 5, 2018

[1333]Omri Marian, Are Cryptocurrencies Super Tax Havens?, 112 MICH.L.REV.(forthcoming 2013).

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Maybe the most noticeable case of why world governments are probably going to take a more noteworthy enthusiasm for Bitcoin was the, now dead, online commercial center known as Silk Road and the manner by which it encouraged the exchange of illicit drugs. In June 2011, the online magazine Gawker published an article that uncovered the presence of the commercial center to the general public.[1334] This set off a media whirlwind and caused shock among concerned individuals from society. Silk Road was an online commercial center where one could buy, among other things, any of 340 distinctive unlawful drugs from individual sellers. Your buy would then be sent straight to your doorstep from wherever on the planet the vender happened to be located. The webpage had areas for audits—much like Amazon or other online retailers—and numerous merchants even offered free samples. The system depended intensely on the its dealers and strived to identify and eradicate scammers. Similar to numerous other genuine online commercial centers, purchasers could measure whether to confide in a particular merchant in view of the encounters of others. The key to Silk Road's presence was its apparent anonymity; both purchasers and dealers were unidentifiable , and the website lived in a dim, as far as anyone could hack into untraceable corner of the Internet. This anonymity was refined by means of the usage of two advances: 1) [1335]an online system known as TOR and 2) Bitcoin.[1336] To elucidate more on the above-mentioned advances, TOR made it difficult to track a Silk Road client on the website by observing web movement, and, on the grounds that payments were just acknowledged in anonymous Bitcoins, clients couldn't be followed that way either. Governments were believed to be totally oblivious in regards to what their natives acquired in the commercial center and even to the way that the business sectors were there in the first place. On October 1, 2013, the FBI declared that it had effectively shutdown Silk Road. Rather than some weakness in the TOR or Bitcoin systems, the FBI simply used old-fashioned police techniques to track down the site's operator, who turned out to be somewhat less of an evil genius than internet lore had built him up to be.[1337] By catching medication shipments and afterward investigating the digital trails and correspondences of the individuals who fell into their grip, the FBI could discreetly sort out a comprehension of the merchants and overseers who made up the marketplace. Ultimately, a covert operator could build up an association with Dread Pirate Roberts (DPR), the pseudonymous proprietor behind Silk Road. Ultimately, messy endeavors at concealing his character enabled the FBI to expose DPR, who was uncovered to be Ross Ulbricht, a 29-year-old from San Francisco. However, the estimation of Bitcoins to the individuals who wish to direct unlawful action namelessly was not restricted to Silk Road. There are destinations that offer guns, cleaned of their serial numbers, available to be purchased to unknown buyers. Similar

[1334] Adrian Chen, The Underground Website Where You Can Buy Any Drug Imaginable, GAWKER (Sept 5 4:20 PM),

[1335]Adrian Jeffries, FBI seizes underground drug market Silk Road, owner indicted in New York, THE VERGE (sept 8, 2018)

[1336] TOR, see generally Joel Falconer, Mail-Order Drugs, Hitmen & Child Porn: A Journey into the Dark Corners of the Deep Web, NEXT WEB (sept. 8, 2018, 2:56 AM), for a more detailed exploration of TOR beyond the scope of this paper.

[1337] Kim Zetter, How the Feds Took Down the Silk Road Drug Wonderland, WIRED (Sept 10,2018), http://www.wired.com/threatlevel/2013/11/silk-road/.

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commercial centers could be made to encourage the offer of a merchandise, legitimate or not. As of now, successors to Silk Road have started to emerge.

As indicated by the fixed protest documented by the FBI, government specialists captured Ross William Ulbricht on Tuesday evening, accusing him of drug trafficking, PC hacking and illegal currency laundering.

The FBI likewise grabbed the Silk road site. Since its 2011 origin, Silk road has been the go-to underground market for a wide range of unlawful items and administrations.The site was worked on an unknown system known as Tor, making movement on Silk road for all intents and purposes untraceable. The main cash acknowledged on Silk road was the advanced currency bitcoin, including an extra layer of anonymousness to purchasers and dealers.The utilization of bitcoin helped Silk road turn into a mammoth money laundering activity, as indicated by the FBI.[1338] To process bitcoin exchanges, Silk road utilized what the FBI depicted as a "tumbler," a mind boggling framework that utilized innumerable sham exchanges to carefully disguise where the cash originated from.

In the course of the last more than two years, the FBI said the site produced income worth in excess of 9.5 million bitcoins - esteemed at $1.3 billion early Wednesday. The FBI had reported that Ulbricht's total assets was basically his incentive in Silk road's payments, which totaled in excess of 600,000 bitcoins ($85 million).

Silk road wasn't limited to illicit drugs. The FBI says it was likewise used to exchange guns, contract professional killers and utilize hackers. FBI earlier reported how undercover agents utilized Silk road to purchase euphoria, cocaine, heroin and LSD. They additionally bought hacking programming from in excess of 100 clients. The FBI likewise found a few of Silk road's PC servers, incorporating one out of an outside nation.

MEASURES TAKEN BY ENFORCEMENT AGENCIES IN VARIOUS COUNTRIES

USA: Bitcoin has for some time been the exchange currency of decision for drug traffickers and extortionists, yet this month, the IRS has increased the diversion. The IRS as of late subpoenaed client records from Coinbase, a main Bitcoin trade.

The latest request from the IRS to Coinbase is a **'John Doe'** summons, which implies that the IRS isn't naming a specific Coinbase clients, yet is somewhat issuing a sweeping solicitation for data about countless – despite the fact that the IRS might not have any doubts about every one of them.

[1338] According to the sealed complaint filed the FBI, FBI shuts down online drug market Silk Road FBI busts black market bazaar Silkroad, arrests its alleged mastermind CNNCurrency, https://currency.cnn.com/2013/10/02/technology/silk-road-shut-down/index.html (last visited Sep 10, 2018).

Accordingly, Coinbase says that while it has a strategy of agreeing to every single legitimate request (of which this is one), it trusts this one exceeds certain limitis, and is in this way is battling it in court. "Get the job done to state, we feel the IRS's subpoena is excessively expansive and erroneously suggests that all clients of virtual currency are violating laws and evading taxes," expressed Coinbase Fellow benefactor and Chief Brian Armstrong in a blog entry.

Such non-compliance, actually, may not generally be purposeful. It's imaginable numerous Bitcoin fans are unintentionally crossing paths with IRS's direction that Bitcoin is property, not cash. Subsequently, every Bitcoin connection is possibly assessable independently, prompting a printed material migraine for dynamic Bitcoin dealers[1339].

In light of a broadly discussed article about the Silk Road, Senators Charles Schumer and Joe Manchin composed a letter to the United States Attorney General, Eric Holder, to ask him and the Drug Enforcement Administration (DEA) to "make quick move and close down the Silk Road network."[1340] Though the Senators did not propose a way in which this may be done, they pointed out the large number of specialized troubles in doing as such, one of which was the site's restrictive utilization of BTC for payment. The letter incited the DEA to react that it is likewise worried about the potential for illicit action offered by Bitcoin, is "very much aware of these rising dangers," and "will act accordingly." In a spilled report, the United States Federal Bureau of Investigation (FBI) reasoned that Bitcoin is at present being utilized and acknowledged by both real and criminal organizations and users. The report found that, as a result of the absence of a focal, controlling substance, the cryptocurrency system is unequipped for managing, observing, or writing about the action of clients who disregard the law. The FBI did, nonetheless, call attention to that Bitcoin exchange anonymity cannot be defeated by and large where clients have not found a way to shroud their identities, for example, veiling their IP address and laundering their Bitcoins. Users are especially defenseless while changing over Bitcoins into fiat currency.

In the primary clear case of bureaucratic ineptitude with respect to cryptocurrencies, California's Department of Financial Institutions issued a letter to the Bitcoin Foundation asserting that the Foundation is occupied with unlawful cash transmission. Unfortunately, it creates the impression that the State of California is ignorant that the Foundation is simply a not-for-profit association devoted to the proclamation of best practices for the Bitcoin condition, and they are not occupied with the deal or exchange of Bitcoins.[1341] The Foundation made this unmistakable in its reaction

[1339]Jason Bloomberg, Bitcoin: 'Blood Diamonds' Of The Digital Era Forbes(2017), https://www.forbes.com/sites/jasonbloomberg/2017/03/28/bitcoin-blood-diamonds-of-the-digital-era/#7e599a56492a (last visited Sep 10, 2018)

[1340]Letter from Charles E. Schumer & Joe Manchin, U.S. Senators, to Eric Holder, Att'y Gen. of the U.S. & Michele Leonhart, Adm'r of the Drug Enforcement Admin. (Sept 08,2018),

[1341] Matonis, Bitcoin Foundation Receives Cease and Desist Order from California, FORBES (sept 10,2018, 11:11 AM),

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to the Department. Further, the Foundation expressed its conviction that regardless of whether it was occupied with the offer of Bitcoins, the offer of Bitcoins isn't a movement over which the Department has jurisdiction. The SEC has issued a speculator report cautioning about the danger of Bitcoin-related Ponzi schemes.[1342] The New York Department of Financial Services has appreciated the report, subpoenaing cryptocurrency-related organizations with an end goal to examine their use of money landering projects and consumer protection schemes. Rather than an endeavor to stop the advancement of virtual monetary forms, the Department wants to put in shields that "will be useful to the long-haul quality of the virtual-money industry."

1. **South Korea**: In a record published on Jan. 23, the controller said it would just permit exchange digital currencies from genuine name ledgers starting Jan. 30. Those guidelines empowered banks to consent to their **KYC AML** (know your client, anti money laundering) commitments, the report said.

The measures delineated were proposed to decrease space for digital currency exchanges to be abused for unlawful exercises, for example, violations, money laundering and currency laundering. Markets showed up moderately enthusiastic after the execution of the new standards[1343].

Meanwhile, the law enforcement agencies believe the steps taken by South Korea were positive on a long-term basis. Its the start of a crackdown on anonymity and the illegal use cases that some cryptocurrencies might have. Although this new method might have some shortcomings in the short run but it's a benefitial plan in the long run.

Investors who are established in the cryptocurrencies market and the ones who are looking forward to investing in it will get specialised protection. It's a good thing anytime an investment exchange knows their client and ensure that all the transactions of their clients are legal. Trade in bitcoin denominated in Korean won stood at around 4 percent on Tuesday, according to CryptoCompare. That compared to the more than 40 percent of total bitcoin trade denominated in Japanese yen and the roughly 30 percent transacted in dollar terms.Despite those proportions, the regulations in South Korea could still make a broader impact in the market, according to Hosp.

Direction and dangers inside the space have returned under the spotlight after some $530 million worth of virtual cash was stolen from Japanese trade Coincheck. Following the hack, experts in Japan — which a year ago formally perceived a few digital currency trades — guided the trade to enhance its activities.

[1342]U.S. SEC. AND EXCH.COMM'N,INVESTOR ALERT:PONZI SCHEMES USING VIRTUAL CURRENCIES (2018)

[1343]Cheang Ming, New cryptocurrency rules just came into effect in South Korea CNBC (2018), https://www.cnbc.com/2018/01/29/south-korea-cryptocurrency-regulations-come-into-effect.html (last visited Sep 05, 2018)

2. **China:** In excess of 120 cryptocurrency exchanges have been obstructed by Chinese experts. The origin behind isn't totally clear — the national bank didn't react to calls from SCMP journalists — however some hypothesize that the crackdown is a reaction to expanding money related hazard and flimsiness.
   The administration will keep on monitoring for any new crypto news destinations and declarations of Initial Coin Offerings (ICOs). On the off chance that any show up, the legislature will close them down quickly and deny client access by obstructing their IP addresses**.**
   In September 2017, Chinese experts prohibited all new ICOs and existing digital money trades in the nation. To the extent Chinese controllers are concerned, ICOs are only "unauthorized illegal fund raising activities." And to a specific degree, their stresses are legitimized — numerous ICOs in China have been observed to be scamming their customers, victimizing the Chinese individuals of their well deserved money with questionable cases and guarantees of wealth.Although, Chinese government has banned all sorts of transactions in cryptocurrencies, they are supportive of blockchain and see a bright future for that technology. In 2017, China's national bank opened its own Digital Currency Research Institute close to Beijing's budgetary locale, recommending that a national state-sponsored digital money on the blockchain may be appropriate around the bend.

   China used to command bitcoin exchanging in the world, and still records for a lion's share of bitcoin creation through the "mining" process. Yet, expanded administrative examination, particularly as bitcoin's cost climbed, finished in the nation's national bank and other budgetary specialists disallowing offers of new digital forms of money through supposed ICOs.[1344]

   In the meantime, **Japanese, South Korean** and **U.S**. financial specialists turned out to be progressively intrigued by bitcoin, which hit an untouched high above $19,000 in December. Chinese blockchain extends in some cases moved their recorded home office abroad, while advancement proceeded inside terrain China. Exchanging among digital currencies is as yet conceivable, while bitcoin can be purchased with yuan through over-the-counter markets.

CONCLUSION

Over the long haul, the eventual fate of Bitcoin appears to probably be one of development. Notwithstanding the incident that happened in June of 2011, the prices of cryptocurrencies have

[1344] Evelyn Cheng, China clamps down on cryptocurrency speculation, but not blockchain development CNBC (2018), https://www.cnbc.com/2018/09/03/china-clamps-down-on-cryptocurrency-speculation.html (last visited Sep 06, 2018).

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now bounced back strongly.Though future heists may again dissolve clients' trust, the framework has demonstrated its capacity to deal with such occasions and bounce back in a generally short measure of time. That being stated, if Bitcoin continues to develop in prominence and esteem, the motivating forces for programmers to benefit by burglary and misrepresentation will just increment. In this manner, the likelihood of a trust-crushing, disastrous occasion can't be discounted.

In numerous parts of the developing world, access to banking and financial services is extremely restricted, yet versatile systems are spreading rapidly. therefore, Bitcoin and other comparable frameworks offer huge potential as a minimal effort approach to store riches, make payments, and send cash around the world. Additionally, on the grounds that Bitcoins can be isolated to eight decimal spots, related to the absence of transaction costs, micropayments can be transmitted in amounts which were not possible before the advent of cryptocurrencies. These highlights make Bitcoin a conceivably helpful device for clients in the developing world. There are numerous financial advantages to Bitcoin. By fundamentally decreasing transaction costs, the speed of transfer of money might be enhanced, micropayments end up conceivable, and people in developing countries access banking services they were unable to acess earlier. The probably, and most shrewd methodology that legislatures may take to Bitcoin is to endeavor to direct the exchanges that occur in BTC, as opposed to the framework itself. It appears to be certain that Bitcoin trades, and other comparable elements, will end up held to indistinguishable controls from wares exchanges. Given the potential advantages of a controlled Bitcoin organize, it would be a mix up for governments to adopt a more threatening strategy to the framework itself.

In light of the former examination, governments ought not endeavor to criminalize or stop cryptocurrencies for three reasons: 1) Bitcoin isn't by and by illicit under existing lawful structures in every nation; 2) Bitcoin offers critical monetary focal points over customary monetary forms and payment techniques; and 3) governments don't right now have the capacity to focus on the Bitcoin organize specifically. To recommend that administrations ought not endeavor to ban Bitcoin isn't a contention against direction. Similarly as banks, which bargain in customary monetary forms, are controlled in all the created nations around the globe, the individuals who hold stores, encourage exchanges, and process payments in BTC are possibly open to the direction of their home governments. Despite the fact that new enactment will

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probably be expected to suit these new sorts of organizations, close analogies will regularly be found in existing models. Nothing about Bitcoin changes the way that laundering cash and purchasing opiates are unlawful in many nations around the world. There is no assurance that Bitcoin will succeed. There are such a large number of mysterious factors. It is conceivable, maybe even likely, that an at present obscure contender may overwhelm Bitcoin and supplant it. One of the center engineers of Bitcoin has expressed that he would grasp this, as he underpins rivalry and trusts that it at last works for the best.290 Whatever occurs, one thing stays certain: the world is everlastingly changing, and governments and organizations must remain side by side of these progressions on the off chance that they are to keep up their places of intensity later on.

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INTERGENERATIONAL EQUITY: OUR ENVIRONMENTAL OBLIGATION TO OTHER GENERATIONS – AN ANALYSIS

- *Uttam Ramprasad*[1345]

ABSTRACT

Intergenerational Equity is a topic that has been under the radar with respect to environmental rights for a long time now. The rights of intergenerational equity have been adopted for a long time now in different countries around the world and is discussed whenever any major convention/conference/protocol takes place among different countries such as the Stockholm Declaration, Convention on International Trade in Endangered Species, etc. However, with respect to India; the rights of intergenerational equity have not been adopted through the means of a legislation, they are often construed as a part of existing articles/sections among existing legislations in India. This paper aims to understand the status of the rights of intergenerational equity in India with the help of case laws and relevant provisions from existing legislations while analysing the rights of intergenerational equity on an international perspective.

STATEMENT OF PROBLEM

The rights of intergenerational equity are not guaranteed in India. This article discusses the concept of intergenerational equity on an international and national perspective but focuses primarily on India through judicial precedents.

CHAPTER I

"Then I say, the earth belongs to each of these generations during its course, fully, and in its own right. The second generation receives it clear of the debts and incumbrances of the first, the third of the second, and so on. For if the first could charge it with a debt, then the earth would belong to the dead and not to the living generation. Then, no generation can contract debts

[1345] Christ University, Bangalore

greater than may be paid during the course of its own existence." —Thomas Jefferson[1346]

Intergenerational equity is the subject of a good variety of studies on philosophy, economics, and related disciplines. The concept of intergenerational equity states that groups of people who share rights of enjoying the natural and cultural environment of the world with members of this generation additionally as members of alternative generations (past and future generations).[1347] The thought behind intergenerational equity is to make sure that the economic gain that the future generations could have mustn't be hampered by environmental degeneration caused by this generation. A sense of morality arises with regard to future generations, the main contention being that that other generations should not be tormented by the decisions made by the present generation as other generations have no say in the said matter.[1348] The Brundtland commission incorporates intergenerational equity to both present and 'future generations' includes each the mother and also the unborn kid, World Health Organization each have needs: dietary, water and harmony, additionally as freedom from violence, anxiety, antigens, and toxins. The combined wants of the mother and also the unborn child could progressively conflict amidst competition for scarce resources in contexts susceptible to climate, environmental, economic and socio-political modification.[1349]

The partnership between generations is that the corollary to equality.[1350] It's acceptable to look at the human community as a partnership among all generations. In describing a state as a partnership, Burke determined that "as the ends of such a partnership cannot be obtained in several generations, it becomes a partnership not solely between people who reside however between people who reside, people who are dead, and those World Health Organization are to be born." the aim of human society should be to comprehend and defend the welfare and well-being of each generation, in regard to the natural system, of that it's a region.[1351] This need sustaining the hardiness of the planet: the equipment systems and therefore the ecological processes and setting conditions necessary for a healthy and good human environment. during this partnership, no generation is aware of beforehand once it'll be the living generation, what number members it'll have, or perhaps what number generations there'll ultimately be.[1352] If we tend to take the

[1346] What is Intergenerational Equity? The Terry Group, https://terrygroup.com/what-is-intergenerational-equity/ (last visited Sep 2, 2018)

[1347] Equity - Intergenerational Equity, MEDIA MANIPULATION AND PUBLIC RELATIONS(1996), https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html (last visited Sep 15, 2018).

[1348] Edith Brown Weiss, IN FAIRNESS TO FUTURE GENERATIONS AND SUSTAINABLE DEVELOPMENT(1992), https://pdfs.semanticscholar.org/4966/8f9c7a5a198fb7cfa2bb6e6b3597c41b834d.pdf (last visited Sep 161, 2018).

[1349] Sustainable development: Our Common Future revisited, NEUROIMAGE(2014), https://www.sciencedirect.com/science/article/pii/S0959378014000727 (last visited Sep 5, 2018).

[1350] II. Alternative approaches to intergenerational equity, TOTAL ENERGY EXPENDITURE (TEE) AND PHYSICAL ACTIVITY LEVELS (PAL) IN ADULTS: DOUBLY-LABELLED WATER DATA, http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0z.htm (last visited Sep 6, 2018).

[1351] Equity - Intergenerational Equity, Media Manipulation and Public Relations(1996), https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html (last visited Sep 15, 2018).

perspective of a generation that's placed somewhere on the spectrum of your time however doesn't understand prior to wherever it'll be set, such a generation would need to inherit the planet in a minimum of nearly as good condition because it has been certain any previous generation and to possess as good access to that like previous generations. The environment needs every generation to pass the world on in no worse condition than it received it in and to produce equitable access to its resources and advantages. every generation is, therefore, each a trustee for the world with obligations to worry for it and a beneficiary with rights to use it.

If one generation fails to conserve the world at the amount of quality received, succeeding generations have an obligation to repair this injury, albeit expensive to try and do. However, they'll distribute the prices across many generations, by means that of revenue bonds and different monetary measures, in order that the advantages and prices of rectification are distributed along.[1353] Whereas the generation that enables environmental quality to deteriorate still advantages at the expense of immediate future generations, a lot of distant future generations are protected. Moreover, the generation inflicting the hurt might have passed on a higher level of financial gain in order that immediate successor generations have sufficient wealth to manage the deterioration effectively.[1354]

While intergenerational equity could also be viewed as in conflict with achieving intragenerational equity, the 2 are often consistent and actually should go along. Members of the current generation have an intergenerational right of equitable access to use and get pleasure from the planet's resources, that derives from the underlying equality that each one generation has with one another in relevance their use of the natural system.[1355]

CHAPTER II

Intergenerational equity needs attention to the normative relationship between present and future generations. Within the past states have created general claims for intergenerational justice in few areas and also the negotiations for the Law of the Sea Convention relating to the exploitation of sea bottom minerals.[1356] Intergenerational problems have recently surfaced in debates over responsibility for paying for mitigation of anticipated world environmental modification, like

[1353] Duty to future generations, TOTAL ENERGY EXPENDITURE (TEE) AND PHYSICAL ACTIVITY LEVELS (PAL) IN ADULTS: DOUBLY-LABELLED WATER DATA, http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0m.htm (last visited Sep 6, 2018).

[1354] An Environmental Right for Future Generations, SCIENCE AND ENVIRONMENTAL HEALTH NETWORK(2008), https://www.sehn.org/pdf/Model_Provisions_Mod1E7275.pdf (last visited Sep 7, 2018).

[1355] Equity - Intragenerational Equity, MEDIA MANIPULATION AND PUBLIC RELATIONS, https://www.uow.edu.au/~sharonb/STS300/equity/meaning/intragen.html (last visited Sep 15, 2018).

[1356] Jarrod Hepburn, INTERGENERATIONAL EQUITY AND RIGHTS AND INTERNATIONAL CRIMINAL LAW (CHAPTER 9) - SUSTAINABLE DEVELOPMENT, INTERNATIONAL CRIMINAL JUSTICE, AND TREATY IMPLEMENTATIONCAMBRIDGE CORE, https://www.cambridge.org/core/books/sustainable-development-international-criminal-justice-and-treaty-implementation/intergenerational-equity-and-rights-and-international-criminal-law/6D7C5482F6156D677A4CF52C65697050/core-reader (last visited Sep 8, 2018).

temperature change or gas depletion, ensuing from countries' past and present industrial activities.

Since World War II, states have expressed concern in international legal documents for the welfare of future generations. A growing range of international agreements, declarations, charters, and United Nations General Assembly resolutions replicate such concern and set forth principles or obligations meant to shield and enhance the welfare of each present and future generations. Even the United Nations Charter, written within the aftermath of war II, Affirmed the universal concern for the welfare of future generations in its gap paragraph: "We the peoples of the United Nations, determined to avoid wasting succeeding generations from the scourge of war..."

Concern for justice to future generations relating to the natural environment first emerged as a serious concern within the propaedeutic conferences for the 1972 Stockholm Conference on the Human Environment. The preamble to the Stockholm Declaration on the Human environment expressly refers to the target of protecting the well-being of future generations, "... to defend and improve the environment for present and future generations has become an indispensable goal for world - a goal to be pursued alongside, and harmonized with, the established and elementary goals of peace and of worldwide economic and social development." The Declaration's first principle provides that "man... bears a solemn responsibility to shield and improve the environment for present and future generations," whereas the second declares that the "natural resources of the world, as well as the air, water, land, flora, and fauna... should be safeguarded for the good thing about present and future generations through careful coming up with and management."[1357] The Stockholm Conference diode on to the creation of the United Nations Environment Programme (UNEP).[1358] The specific concern for future generations and for enhancing the environment was new contributions to the method of developing jurisprudence during this space.

There are various international agreements within the last 20 years that have contained language indicating either a priority for property use of the environment or a priority for future generations, typically by relevancy the common heritage of the world. alternative legal instruments proof similar concern.[1359] The 1982 World Charter for Nature, not a proper agreement, refers expressly to a worldwide concern for the heritage we tend to leave to future

[1357] United Nations Conference on the Human Environment, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENTA/RES/14/1386 - DECLARATION OF THE RIGHTS OF THE CHILD - UN DOCUMENTS: GATHERING A BODY OF GLOBAL AGREEMENTS, http://www.un-documents.net/unchedec.htm (last visited Sep 10, 2018).

[1358] United Nations Conference on the Human Environment, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENTA/RES/14/1386 - DECLARATION OF THE RIGHTS OF THE CHILD - UN DOCUMENTS: GATHERING A BODY OF GLOBAL AGREEMENTS, http://www.un-documents.net/unchedec.htm (last visited Sep 10, 2018).

[1359] Edith Brown Weiss, In Fairness To Future Generations and Sustainable Development(1992), https://pdfs.semanticscholar.org/4966/8f9c7a5a198fb7cfa2bb6e6b3597c41b834d.pdf (last visited Sep 16, 2018).

generations.[1360] At the tenth day of the Stockholm Declaration, countries reaffirmed the continued validity of the Declaration and urged "all Governments and peoples of the globe to discharge their historical responsibility, jointly and singly, to make sure that our little planet is disregarded to future generations during a condition that guarantees a life in human dignity for all."

The modern approach to try and develop a precautionary principle in jurisprudence replicates concern regarding the results of our actions nowadays on the environment of future generations. The principle tries to answer the question of once to constrain activities that risk harming the environment in the future. it absolutely was first supported in 1987 at the International Conference on the North Sea[1361] and has been invoked most extensively in marine instruments. it's been hotly invoked throughout the negotiations for a temperature change convention.

Three principles give the idea of intergenerational equity.[1362] First, every generation ought to be needed to conserve the range of the natural and cultural resource base, in order that it doesn't unduly prohibit the choices on the market to future generations in resolving their issues and satisfying their own values and will even be entitled to diversity resembling that enjoyed by previous generations. This principle is termed "conservation of choices." [1363] Second, every generation ought to be needed to take care of the standard of the earth in order that it's passed on in no worse condition than that within which it absolutely was received, and will even be entitled to planetary quality resembling that enjoyed by previous generations. this is often the principle of "conservation of quality." [1364] Third, every generation ought to give its members with evenhanded rights of access to the inheritance of past generations and will conserve this access for future generations. this is often the principle of "conservation of access." [1365]

The proposed principles recognize the right of every generation to use the Earth's resources for its own profit, however, constrain the actions of this generation in doing this. Thus, at intervals, these constraints do not dictate how every generation ought to manage its resources. This generation is not predicting the preferences of future generations, which might prove to be troublesome. Rather, they fight to make sure a fairly secure and versatile natural resources base for future generations that they will use to satisfy their own values and preferences. they are typically shared by completely different cultural traditions and are typically acceptable to different economic and political systems.

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[1361] North Sea Conferences, OSPAR COMMISSION, https://www.ospar.org/about/international-cooperation/north-sea-conferences (last visited Sep 13, 2018).

[1362] Equity - Intergenerational Equity, MEDIA MANIPULATION AND PUBLIC RELATIONS, https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html (last visited Sep 15, 2018).

[1363] Equity - Intergenerational Equity, MEDIA MANIPULATION AND PUBLIC RELATIONS, https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html (last visited Sep 15, 2018).

[1364] Equity - Intergenerational Equity, MEDIA MANIPULATION AND PUBLIC RELATIONS, https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html (last visited Sep 15, 2018).

[1365] Equity - Intergenerational Equity, MEDIA MANIPULATION AND PUBLIC RELATIONS, https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html (last visited Sep 15, 2018).

In our planet, environmental quality could decline, however, this doesn't essentially cut back considerably the range of the resource base. Similarly, it's going to be doable for one generation to sustain the standard of air and water however considerably destroy the range of the resource base, as by a big loss of genetic diversity. Certainly, the 2 principles move and feed on one another. It's easier to take care of quality if their square measures several choices on the market for doing this, and heavy pollution could cause fish to disappear. it's easier to conserve choices once there's concern for maintaining quality. All principles are essential for a decent planet for future generations and should be enforced.

Sustainability is feasible as long as we look at the planet and its resources not solely as an investment chance but as a trust, passed to us by our ancestors, to be enjoyed and passed on to our descendants for his or her use. [1366] Such a "planetary trust" conveys to us each right and responsibilities. most significantly, it implies that future generations too have rights - though to be sure, these rights have meaning as long as we the living respect them and if this respect transcends the variations among countries, religions, and cultures. the idea of intergenerational equity planned argues that we, the human species, hold the natural environment of our planet in common with all members of our species: past generations, this generation, and future generations. As members of this generation, we tend to hold the world in trust for future generations. At an equivalent time, we tend to are beneficiaries entitled to use and have the benefit of it. There are 2 relationships that have to form any theory of intergenerational equity within the context of our natural environment: our relationship to different generations of our own species and our relationship to the natural system of that we tend to are a section.[1367] The human species is integrally connected with different elements of the natural system; we tend to have an effect on and are suffering from what happens within the system. we tend to live among all living creatures that have the capability to form considerably our relationship to the environment. because the most sentient of living creatures, we have a special responsibility to worry about the earth. The second basic relationship is that between totally different generations of the human species. All generations are inherently connected to different generations, past, and future, in the mistreatment of the common patrimony of the earth. the speculation of intergenerational equity stipulates that every one generation have an equal place in relevancy the natural system. there's no basis for preferring this generation over future generations in their use of the earth.[1368]

There have been multiple cases that have taken place in India where the judiciary has imbibed the concept of intergenerational equity into their judgment.

[1366] II. Alternative approaches to intergenerational equity, TOTAL ENERGY EXPENDITURE (TEE) AND PHYSICAL ACTIVITY LEVELS (PAL) IN ADULTS: DOUBLY-LABELLED WATER DATA, http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0z.htm (last visited Sep 6, 2018).
[1367] Stefanie Glotzbach, THE RELATIONSHIP BETWEEN INTRAGENERATIONAL AND INTERGENERATIONAL ECOLOGICAL JUSTICETHE MUTUAL DEPENDENCY OF FORCE AND LAW IN AMERICAN FOREIGN POLICY ON JSTOR(2012), https://www.jstor.org/stable/23240649 (last visited Sep 17, 2018).
[1368] we have a special responsibility to worry about the earth.

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In the case of **State of Himachal Pradesh v Ganesh Wood Product**[1369], a writ petition was filed seeking issuance of a writ that would restrain the government of the State of Himachal Pradesh from permitting the establishment of any factory units for the manufacture of Katha in the State. Katha is derived from the Khair tree which is available abundantly in the State of Himachal Pradesh. Since only the central portion of the trunk of the Khair, the tree is used for the manufacture of Katha; the manufacture of Katha requires the cutting of the Khair trees. The basis for seeking this writ petition was that the establishment of multiple Katha manufacturing units would result in the indiscriminate felling of Khair trees which would have a deep and adverse effect upon the environment and ecology of the State.

The Supreme Court then emphasized the significance of the concepts of sustainable development and intergenerational equity while delivering their judgment. An excerpt from the judgment of the Supreme Court with regard to the rights of intergenerational equity-

"Intergenerational equity means the concern for the generations to come. The present generation has no right to impede the safety and well-being of the next generation or the generation sot come thereafter".

The Supreme Court found the actions of the said government body to approve any and every proposal that came before it, on the assumption that so long as there is no commitment on the part of the Government to supply Khair wood to the proposed factories there is no harm, to be "a totally faulty and a myopic approach". It not only violated relevant and National and State Forest Policies, but it was also:

"contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity. After all, the present generation has no right to deplete the resources of all the existing forests and leave nothing for the next and future generations. Not keeping the above considerations in mind, it is obvious, has vitiated the approvals granted by the sub-committee of IPARA – apart from the fact that it was not empowered to grant any such approval. The obligation of sustainable development requires that a proper assessment should be made of the forest wealth and the establishment of industries based on forest produce should not only be restricted accordingly but their working should also be monitored closely to ensure that the required balance is not disturbed".

The case of **Rural Litigation and Entitlement Kendra v State of Uttar Pradesh**[1370] is considered an important judgement with respect to intergenerational equity as in this case the petitioners were rural villagers who were concerned about the unauthorized and illegal mining of limestone in the Mussoorie-Dehradun belt in the State of Uttar Pradesh which adversely affected the ecology of the area and led to environmental disorder. The mining also adversely affects the villagers.

[1369] AIR1996SC149
[1370] AIR1985SC652

In 1988, the Supreme Court considered the further evidence and gave reasoning for its conclusion that mining in the Doon Valley area should be stopped. The Supreme Court surveyed the ecological consequences of mining of the limestone deposits and noted:

"The Doon Valley limestone deposits are a present of nature to mankind. Underneath the soil cover, there is an unseen storehouse of bounty almost everywhere. Similarly, forests provide the green belt and are a bequest of the past generations to the present. Limestone deposits if excavated and utilized get exhausted while if forests are exploited, there can be regeneration provided reforestation is undertaken. Trees, however, take time to grown and ordinarily a 15 to 25-year period is necessary for such purpose".

The Supreme Court was of the opinion that mining activities even if conducted in a limited manner would prove to be disastrous to the environment and the whole sanctity of the said area would be completely destroyed making it absolutely useless as it would result at the end of tourism in that area. The Supreme Court ordered that the mining activities in the Valley must be discontinued immediately. The Supreme Court's decision, therefore, addressed both intergenerational equity and intragenerational equity for the affected villagers in the valley.

In **M.C. Mehta v. Union of India**, The Supreme Court ordered that all mining operations in the entire Aravalli Hill range within the State of Haryana where mining operations were being carried out must be discontinued immediately. In this landmark judgment, the Supreme Court held that since Environment and ecology are national assets. They are subject to inter-generational equity. Therefore, it was now time suspend all mining in the above area under the principle of 'Sustainable Development' which is part of Articles 21, 48A and 51A(g) of the Constitution of India. In fact, these Articles had already been extensively discussed in the judgment in M.C. Mehta's case (2004) which kept the option of imposing a ban in the future open. Mining within the Principle of Sustainable Development comes within the concept of "balancing" whereas mining beyond the Principle of Sustainable Development comes within the concept of "banning". It is a matter of degree. Balancing of the mining activity with environment protection and banning such activity are two sides of the same principle of sustainable development. They are parts of the Precautionary Principle.

Glanrock Estate v. State of Tamil Nadu[1371], the Supreme Court judgment was with respect to forests and intergenerational equity. The Supreme Court held that:

"Forests in India are an important part of the environment. They constitute a national asset. In various judgments of this Court delivered by the Forest Bench of this Court in the case of T.N. Godavarman v. Union of India Writ Petition No. 202 of 1995[1372], it has been held that "inter-

[1371] MANU/SC/0689/2010

[1372]T.N. Godavarman Thirumulpad vs Union Of India & Ors on 26 September, 2005, HUSSAINARA KHATOON & ORS VS HOME SECRETARY, STATE OF BIHAR, ... ON 9 MARCH, 1979, https://indiankanoon.org/doc/1026316/ (last visited Sep 15, 2018).

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generational equity" is part of Article 21 of the Constitution. What is inter-generational equity? The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated. The doctrine of sustainable development also forms part of Article 21 of the Constitution. The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21."

The reason for it being completely necessary for the Judiciary to intervene and lay down objective principles and standards of intergenerational equity is that each the legislative assembly and also the government are solely involved with the present generation because the present generation determines their own fortunes and their own future. Therefore, it's completely necessary for the Judiciary to safeguard the rights of future generations. The direct implication of the abovementioned judicial choices, Article 21 and part four of the Constitution of India.

CHAPTER III

Intergenerational Equity is needed thanks to undue human interference in natural systems. It may be achieved through development on a sustainable basis. a very important step towards this path is that the formation and implementation of correct trade policy. National trading policy encompasses a very important role to play in actively supporting environmentally friendly trade. Trade-related instruments ought to be more inspired to act as a driver for providing incentives to a lot of sustainable trade flows. Trade tools might, for example, be instrumental in creating tangible progress towards a lot of sustainable consumption and production patterns. Economic instruments additionally got to be a lot of actively developed, notably with a read to permit for the mandatory internalisation of external environmental prices. As an example, nowadays, corporations are as well as sustainable coverage in their Annual Reports so as to draw in shareholders WHO are awake to its importance. Several treaties are shaped for giving corporations customary benchmarks that they'll deliver the goods in sustainable coverage. many international conventions and treaties have recognized the higher than principles of sustainable development and, in fact, many inventive proposals are submitted as well as the locus standi of people or teams to require out actions as representatives of future generations, or appointing associate investigator to require care of the rights of the long run against this. The principles mentioned higher than completely apply for adjudicating matters regarding setting and ecology. These principles should, therefore, be applied fully force for safeguarding the natural resources of this country. Article 48A of the Constitution of Republic of India mandates that the State shall endeavour to safeguard and improve the setting to safeguard the forests and life of the country. Article 51A of the Constitution of India enjoins that it shall be the duty of each subject of India, inter alia, to safeguard and improve national setting as well as forests, lakes, rivers, life and to own compassion for living creatures. These 2 Articles don't seem to be solely basic to the environmental governance of the country however additionally it shall be the duty of the State to use these principles in creating laws and more these 2 articles are to be unbroken in mind in

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understanding the scope and purport of the elemental rights secure by the Constitution as well as Articles 14, 19 and, 21 of the Constitution of India and additionally the varied laws enacted by the Parliament and also the State assembly. additionally, positive synergies between trade, setting and development ought to be more thought of, significantly relating to the elimination of environmentally damaging subsidies and also the promotion of environmentally friendly product and services, with a special target those originating in Developing Countries. we tend to the members of this generation, we tend to hold the planet in trust for future generations and sustainable development can facilitate us in ensuring intergenerational equity.

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A COMPARATIVE ANALYSIS OF ADULTERY LAWS IN INDIA, AFRICA, FRANCE, NIGERIA, SOUTH AFRICA & CHINA

- *Annah Vimbai Anopa Mapiye*[1373]

INTRODUCTION

Adultery has been a controversial practise in most societies; this is because it is regarded as a practice that is biased in one way or the other. Different societies have their belief in different things and this leads to the different reactions that one gets out of adultery. Asia, Africa, Europe and the United States of America have different backgrounds which makes it understandable on why they have a different approach to solve adultery. One can observe that in most countries men are mostly punished in the case of adultery as they are called the perpetrators of the activity, however the history of what was there long back is so different from what we have today. This can be seen in countries like France, what they have today is the opposite of what they had long back. A brief idea is that they used to punish women in the past when adultery was committed, they would not consider that the act is performed by both parties that is the man and the woman, however the laws were revised which left them punishing both parties and they are now asked to pay some huge fine to the Government, this is only a way to reduce the cases of adultery.

BACKGROUND OF ADULTERY LAWS IN THESE COUNTRIES

FRANCE

The history of adultery laws in France explicitly lay out how the laws gradually came into society. At first, it was not drafted into the books as we see today but it started as a practice that was adopted by many but at the time there was chaos, there was need to regulate the actions of the people. An example is the story of Lucretia who was raped and threatened not to say it out because she would be punished since the adultery laws only punished women in those days. This developed as the soldiers were going to raid different places and they would rob the people of their livestock, take the men as their slaves and the women were shared amongst the soldiers and that was when women were not allowed to be seen with another man except the one given to them, however men could do whatever they wanted with women be it married or not. The culture was borrowed from the Romans who used to raid a lot of places to gain power, hence they would

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destroy the State by taking all of its people and men would be used as slaves whereas women would be shared amongst the soldiers.

For a long time women were suffering the abuse of men because sometimes they would get forced into adultery, the threats they would receive made them get into adulterous activities unwillingly. The women would get humiliated in front of the whole society as a form of punishment, sometimes they would get lashed and the crowd would throw garbage to their faces and this was a form of punishment given long back. This did not adequately finish adultery as such but to some extent women would try to avoid getting into such situations.

However, change eventually came after a long struggle as women were trying to fight for justice. It took a long time before the laws were revised to protect the women as well. The laws were changed from being criminal cases into the civil cases category. The laws were drafted and they took a drastic change that would punish both the adulterous parties and there was a huge fine given that would be paid in the existence of these issues.

There were protestors who did not agree with this and they went on to create platforms for people if in case they wanted to take a break from their marriage, this platform allowed people to be adulterous, however this Company went on to put adverts in the streets giving awareness to the people about their business. This was not welcomed by most citizens as it was considered to be immoral and in a way it was taking the society back to where they were coming from. This Company was not tolerated by the State but it was cautioned to stop, which did not happen as such but it was still there making different websites where people can meet and cheat their partners.

France has these laws present today and this has helped reduce the rate of adultery cases. By introducing heavy fines on the people who commit adultery, it has helped stop those who haven't committed adultery to stay away from it at all. The societies had incurred a lot of problems because marriage is a union that is recognised by the whole society and the State hence did not have to be seen as a small issue by people breaching that contract, like other contracts if one breaches, there will be consequences to it, therefore, the married people have to keep their contract alive by being faithful to one another and in case they or one partner feels that there is no affection anymore, that is when divorce cases should be filed rather than cheating. Divorce may be a harsh way to solve the problem, however if one is to look at it from the point of health of the partners, it is safe to have the people separated so that they do not spread diseases else one ends up becoming a victim of getting diseases. In most cases, when there is no affection in the marriage, people end up abusing each other, physically, emotionally, and mentally, which is really not safe for anyone be it male or female.

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INDIA

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Adultery has been mentioned under Section 497 of the Indian Penal Code. As per the Indian Law, a woman cannot be punished for the offense of adultery. Only a man who has consensual sexual with the wife of another man without his consent can be punished under this offense. The Indian laws punish the man who will be in the adulterous acts with the woman of another man. The background to this is that when the laws were being drafted, adultery was considered to be caused by men and that is why they are still being punished today by the law even if they try to explain that they are not the perpetrators of the adulterous act. However, if the man gets the consent of the owner of the wife, there will no offense committed. This leaves the women as the objects of men as if on their own they cannot decide what they want. It then looks like women are being treated as irrational beings that have no ability to decide what they want to do with their lives.

To add on the above point, the issue of arranged marriages has contributed so much to be rate of adultery cases that are present in India today. The culture of the people in India promotes the arranged marriage practice because it has been done since a long time ago. This makes it acceptable in today's day although there are some who dispute this practice but if they are minors they cannot argue or go against what the family would have agreed on. Some practice this as a means of securing their property inside their families, that is why they avoid intermarriages. The elite are the ones who mostly abide to this. However, others follow this culture because of Caste, this means that if one is of a higher caste such as a Brahman, it may not be accepted by their family to get married from someone of a lower caste.

Therefore, the above factors lead to people cheating on their partners because sometimes there will be no affection from the beginning. This will therefore raise the number of adulterous cases as women will be complaining about their husbands' behaviour. Most reports demonstrate that men are the ones who leave their wives and their wives will not complain but will wait for the husband to come home. This is because they respect their marriages so much. In the Moslems situation, the women could not divorce the husband before until the laws were revisited. This would mean that the man would do whatever he wishes and the woman would not have anywhere to complain since the husband would be breaching the contract. However, because of a lot of activists, most issues that were suppressing women were addressed and in trying to solve the problem, it looks like the laws favours the female. This is because the laws were trying to protect women since they had come a long way being abused by their husbands.

The present laws are still the same as the ones that had been there before. Men are seen as the perpetrators of adultery hence they are still getting punished if they had knowledge that the woman they are in a relationship with is someones wife or even when they have a reason to believe so they still get punished.

SOUTH AFRICA

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Adultery came under the civil cases in the past as the married men could not get into affairs with married women as well, it would be considered as an offense. If a man was to be caught in an adulterous act with the wife of someone, that man had to pay damages to the owner of the wife. If the husband was to refuse to take his wife back, the woman would be taken back to her father's house, for some time she would remain unmarried. The time that she would get married the man would be charged more. There are a series of cases where the parties go to court and the remedy that most judges were coming up with was divorce[1374]. It took a long time as the people were trying to get the State away from their marriage lives because they were saying that that was their personal liberty zone.

There was a drastic change that took place as the society had taken stand that wanted to govern their marital lives. The Marriage Act exists, however it does not encroach into the adultery issues at all. It regulates the marriage by recognizing the contract that people have when they get married. The society did not agree on one thing but the majority was of the point that these laws that they follow today were drafted by the earlier generation which is so different from the present generation, so they were of the ideology that the present generation should be given a chance to draft their own laws which would fit their way of life, not that they get forced to fit into some kind of life that was lived by some people, some of who may not be existing anymore. This was their argument, so this would mean that they would get every generation to choose a life they wanted and would have to make laws accordingly. One can argue that this is the norm of the day that the laws get amended time to time so that they do not get outdated and old fashioned, however there is a difference that has to be acknowledged in order to make peace in the communities. There is an article that explains how the South African society finally did away with the adultery laws.

J.M.T LABUSCHAGNE, J A van derz Heaven

The comparative and International Law volume 32 No.1

NIGERIA

Adultery has taken its evolution from the ancient times till to what it is today. Nigeria has its background on adultery however; most of the things were buried when Christianity came into existence. Adultery is when one man gets into an affair with the wife of another man. This is a criminal offense and the husband of the adulterous woman has to be compensated. The laws come under the Criminal Code Act (Chapter 77). Adultery as a criminal offense is punished in the criminal courts. The Nigerian sources of their Adultery laws are driven from the Bible. That is why men are spared from this adultery cases, only the women are punished by the laws and in case being caught as an adulterer, it is grounds for the husband to divorce the wife. However, if

[1374] JMT Labuschagne, JA Van Derz Heaven
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the woman catches the husband cheating, there are grounds that she can sue the husband or anything.

Since Polygamy is still accepted by the Society, if a man is caught having an affair, it is not a case that will be taken to the courts because it does not have any laws in support of that. Men are exempted from this; however, when a woman is caught she has to perform some rituals to appease the husband so that she would not get rejected by him. This is not so far from the Indian way of life except that polygamy is not openly accepted although it happens. Situations like these always leave women as the objects of men as they will be feeling like they have to submit themselves to their husbands.

The actions of men are acceptable, they can have as many wives as they wish but if the woman wants to have a second husband; it is taboo to the society. Women have accepted that their life will always be like that, that is why they tolerate and a few fight the bias.

The history of adultery laws is an eye opener as it helps one to be more open minded and take in different cultures and understand where we are coming from and if there are problems in other societies that have been solved by the others, those solution ideas can be shared to help the ones that would not have crossed the line. Societies differ in what they believe in and the traditions as well but the way people live is that they protect their morals first. This is a common practise that is respected by many around the world.

CHINA

China has had its problems regarding adultery whereby it would brutally punish the women. It took a long time before the activists came to cry out on how unfair the system was. There was a debate that took place which had a discussion on how the adultery laws could be revised. It had the topic sex equality in Republican China[1375]. Women had always been under the authority of men hence change was not easy to get, to change the laws from punishing only women to make it gender neutral. The laws were not amended in favour of women but there was a slight change that could be noticed and their aim was to put an end to men who get into adulterous activities. Men were given enough space to do whatever they desired and it was in their choice domain to have as many wives as they wanted but it was then causing chaos in the State.

They laws were no longer strict anymore as they were in the past. Today the laws punish men as they are believed to be the perpetrators of the act. This was a new dawn for women as they had suffered for a very long time without anyone defending them.

The United States of America has writers who have written about adultery however most of them do blame women for such because they say that most women have lost their ethics of marriage.

[1375] Lisa Tran
Modern China volume 35,number 2
Sex equality in Republican China

Women were blamed that if there is a problem within the family, they are the ones to go out of their marriage in order to get a partner who would make them feel good about themselves. A survey was conducted which showed that most women who get into adulterous activities would not want to leave their husbands but they only engage into such because they will be trying to heal themselves. The courts have laid down that adultery can be a ground for divorce if the partners wish to take that route, however, getting a divorce does not solve the problem but it only brings out a dismantled society with broken families which then becomes a problem for the children who will grow up without the love and guidance of both parents. This mostly results in children not having anyone to teach them about the morals that one should keep in order to be called a human.

Therefore, if there is a problem, there should be ways to fix it than to have the married people separate unless if it's a crucial scenario. The laws should not be made to separate the people but they should be drafted in a way that they unite the people. That way, it will help come up with a united society growing up to the State level.

CONCLUSION

Adultery breaks families, causes hate within the people hence should be tackled in such a way that it will not leave the people with hatred among each other. Some say that, it comes out of lack of satisfaction in the marriage but all these are problems can be solved and will help reduce the damage that comes in case the marriage is broken. Most countries around the World see adultery as an immoral act, thereby it is forbidden. However, because of different problems around the people, adultery cannot be absolutely stopped but can only be reduced by way of imposing punishments & huge fines. In most cases, people abstain from adultery as an option to solve their problems because they fear being embarrassed when they are caught. There is a progression around the World, where people have opened their minds to see that the laws should not be gender biased, but should punish both parties in this situation although there should be some exceptions to help those women who will have been threatened to be in affairs.

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ONLINE DISPUTE RESOLUTION: A REMEDY JUST A CLICK AWAY

- *Navneet kaur Chahal*[1376]

The basic legal principal is "justice delayed is justice denied" if justice has not been administrated timely it is equal to no justice at all. This phrase is reflecting in Indian judicial system from times. Indian judicial system has been overburdened by huge pendency of cases, which has resulted delay in Justice. Latest statistics shows huge pendency of matters in the higher and lower courts. At the end of February 2016, 59,468 cases were pending in Supreme Court. Of these pending matters, about four-fifths are civil in nature and the rest were criminal in nature. Similarly at the end of June 2015, 40,05,704 cases were pending in different High Courts in the country. There were more than 2.18 crore cases pending in district courts across the country; 12 states have more than 5 lakh cases to decide; while a little more than one case, on an average, was awaiting conclusion for at least 10 years. Around 38.3 lakh cases were pending for more than five years but less than 10 years-17.5 per cent of the total number of cases. Therefore, more than one-fourth of cases pending across district courts in the country were pending for at least five years. And 29.5 per cent of total cases, or 64.5 lakh cases, have been pending for more than two years, according to the E-Committee's report. 1 Another drawback of Indian legal system is high costs of litigation. These factors have resulted in loss of faith of people in the Indian judicial system. Therefore people avoid going to courts for their claims and disputes

Disputes resolution is a difficult affair for all stakeholders including courts, government, companies, individuals, etc. This is more so where conflict of law is involved as different countries may have different laws for dispute resolution. International commercial disputes faced many hurdles for their resolutions in the past days. To reduce these hardships of such disputes, countries adopted a model code of conduct that was incorporated in their respective domestic laws. The harmonized alternative dispute resolution (ADR) methods like arbitration and mediation is a result of such international codification.

It is elementary knowledge both that disputes arise in society due to interaction amongst its members and that the greater and/or the more frequent the interactions amongst those with differing needs or conflicting interests, the higher the chances of disputes. The opening up of world markets – given their diversities - has been a contributor to the eruption of differences, misunderstandings and miscommunications, often culminating in complex disputes. With the advent of e-commerce and the Internet, the phenomenon of a 'Global Village' has been emphatically underlined. The unsavory result, however, is that now we not only have disputes

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arising at a far greater pace than ever before but the same also entail even greater complexities due to their cross-border and cross-culture nature. [1377]

Courts all over the world are being challenged in the uphill task of matching and improving their disposal rates to the filing rates of new disputes. As a result, many courts have on their register matters which are awaiting disposal for years and, in some cases, even decades.[1378] What makes the scenario truly i is that the very nature, or more appropriately, the raison d'être, of e-commerce is speed and cost-effectiveness which thus require that should a dispute arise, there must be a swift redressed thereof.

The United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985. The UNCITRAL has also adopted the UNCITRAL Conciliation Rules in 1980. The General Assembly of the United Nations has recommended the use of the said Model Law and Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation.[1379]

India has also incorporated these uniform principles of alternative dispute resolution in the Arbitration and Conciliation Act, 1996 that was amended in the year 2015. The Arbitration Act provides for alternative dispute resolution mechanisms like arbitration, conciliations etc for national and international stakeholders.[1380]In continuation of this Civil procedure code was also amended to provide ADR in India and section 89 was added in this.

ODR is a new concept it is introduced to circumvent clogged and slow moving courts and the hassle of physical dispute resolution mechanisms. ODR tries to use the internet to resolve disputes, it helps to reduce costs, doing away with the necessity to travel to attend courts and generally making the entire process faster and efficient through use of web based technologies. This is the basic precept on which ODR is built. If possible, this could be a significant improvement over the current alternative dispute resolution methods such as traditional arbitration, mediation etc.[1381] The first attempt to Resolve dispute by ODR was during 1995/1996 in US and Canada.[1382]

Online Dispute Resolution (ODR) uses alternative dispute resolution processes to resolve a claim or dispute. Online Dispute Resolution can be used for disputes arising from an online, e-commerce transaction, or disputes arising from an issue not involving the Internet, called an

[1377] Online Dispute Resolution In India by Prathamesh D. Popat
[1378] The Bombay High Court is currently taking up for final hearing Civil Suits which were filed in the '70s and '80s. The total number of Civil Suits pending disposal as on 1.1.2003 is 42508, only marginally less compared to the 45136 pending disposal as on 1.1.2000.
[1379] http://www.uncitral.org
[1380] Cyber Arbitration Trends In India 2017 By TLCEODRI

[1381] https://blog.ipleaders.in/odr/
[1382] Court-based Mediation for civil court cases: An Evaluation of ADR center, Julie Macfartance,Nov. 1995

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"offline" dispute. Dispute Resolution is an alternative to the traditional legal process, which usually involves a court, judge, and possibly a jury to decide the dispute. Online Dispute Resolution can involve the parties in mediation, arbitration, and negotiation. The parties may use the Internet and web-based technology in a variety of ways. Online Dispute Resolution can be done entirely on the Internet, or "online," through email, videoconferencing, or both. The parties can also meet in person, or "offline." Sometimes, combinations of "online" and "off-line" methods are used in Online Dispute Resolution. Some e-commerce companies provide Online Dispute Resolution as a service to customers. A growing number of organizations exist that provide Online Dispute Resolution services for consumers and e-commerce businesses. These organizations are called Online Dispute Resolution Providers.[1383]

Possible classifications within the ODR framework[1384]:

i. Business to Business (B2B)

Business to Business (B2B) disputes revolve around two commercial parties that are seeking to resolve a dispute over a specific transaction. The parties in B2B tend to be sophisticated users, and there is generally less concern over party vulnerability, and a greater emphasis placed on the convenience and expertise of the process.[With many B2B disputes resolved with some form of ODR, the use of arbitration is prevalent.

ii. Business to Consumer (B2C)

Business to Consumer (B2C) disputes are becoming more common, particular with the expansion of e-commerce. B2C disputes tend to be low-cost, but high-volume, and may involve unequal bargaining power between the consumer and the business. An ODR process may meet consumers' need for redress against businesses and to provide the necessary support for due process rights.[

iii. Consumer to Consumer (C2C)

Consumer to consumer (C2C) disputes involve transactions between two consumers (i.e. the sale of a used item). These types of e-commerce transactions are also becoming more common with websites such as eBay or Craigslist acting as facilitators between two parties, although the website is not an actual party to the dispute.

MERITS OF ODR

ODR is not only time saving process but has some other important advantages . when the technology merged with party-friendly nature of ADR it comes with a great impact. The advantages are as follow:

[1383] ABA Task Force on Electronic Commerce and Alternative Dispute Resolution Task Force Draft March, 2002
[1384] http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html

1. **Less time consuming:** Online Dispute Resolutions is very helpful to resolve the dispute speedily. When the process is time consuming it often become burden for the parties ; however many things that required time are not in ODR . The limitless nature of the Internet finishes the communication complexity faced by parties and counsel located in different countries. Further, most of these ODR service providers are functioning round the clock. All the form relating to the ODR are available online and parties can fill the form at anytime which save their time. Moreover, in ODR internet is helpful to collect the data easily. Moreover in classical justice system parties must free themselves to available on time and venue when they have to meet each other. In addition to easy accessibility, e-mail simplifies the task of scheduling ADR proceedings and avoids any phone or fax-tags in the process.
2. **Accessible justice** : One of the biggest benefits of online dispute resolution is that such systems can drastically decrease the cost of getting a dispute resolved; thus allowing the opening of the doors of the justice system to traditionally disadvantaged groups. As compared to filing suit in a court, the cost of online dispute resolution is a “mere trifle." There is even a fairly significant difference between the costs of using online dispute resolution as compared to using other forms of alternative dispute resolution. Cost is one of the most crucial factors in dispute resolution, as both sides would eventually like to reach an optimal decision at the lowest possible price. These additional savings tend to revolve around the cost of travel and venue reservation that is required in other forms of alternative dispute resolution, but not in the online dispute resolution setting.
3. **Peaceful settlement** : Sometime intangible nature of ODR is consider as big hurdle but actually it is beneficial for the parties too, because many time parties are not comfortable to confront each other and they do not want to face .By ODR there are more chances of settlement.
4. **Neutral location** : ODR provides neutral place for settlement compare to traditional ADR where parties need to visit one place sometime office of Lawyer or other person.
5. **No Jurisdictional Problems**: In Formal court systems parties are restricted by the jurisdiction sometimes an victim has to travel from one place to another to file a suit In the ODR m this is not there as two parties to a dispute submit an online ADR provider, then the issue of jurisdiction is avoided.
6. **Easy to keep Record** : ODR is very helpful for recording statements , pleadings, drafting , and any other written, oral, or visual communication transmitted electronically.

DISADVANTAGES

1. Information safety and confidential question *:*Any online activity gives rise to concerns about privacy and data security. Moreover, not all ODR tools are created equal when it comes to security and privacy. Parties must be counseled on and understand the potential risks of their ODR activities.

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2. Lack of availability for certain types of disputes: ODR is used in a wide variety of areas, from custody disputes to micro-transactions, but our legal structure is not conducive to simplification or to the accessibility of online tools for legal purposes. Nonetheless, our overburdened court systems will evolve to place some of that burden online. Currently we may be able to resolve micro-transaction disputes online, but challenging a moving violation still requires participating in the traditional court system.

3. Presence of a Technological Gap: One of the most prominent problems with ODR is that it entirely depends upon technology and mode of communication. This actually prevents a lot of people from using these methods. This turns out to be a huge disadvantage as these people might be the ones who would be greatly benefited by the cost-effectiveness of these methods. Although increased technology may potentially advance the field of mediation, these advances will not be available to those who do not have access to a computer and the Internet. This may be especially true for online resolution of disputes occurring in the physical--rather than the virtual-- world. While technological advances have been useful in increasing communication abilities between parties, such advances presume that the users have an understanding of the underlying technology. This presumption, however, is not always warranted as there is a gap between many groups in society in relation to technological knowledge and use, and it seems that this gap may continue to grow. Additionally, many of these individuals simply may not be able to access the technology that is necessary for online dispute resolution (e.g. at the very minimum, a computer and an Internet connection).

A lot of places technology is not as developed as other countries and this proves as a great hindrance in the usage of the ODR process to resolve the dispute. There is a technology gap between countries and due to this gap, ODR processes cannot be used to solve a lot of disputes. The structure of the online systems that is currently in place further exacerbates quite a few of the problems that exist regarding technological gaps between individuals and the effect of such gaps on online dispute resolution. The formatting of many of the current online dispute resolution systems is excessively confusing, thus further adding to the problems that a technological gap causes. Oddly enough, however, advances in technology may actually be the solution to these technological issues.

Further, even if parties and their counsel do have Internet and e-mail access, they may not be sophisticated or savvy enough to use these technologies in the course of dispute resolution. In a real world legal dispute, an attorney assists the consumer in filing complaints and other pleadings. However, in an online ADR situation, the consumer generally drafts his or her own complaint. Sometimes the complaint may not be appropriately drafted; in other words, legally relevant facts may be omitted and unnecessary facts may be included. Since most of the communication with arbitrators and mediators is online, a party that is uncomfortable with organizing and eloquently penning down its arguments may be at a disadvantage. These types of “access issues" potentially span a number of scenarios. For instance, a party involved in a dispute

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as a result of an online purchase made using a library computer will clearly have difficulty conducting a lengthy, real-time mediation.

4. Lack of Human Interaction and Miscommunication: The lack of face-to-face interaction also deprives the mediators and arbitrators of the opportunity to evaluate the credibility of parties and witnesses. When online disputes are settled over e-mail, the parties may engage in caucusing without the mediator's knowledge. While the physical separation of parties can help the neutral third-party focus on the substantive issues rather than on the parties' emotions, such physical separation also leaves ample opportunities for miscommunications between the parties or between one of the parties and the neutral third-party. Even if a sender is able to adequately express him or herself in writing, the recipient may still misinterpret the message. This is especially likely to occur when parties are located in different countries and speak different languages. Moreover, the fact that the parties do not know each other may as it is cause tremendous misunderstanding between them. A party to the dispute may also frustrate the process by not responding to e-mail other requests. This makes it almost impossible for the ADR provider to distinguish between a genuine technical difficulty and an uncooperative party.

5.Service of documents and non-repudiation: In some instances, it is necessary to send a message in such a way that the recipient cannot deny having received the message. This is the reason why in the physical world some documents are sent by registered mail or served personally on the intended recipient. Where the sender of a message requires proof that the other side has received the contents of the message in an unaltered, legible format, email and other forms of electronic communication may not fulfil this purpose. Emails sometimes arrive with considerable delay, with corrupted contents or not at all. Most email software does provide for an electronic receipt, which is automatically sent back to the sender of the original email either when the email has arrived in the recipient's mailbox or when the recipient has opened the messages. Unfortunately these receipts are not reliable- they were not designed to be a legal acknowledgement.

6. Confidentiality and privacy on the Internet: E-commerce emerged and still largely exists as “stranger-to-stranger" commerce, thereby making transaction and communication security and confidentiality one of the biggest concerns. In most arbitration proceedings the parties will wish to maintain all aspects of the proceedings private. The Internet being an open, public network, communications per email or communications via a website platform may be less secure than mail, fax or telephone. There is a risk that unauthorized persons could intercept communications transmitted over the Internet and hackers may break into computers connected to the Internet. from a trusted computer base, i.e. a computer base secure from attacks. Users of ADR are greatly concerned about the privacy of their proceedings and the privacy of any personal information that they supply to ADR providers before, during, or after the proceedings. It is therefore crucial that the same level of security and confidentiality is obtained in cyberspace. Inadequate

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Internet security has been a major deterrent in the growth of e-commerce and may also have a direct bearing on the use of online ADR. [1385]

CONCULSION

Online Arbitration should be a preferred way of dispute resolution since it is fast, economic and efficient. Online Arbitration is still conducted by traditional arbitration rules even though it is a new method to conduct dispute resolution. The parties and the arbitrators in an online arbitration should always consider the legality of the applicable arbitration agreements and procedures, choice of law, seat of arbitration and form of the awards. These precautions will assist online arbitration to work within the framework of existing national and international treaties. However, online arbitration should develop its own rules over the course of time. It is clear that Online Arbitration is not different from what the conventional arbitration is. The only difference is the omission of physical platform and introduction of a virtual platform.

In conclusion, online arbitration is possible and online arbitral awards should therefore have the same effect of traditional arbitral awards. Online arbitral awards are binding and final, subject to set aside only for the same limited procedural grounds as traditional arbitral award. *In* Grid Corporation of Orissa Ltd. vs. AES Corporation *(2002) 7 SCC 736), the Supreme Court explicitly mentions that:"*when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties*".*

[1385] https://www.lawteacher.net/free-law-essays/commercial-law/merits-and-demerits-of-odr-law-essays.php

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TRANSGENDER RIGHTS – ENDING THE PREJUDICE

- *Madhurima Nair*[1386]

ABSTRACT

Transgender rights are human rights. Transgender people in India face many legal and social difficulties. From the research on transgender youth and life-threatening behaviors, transgender youth would have a 4-times higher risk in attempting life-threatening behaviors. It is mainly because of the experiences of past parental verbal and physical abuse. As many families still have the traditional idea of binary sex catalog, seeking parental consent could put the youth at risk for exposing their gender identity or lead to harm. Also, because of the unacceptable and traditional thinking sharped from the media, transgender youth would experience victimization from their peers, and negative parental reactions to their gender nonconforming expression. Besides, transgender people are not equally protected under the law.

Therefore, they are not actually enjoying the same basic rights as others, like health care and discrimination protection in schools and workplaces. Furthermore, as there are only male and female identities on the ID cards, and there are only male and female's washrooms, many transgender people have faced serious insults and discriminations in the public. These serious insults happen almost every day in their life and it has caused severe mental stress on them, which would lead them to have emotional disorders and depression. The discrimination that transgenders face seeps into every aspect of their lives.

This paper aims to examine the various kinds of discrimination that transgenders face and aims to provide solutions to eradicate such evils from the society.

INTRODUCTION

All human beings are born free and equal in dignity and rights.[1387] Trans people have these same human rights. Everyone has a gender; it is a thing affects everything in our lives. It affects how we act like and look like every day. Firstly, what is gender? Gender is the thing that describes the characteristics that a society or culture delineates as masculine or feminine[1388]. Today, most of the countries define gender base on the physical and genetic sexuality at birth. There is at least one transgender person, whose self-gender identity is different from the assigned gender sex at

[1386] Christ University Bangalore
[1387] Universal Declaration of Human Rights (Article 1)
[1388] Nobelius, Ann-Maree. "What is the difference between sex and gender?", Monash University, May 10 2012.

birth, in each 100 people[1389]. Under the rules of our society, there are at least 70 million people living in the world without their identity. Loss of identity also comes with life-threatening discriminations and inequities to them. To solve this serious problem and to improve the harmony of the society, gender's definition should be redefined to include transgender and not only base on the physical sexuality at birth. Transgender is defined as the state of one's self gender identity not matching one's assigned sex which based on physical sexuality at birth[1390].

MASS MEDIA PORTRAYAL

The mass media has already shaped how a gender should look and live. For example, men must be brave and working hard outside to earn money, while women must be cooking and looking after the children. The image of male and female shaped by the mass media would be normal and those people who acting differently would be abnormal. The information we have received every day through mass media has restricted that there are only two genders in the world: male and female while male should act as masculine while female should act as feminine. This either/or fallacy from the mass media has misled us into a restricted norm and thinking. What the mass media is doing is to build up a clear binary sex category and keep the transgender people in secret. In the world that almost everyone is talking about freedom and rights, there are 70 million transgender people living without their identities, facing serious life-threatening discriminations and difficulties in their everyday life; 70 million people are not enjoying the same rights, benefits, and even basic protections as others.

LEGAL ASPECTS

Section 46 of the Army Act-

Section 46 of the Army Act notes that "Any person subject to this act who (a) is guilty of disgraceful conduct of a cruel, indecent or unnatural kind can be remove from service". There are similar provisions in the Navy Act that subjects all employees of the Indian Navy to the disciplinary requirements under a similar enactment. Police Acts can also be used to target same sex behaviors and identities. Homosexual relationships are not recognized when it comes to defining the family for the purposes of insurance claims, compensation under the workman's compensation act, gratuity benefits and for the purposes of nomination.

[1389] NCTE (National Center for Transgender Equality). "Understanding Transgender."Frequently Asked Questions About Transgender People. USA. May 2009.
[1390] GLAAD (Gay and Lesbian Alliance Against Defamation). "GLAAD Media Reference Guide, 7th Edition." GLAAD. USA. May 2010.

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In 2008, Tamil Nadu became the first Indian state to recognize 'transgender' on official documents, as an option for aravani on ration cards.[1391] This was important because ration cards are also used as identification, for example to open a bank account or apply for a passport.

Subsequently Tamil Nadu formed a Transgender Welfare Board and introduced education, health, employment and housing policies for aravani.[1392]

Nationally, India now uses a third gender category in several administrative documents. In 2005, the option of identifying as eunuch (denoted by an 'E') was included in India's online passport application form.[1393] 2009, the 'E' option was added to electoral lists and voter identification cards.[1394] In 2011, India's new ID numbering system introduced 'transgender' as a third gender option.[1395] As of late 2013, the Indian Supreme Court was considering whether to direct India's central and state governments to include transgender as a third category on passports, voter ID cards, driver licences, ration cards and educational admission forms.[1396]

On August 24, 2017, India's Supreme Court has given the country's LGBT community the freedom to safely express their sexual orientation. Therefore, an individual's sexual orientation is protected under the country's Right to Privacy law. However, the Supreme Court did not directly overturn any laws relating to the same. The Supreme Court further held that "discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."

In a recent 2018 judgement, Section 377 of the IPC which does not distinguish between consensual and coercive sex and thereby violating the right to privacy, which was used as a tool to discriminate against the transgender community amongst others was struck down. While this is a monumental step towards achieving rights of the transgender community, it can be effective

[1391] Harrington, M. (2008)
[1392] Govindan, P. (April 2009) 'Interrogating aravani activism in Tamil Nadu' in InfoChange News and Features, accessed 28 August 2013 at: http://infochangeindia.org/ human-rights/the-body-politic/interrogating-aravani-activism-in-tamil-nadu.htm
[1393] N.A (10 March, 2005) '"Third Sex" Finds a Place on Indian Passport Forms' in The Telegraph, accessed 28 August 2013 at: http://infochangeindia.org/human-rights/ news/-third-sex-fi nds-a-place-on-indian-passport-forms.html
[1394] N.A. (22 November, 2009) 'EC's Decision Comes as Big Reprieve for Eunuchs' in DNA, accessed 28 August 2013 at: www.dnaindia.com/india/report_ec-s-decisioncomes-as-big-reprieve-for-eunuchs_1314939
[1395] Nilekani, N. (6 November 2011) 'Over 12,500 Eunuchs Get "Aadhaar"' in The Economic Times, accessed 28 August 2013 at:http://articles.economictimes.indiatimes. com/2011-11-06/news/30366592_1_aadhaar-numbers-uidai-12-digit-uniqueidentifi cation-number. The Unique Identifi cation Authority of India's form can be viewed online at: http://uidai.sifyitest.com/registration.php
[1396] N.A. (2 October 2012) 'Court notice to Centre, States on transgender issue' in The Hindu, accessed 28 August 2013 at: www.thehindu.com/news/national/court-notice-to-centre-states-on-transgender-issue/article3956185.ece

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only when the society as a whole changes its perception and discriminatory practices against this community.

EMPLOYMENT

Transgenders often find it extremely difficult to get suitable employment of their choice. Due to social discrimination in employment most of them are forced into sex work. Apart from the fact of social discrimination, the low levels of literacy in the community also ensure the social, economic and political powerlessness of the community.

The combined operation of the various societal institutions and mechanisms which bear down upon the affected person constructs a mindset wherein the person begins to think of himself as dirty, worthless, unclean and vulgar. The invisibility and silence which surrounds the existence of sexuality minority lives and worlds produces its own order of oppression.

Discrimination often prevents trans adults from finding or keeping a job. Trans people face high rates of unemployment and under-employment, and are segregated in narrow, marginalized occupations. Work place harassment is common. In some regions, most trans women are sex workers, with limited or no rights or legal protection.

Kochi Metro was the first government agency in the country to employ transgenders.

ROLE PLAYED BY INTERNATIONAL BODIES

International human rights standards recognize the diversity of humankind and explicitly protect the rights of marginalized groups such as trans people. States are obliged under international law to respect, protect and fulfil human rights. Yet UN treaty bodies and special procedures are increasingly documenting how States violate trans people's human rights, fail to protect against abuses by third parties and refrain from acting to secure trans people's enjoyment of basic human rights.[1397] The legal, economic and social marginalization of trans people affects every aspect of their lives. Social exclusion is reflected in laws that do not acknowledge the existence of trans people, either as a third gender or as people who wish to transition from male to female, or from female to male. Without legal protection, trans people are vulnerable to daily violence and discrimination, with cumulative impacts. Some impacts are visible, such as the HIV epidemic among trans women in many parts of the world. Most impacts are insidious, with trans people, their families and communities left to support each other and struggle for their rights

FAMILY VIOLENCE:

[1397] Office of the High Commissioner for Human Rights (2012) Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, p. 10

Almost one in five trans or gender non-conforming respondents reported experiencing domestic violence because of their gender identity.[1398] Trans people may be particularly vulnerable to domestic violence if they fear a partner or family member will disclose their gender identity and expose them to prejudice and discrimination. Other risk factors include fear they will be denied access to hormones or be forced to marry.[1399]

EDUCATION

Education is essential for the development of human potential and realization of other human rights. However, many trans children and young people are unable to realize these rights due to stigma and discrimination. Trans and gender-variant children and young people are particularly vulnerable at school, where teachers' and students' attitudes typically defi ne whether the school will be a safe and inclusive environment. Conversely, supportive teachers and peers play a significant role in affirming a trans child's gender identity, enabling that child to focus on learning. Trans children and young people confront barriers to education when they are unable to attend school safely under their preferred name and gender identity. School records, uniforms, sports teams and facilities routinely fail to reasonably accommodate the needs of trans and gender-variant students and their families. This results in high levels of bullying, violence, truancy and exclusion from school. High levels of harassment of trans students are related to increased absenteeism, as well as decreased educational aspirations and lower academic performance.

In 2006, the Department of Social Welfare in Tamil Nadu, India passed a landmark order protecting the rights of aravanis / hijras to attend schools and college.[1400]

HEALTH

Everyone has the right to enjoy the highest attainable standard of physical and mental health.110 Trans people have the same range of general health needs as other groups. Yet very few health surveys collect data about gender identity, severely limiting the capacity to identify health risks, protective factors or health outcomes for trans people. The cumulative impact of discrimination and relative deprivation is bound to impact negatively on trans people's health. Trans people face

[1398] Grant, J., Mottet, L., Tanis, J., Harrison, J., Herman, J. and Keisling, M. (2011) Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, Washington DC: National Center for Transgender Equality and National Gay and Lesbian Task Force, p 88, accessed 3 October 2013 at: www.thetaskforce.org/reports_and_research/ntds

[1399] Greenberg, K. (2012) 'Still hidden in the closet: Trans women and domestic violence' in Berkeley Journal of Gender, Law and Justice, 27 (1) pp. 198-251, accessed 3 October 2013 at: http://genderlawjustice.berkeley.edu/wp-content/uploads/2012/09/Still-Hidden-in-the-Closet-Trans-Women-and-Domestic-Violence.pdf; LGBT Domestic Violence and Abuse Working Group (2011) Domestic Violence: A Resource for Trans People in Brighton and Hove, accessed 3 October 2013 at: www.domesticviolencelondon.nhs.uk/uploads/downloads/DV%20Trans%20guide_FINAL_FOR_WEB.pdf

[1400] Harrington, M. (19 April 2008) "The rationing of rights" in Tehelka Magazine

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systemic discrimination trying to access general health services.111 This includes being treated with contempt and refused care.

TRANSGENDER RIGHTS

The states Tamil Nadu and Kerala in India were the first states to introduce a transgender (hijra/ aravani) welfare policy. According to the transgender welfare policy transgender people can access free Sex Reassignment Surgery (SRS) in the Government Hospital (only for MTF); free housing program; various citizenship documents; admission in government colleges with full scholarship for higher studies; alternative sources of livelihood through formation of self-help groups (for savings) and initiating income-generation programmes (IGP). Tamil Nadu was also the first state to form a Transgender Welfare Board with representatives from the transgender community. In 2016, Kerala started implementing free SRS through government hospitals.[1401]

In India one group of transgender people are called Hijras. They were legally granted voting rights as a third sex in 1994.[1402] Due to alleged legal ambiguity of the procedure, Indian transgender individuals do not have access to safe medical facilities for SRS.[1403] On 15 April 2014, Supreme Court of India declared transgender people as a socially and economically backward class entitled to reservations in Education and Job, and also directed union and state governments to frame welfare schemes for them.[1404]

On 24 April 2015, the Rajya Sabha passed the Rights of Transgender Persons Bill, 2014 guaranteeing rights and entitlements, reservations in education and jobs (2% reservation in government jobs), legal aid, pensions, unemployment allowances and skill development for transgender people. It also contains provisions to prohibit discrimination in employment, prevent abuse, violence and exploitation of transgender people. The Bill also provides for the establishment of welfare boards at the Centre and State level, and for Transgender Rights Courts. The Bill was introduced by DMK MP Tiruchi Siva, and marked the first time the House had passed a private member's bill in 45 years. The Bill was passed unanimously by the House. However, the Bill contains several anomalies and a lack of clarity on how various ministries will

[1401] How Kerala left the country behind on transgender rights | Latest News & Updates at Daily News & Analysis". dna. Retrieved 2016-03-19.
[1402] Shackle, Samira. "Politicians of the third gender: the "shemale" candidates of Pakistan". New Statesman.
[1403] "Crystallising Queer Politics-The Naz Foundation Case and Its Implications For India's Transgender Communities" (PDF). NUJS Law Review. 2009
[1404] "Supreme Court's Third Gender Status to Transgenders is a landmark". IANS. news.biharprabha.com. Retrieved 15 April 2014

co-ordinate to implement its provisions.[1405] Social Justice and Empowerment Minister Thaawar Chand Gehlot stated on 11 June 2015 that the Government would introduce a comprehensive Bill for transgender rights in the Monsoon session of Parliament. The Bill will be based on the study on transgender issues conducted by a committee appointed on 27 January 2014. According to Gehlot, the Government intends to provide transgender people with all rights and entitlements currently enjoyed by Scheduled Castes and Scheduled Tribes.[1406]

In April 2017, the Ministry of Drinking Water and Sanitation instructed states to allow transgender people to use the public toilet of their choice.[1407]

TRANSGENDERS IN INDIAN POLITICS:

The All India Hijra Kalyan Sabha fought for over a decade to get voting rights, which they finally got in 1994. In 1996 Kali stood for elections in Patna under the then Judicial Reform Party and gave the Janata Dal and the BJP a bit of a fight. Munni ran for the elections as well from South Bombay that year. They both lost, more than 13 years Hijras are participating in the politics in India. After the defeat of Kali and Munni, three years later we saw Kamla Jaan run and win the position of the mayor of Katni in MP. Then there was Shabnam Mausi, who was elected to the Legislative Assembly in 2002 as well. In the huge political machinery, Heera won a seat at the city council of Jabalpur, Meera won a similar position in Sehora, and so did Gulshan in Bina. In December 2000, Asha Devi became the mayor of Gorakhpur, and Kallu Kinnar was elected to the city council in Varanasi. I am sure there are many more low level, inconspicuous bureaucratic positions that were held by the hijras but did not whip up any excitement for the media — not to mention the cases where they were probably threatened, bullied and killed to prevent them from running for seats. This brings us to the current elections, which has Mangesh Bharat Khandye running for the Thane Lok Sabha seat.Shabnam Mausi is the first transgender Indian or hijra to be elected to public office. She was an elected member of the Madhya Pradesh State Legislative Assembly from 1998 to 2003.In 2000 Shabnam Mausi became India's first eunuch MP.(Hijras were granted voting rights in 1994 in India.) In 2003, Hijras in Madhya Pradesh have announced establishing their own political party called "Jeeti Jitayi Politics" (JJP), which literally means 'politics that has already been won'. The party has also released an eight-page election manifesto which it claims outlines why it is different from mainstream political parties.Hira bai became first TG MLA of India from Jabalpur vidhanshaba seat.[1408] Kalki Subramaniam, a transgender rights activist, writer and an actor,In the 2011 assembly elections, Kalki tried in vain to get a DMK ticket.[1409] Again on March 2014 Kalki announced in Puducherry that she would contest in this election from Villupuram constituency in neighbouring Tamil Nadu. She is likely to be among the very few contestants fighting in the national elections

[1405] "Rajya Sabha passes historic private Bill to promote transgender rights". The Indian Express. 25 April 2015.
[1406] "Bills on transgenders, disabled in monsoon session: Gehlot".
[1407] "India allows transgender people to use bathroom of their choice". BNO News. 6 April 2017. Retrieved 6 April 2017.
[1408] "Eunuch MP takes seat". BBC News. 6 March 2000.
[1409] "Transgender activist Kalki to seek DMK ticket".

from the transgender community that faces discrimination and ridicule.[1410] On 4 January 2015, independent candidate Madhu Bai Kinnar was elected as the mayor of Raigarh, Chhattisgarh becoming India's first openly transgender mayor.[1411] Manabi Bandopadhyay became India's first transgender college principal, on 9 June 2015, when she assumed the role of Principal of the Krishnagar Women's College in Nadia district, West Bengal. On 5 November 2015, K. Prithika Yashini became the first transgender police officer in the state of Tamil Nadu. At the time, the Tamil Nadu police had three transgender constables, but Yashini became the first trans person to hold the rank of officer in the state.[1412] Gopi Shankar Madurai was one of the youngest candidates, and the first openly intersex and genderqueer candidate to contest an election, in the Tamil Nadu Legislative Assembly election, 2016.[1413] On 12 February 2017, two transgender people were appointed by the Kolhapur District Legal Services Authority (KDLSA) as panel members for the Lok Adalat (People's Court). 30 panels were appointed to settle general local disputes that arise within the community. The Lok Adalat is mandated by the Supreme Court in order to provide an alternative way to resolve disputes and bring down the pending case load of lower courts. Members of the KDLSA state, "Our main achievement was inclusion of transgenders as panelist in Lok Adalat. As per the Supreme Court's judgment, transgenders must be recognised as the third gender in our country. As per the norm, we have put in efforts and included two transgenders Mayuri Alawekar and Yuvraj Alavankar as panel members." [1414]

CONCLUSION

Realizing the right to development for trans people, like other marginalized groups, is about core development issues such as poverty reduction, mitigating negative health and HIV consequences, the protection and exercise of human rights and combating gender-based violence. It requires trans people's inclusion in society on an equal basis with others.Trans people must continue to be at the centre of responses to these challenges. Social inclusion is about supporting trans people to actively and meaningfully participate in decisions about their lives and their communities must "involve and consult transgender persons and their organisations when developing and implementing policy and legal measures which concern them." The development of the society can take place only when the development of every section takes place and no part of the society is excluded. Therefore, in order for our society to progress and achieve development, transgenders must not be left out of the development process. We must recognize them as a third gender and give them equal rights as those from the other two genders and only then can our country achieve development.

[1410] Jaisankar, C.; Raghunathan, A. V. "Transgender Kalki in poll race". The Hindu. Chennai, India.
[1411] "India's First Openly Transgender Mayor in Her Own Words". The Wall Street Journal. 7 January 2015
[1412] "With a little help from Madras HC, Tamil Nadu gets its first transgender police officer". The Indian Express. 7 November 2015.
[1413] "3rd gender gets a new champion in Tamil Nadu poll ring – Times of India"
[1414] "Lok Adalat makes history, appointed two transgenders as panelist". The Times of India. 12 February 2017. Retrieved 12 April 2017.

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THE DISSOLUTION OF A BLACK SPLOTCH: CHILD MARITAL RAPE

Independent Thought

v.

Union of India and Others.

Quorum: Madan B. Lokur and Deepak Gupta

Decided on: 11.10.2017

Writ Petition (Civil) No. 382/2013 (under Article 32 of the Constitution of India)

- ***Keiya Barot and Manvi Rathod***[1415]

ABSTRACT

This case commentary addresses the longstanding issue of the gallimaufry in the legality of consummation of marriage wherein the female spouse is below eighteen years of age and above fifteen years of age. This treatise deconstructs the conflict in law between Protection of Children from Sexual Offences Act (Section 2(d) and Section 3) and the Indian Penal Code (Exception 2 to Section 375), while simultaneously resolving the issues of whether Articles 14, 16 and 21 of the Constitution of India are violated by Exception 2 to Section 375 wherein a married girl below eighteen years is presumed to have consented to sexual intercourse with her husband for all times to come when otherwise an unmarried girl would be unable to give her consent. This commentary also deals with whether Exception 2 to Section 375 of the Indian Penal Code, relating to girls aged fifteen - eighteen years is unconstitutional and should be struck down as it infringes on the most basic rights bequeathed by the Constitution to innocent, young girls. Penultimately, this commentary subtlely drives home the point that regardless of a girl's marital status, she is under no circumstances a commodity before coming to its ultimate conclusion- sexual intercourse with a girl, married or otherwise, is illegal.

Sexual Violence is the most dehumanizing act one can inflict upon a child. At a tender age, children need the nourishment of care and protection, which should be to every child freely available, but unfortunately,

[1415] 3rd Year, B.L.S, L.LB

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the plight of young girls serves as discourse over one a many glass tables but isn't implemented at grass root levels.

In 2013, the Indian Penal Code (IPC) was amended, after the lamentable Nirbhaya incident and the age of consent under Clause Six of Section 375 of the IPC was raised to eighteen years. Ergo, under Section 375 of the IPC a man cannot have sexual intercourse with a girl if she is below the age of eighteen years because she is deemed unable to give her consent. However, if the girl child is married and aged above fifteen years, then such consent is presumed and there is no illegality in a husband consummating such a marriage.[1416] There is a gallimaufry in the legality of consummation of marriage wherein the woman is below the age of eighteen and above fifteen years; which is why in the State of Karnataka an amendment was made in the Prohibition of Child Marriage Act (PCMA) wherein Section 1(A) was inserted which stated that every child marriage solemnized on or after the date of coming into force of the PCMA (Karnataka Amendment), 2015 shall be held void ab initio. Therefore, a husband who has sexual intercourse with his underage wife in Karnataka cannot get the benefit of Exception 2 of Section 375 (hereafter Exception 2) as their marriage never legally existed. Whereas in the residual states PCMA states that a child marriage is voidable at the option and pleasure of any contracting party who was a child at the time of the marriage when they turn eighteen, subjects to a few conditions.[1417]

Independent Thought, the Petitioner is a society which works in the area of child rights. This society filed a petition under Article 32 of the Indian Constitution as Public Interest Litigation with the intention of making beknownst to the Court the flagrant violation of the rights of girls between the ages of fifteen to eighteen who are married. The POCSO Act prohibits 'penetrative sexual assault'[1418] with a child[1419] irrespective of their marital status.

Section 5(n) of the POCSO Act states that a person is guilty of aggravated penetrative sexual assault if that child is related to him, affinally amongst other things.

[1416] Exception 2 of Section 375 of the Indian Penal Code states: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.
[1417] Section 3 of Prohibition of Child Marriage Act, 2006.
[1418] Section 3 of the POCSO Act defines "penetrative sexual assault."

Penetrative Sexual Assault. -A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

[1419] Section 2(d) of Protection of Children from Sexual Offences Act, 2012 defines a child as any person below the age of 18.

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The issues presented before the Court were substantial: Firstly, whether a girl below eighteen years, otherwise unable to give consent can be presumed to have consented to have sexual intercourse with her husband for all times to come and whether such presumption in the case of a girl child is violative of Articles 14, 16, and 21 of the Constitution of India.

Secondly, "Whether Exception 2 to Section 375 of Indian Penal Code, in so far as it relates to girls aged fifteen to eighteen is unconstitutional and should be struck down." The Court was of the opinion that Exception 2 of section 375 of IPC should reflect a changed attitude-since matrimony with a girl child below eighteen years is prohibited, sexual intercourse should also be prohibited.

Premature matrimony is a violation of human rights[1420], as it stuns the personal growth and development of young people by depriving them the opportunity to explore their individuality. It deprives them of freedom, the right to education, cognitive and physical health. A report[1421] revealed that girls below the age of eighteen are 'three times more likely to experience marital rape as compared to women above the age of eighteen.' Child marriage has far reaching consequences it crushes the spirit and ability of young girls in several ways-

Firstly, girls at a young age who are not fully educated about sexual changes in their anatomy, contraception and child birthing are prey to higher rates of woman and child mortality. This lack of sexual awareness and early sexual initiation creates a vacuum and a conducive environment for sexually transmitted diseases such as HIV and other problems like obstetric fistula. When these vulnerable girls are forced to consummate their marriage, or perform 'wifely duties' they often show signs of post-traumatic stress and depression. Secondly, these girls suffer from an abysmal lack of education which culminates into persistent poverty and dearth of meaningful work which leads to insufficient social interaction and social awareness. Owing to the tilted scales of power and gender inequality, these girls are subjected to domestic violence, dowry, pre-natal sex determination and termination, sexual abuse and social isolation. Child marriage not only has detrimental effects on girls but also on adolescent boys who face educational and psychological setbacks but there is sparse research to be a buttress.

The Union raised their main point of contention while giving apt statistics. Though the practice of child marriage may be deplorable and looked down upon by the law, the stone-cold truth is that 20%-30% of female children below the age of eighteen years are married and there are currently 23 million child brides in the country. While scrutinizing the sanctity of marriage they thought it wise to level the age at fifteen in Exception 2. They are of the opinion, that the legal provisions should not affect a particular section of society, Exception 2 has been fashioned according to the social conditions in India. They mentioned that when Parliament enacts any law which falls within its jurisdiction then the Supreme Court must not normally interfere with that Act. The bench emphasized that it is their obligatory duty discharged by the constitution to adjudicate the conformity of laws to the constitutional principles and thus they cannot hesitate to provide remedial action to aggrieved parties.

[1420] The Protection of Human Rights Act, 1993 defines "human rights" in Section 2(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India.

[1421] A Statistical Analysis of Child Marriage in India, based on consensus 2011(Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi.

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The Union submitted that the age of relaxation was instated to give protection against criminalizing the sexual acts performed in sacrosanct matrimony, hence penalizing the consummation of marriage with rape[1422] would be inappropriate and impractical. The Court was of the opinion that with evolving times the customs and traditions once sanctimonious may have been weathered. It was held by this Court[1423]- "what was once a perfectly valid legislation may in course of time become discriminatory and liable to challenge on the ground of it being violative of Article 14". The Judges reminded the Union that since it has acceded to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women highlighting specifically Article 16.2,[1424] it has an obligation to protect the interests of young girls.

During oral submissions, the Union made a tripartite argument: Firstly, the girl's consent has been implied by marriage and thus she is in no position to withdraw that consent; secondly this tradition is age old and must remain undemolished, lastly, members of Rajya Sabha felt that instating marital rape in the IPC will degrade the institution of marriage. Considering all these arguments, they stated that Exception 2 should not be repudiated. Honourable Justice Lokur stated that the view that marital rape of a girl child could destroy the institution of marriage cannot be accepted-nothing could destroy the 'institution' of marriage 'except a statute that made marriage illegal.'

The Petitioner submitted that the husband of a girl child between fifteen and eighteen years should not be given the right to have non-consensual intercourse with his wife. Such a girl does not cease to be a child merely because of her marital status or being psychologically or physically in a state to partake in sexual congress. They are of the view that since the minimum age of marriage is eighteen years in the case of females and sexual intercourse with a girl below eighteen years is prohibited- the same with a married girl between the age of fifteen to eighteen years should also be disallowed.

[1422] Rape.-A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Exception 2 of Section 375 of Indian Penal Code envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the Indian Penal Code.

[1423] Motor General Traders vs State of A.P (1984) 1 SCC 222

[1424] Article 16.2 thereof provides "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

The Petitioner submitted that Exception 2 which legitimizes sexual exploitation and fails to denounce it as a heinous crime, is directly in conflict with the spirit of the POCSO Act. The reason to decimate Exception 2 is that the POCSO Act prevails over the IPC by virtue of the amendment made on 3rd February 2013-Section 42-A[1425]. The consequences of amendment 42-A of POCSO is that the provisions of said Act will trump the provisions of the IPC to the extent of any inconsistency. A girl below eighteen years can be a victim of rape under the provisions of the IPC and POCSO Act but a married girl child (between fifteen to eighteen years) can only get recourse against rape under POCSO Act and not under IPC if her husband is the rapist. The provisions of IPC and POCSO Act are not in tandem, it is vital to harmonize them.

The Petitioner argued that POCSO Act is considered to be a special law because it is enacted under Article 15(3) which came into being to positively discriminate against and provide a form of affirmative action in favour of women. Thus, a legislation formed for affirmative action for a girl child shall override other laws in contravention to the benefits available to a girl child. They highlighted the irony that the husband of a girl child is not permitted to outrage her modesty[1426] or molest her but is sanctioned by the IPC to have non-consensual intercourse with her. The Court stated that it saw no rationale for such an artificial distinction and that "A rapist remains a rapist regardless of his relationship with the victim" a decision[1427] reflected by the European Commission of Human Rights.

Adding their opinion, the Judges held that a child remains a child regardless of any nomenclature ascribed to it. It is catholic in almost all statutes in India relevant to this case that a child is regarded as a person below eighteen years of age. Therefore, whether the child is married or unmarried does not change its inherent status. The age of consent is definitively eighteen years of age and is indisputable whether married or not. They stated that constitutional morality forbade them from giving an interpretation to Exception 2 that sanctified that tradition or custom that was no longer sustainable.

The Petitioners argued that Exception 2 created an unnecessary and artificial distinction between married and unmarried girls being in conflict with the ethos of Article 21 of the Indian Constitution. One dimension of personal liberty is the right to reproduce or refrain from reproducing, such a woman also has the right to abstain from partaking in sexual activities and from preventing conception adopting correct methods of contraception. The girl's fundamental right to dignity is infringed by the abhorrent sanctions given in Exception 2 which disallows her control over her physicality. Article 21 doesn't envisage merely a right to live an animal existence but includes the holistic growth. For instance, depriving a girl of her right to education would offset a domino effect- divesting her of her right to develop into an independent woman.

Weighing in, the Court stated that there is always a presumption of constitutionality, in order to hold a legislation in relation to Article 14 unconstitutional, it should be discriminative and must confer unbridled powers to the executive. The law must truly be arbitrary, unjust and in contravention of another

[1425] Section 42-A of Protection of Children Against Sexual Offences Act not in derogation of any other law. -The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency

[1426] Section 354 of the Indian Penal Code, 1860.

[1427] C.R. v. UK [C.R. v. Publ. ECHR, Ser. A, No. 335-C]

recognised law and then the court is duty bound to nullify such a law. Thus, the court has to ascertain whether the law is in conformity with the tenants of the constitution.[1428]

Justice Gupta reiterated the Rule of Law saying that equality is antithetic to arbitrariness and thus no person shall be exposed to the arbitrary will of the government.[1429] The principle of reasonableness is at the heart of Article 14 and the procedure contemplated by Article 21 must answer this test of permissibility to be in tandem with Article 14. The court held [1430] that an enactment could be obliterated if it violates Article 14 hinging on the condition that it violates the equality clause, equal protection clause or fundamental rights.

After subsequent alterations in the age of consent which has now been fixed at eighteen years, the minimum age of matrimony is likewise eighteen years, hence, prescribing a different and lower age under Exception 2 would be to teeter on the boundary of insanity. This outrage of the concept of equality and right to fair treatment to the girl child is arbitrary, it questions the rationality behind discrimination between a consenting girl child who is at the cusp of adulthood and a non-consenting girl. It is well within the states purview to fix the age of consent but in this case, the only justification forthcoming from the Union is it doesn't want to punish people consummating their 'illegal' marriage. One would hope that the State would not take to the defense of tradition and custom when it is in violation of Article 14, 15, 21 of the Constitution.

The Judges also shed light on whether the court is creating a new offence because they are decimating Exception 2? They held that no new offence is being created because the offence of sexual intercourse with a girl child is already part of Section 375, Section 3 and 5 of POCSO. The Court in its wisdom is only reading down Exception 2 to bring it in symmetry with the Constitution and POCSO Act. Scrutinizing this, it was held by the Judges that Exception 2 will now be read as **"**Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age is not rape."

The Judges also said that a girl cannot be treated as a commodity regardless of her marital status and should have the right to deny sexual intercourse to her husband. The Judges urged the Union and the other state governments to thoroughly study the reports and take affirmative action for the implementation of PCMA and forbid child marriage which encourages sexual intercourse with underage girls.

It is acknowledged catholically that children are the dawn that is going to radiate light upon our darkened world. It is in our benefit to safeguard these promises of a better tomorrow.

This step in the form of condemnation of child marriage and simultaneous upliftment of young girls was much-needed from the revered Supreme Court. Women are now one step closer to the equality enshrined in the Constitution. This judgement drives home the point that a girl's body is her own temple and she should have autonomy over her holistic evolution. Thus, expunging the black tar that once marred the innocence of their youth.

[1428] State of Punjab vs. Khanchand, (1974) 1 SCC 549
[1429] E.P Royappa v. State of Tamil Nadu, (1974) 4 SCC 3
[1430] State of A.P. v. McDowell & Co. (1996) 3 SCC 709

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RESERVATION IN PROMOTION AND JUDICIAL PRONOUNCEMENTS IN INDIA- AN OVERVIEW

- ***Manjula Ramaiah***[1431]

*"**P**olitical tyranny is nothing compared to the social tyranny and a reformer who defies society is a more courageous man than a politician who defies Government"*

-Dr.B.R.Ambedkar

INTRODUCTION

All are equal before the law but some are more equal before the state and society. The right to equality[1432] is the fundamental right of the Indian Constitution as guaranteed in Part-III of the Constitution. The judicial pronouncement should not abridge Part-III of the Constitution but they should run in compliance with fundamental rights. Article 14 permits reasonable classification but forbids class legislation. The practice of untouchability is prohibited in the Constitution.[1433] Enforcement of disability arising out of untouchability is an offence punishable under the law. The government has been enacted the law to make the practice of untouchability in a stringent manner.[1434]But the condition of scheduled castes and scheduled tribes even today not improved to the level of the other communities.

In order to safeguard the interest of those categories who are not adequately represented in the government, the reservation in promotion has been introduced by way of amendment to the Constitution.[1435] The prevalence of the backwardness among the scheduled castes and scheduled tribes and their inadequate representation in the services of the State is the main reason for providing the reservation in promotion. The following questions will arises to the common mind that;-

1. Why reservation?
2. What amounts to backwardness?
3. Whether they are not adequately represented in the services of the state?
4. What criteria to be applied in determining the backwardness?

[1431] – Assistant Professor, PG Department of Studies in Law, Karnataka University
[1432] Article-14 of the Indian Constitution.
[1433] Article-17- abolition of untouchability
[1434] Like protection of civil rights Act,1955, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989.
[1435] Subsequently, the Constitution was amended by the Constitution (Seventy-seventh Amendment) Act, 1995 and a new clause (4A) was inserted in article 16 to enable the Government to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes.

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Why reservation?

The worst form of inequality is to make unequal things as equal.[1436]The purpose of reservation is to bring the exploited class to the level of other castes in the society. Some are born free with equal dignity but some are denied equal dignity of life in the society. The revolution for freedom is not the revolution of few peoples but, it was the struggle of all communities in the society. The Constitution says about all are equal in all respect, but even today entering the house of the upper castes by the Scheduled Castes and Scheduled Tribes is denied. Even today entering the temple also denied to certain communities. How one can say that all are equal?. The reservation in promotion is to make them to come up in the level of other communities. Because of the backwardness both in social and educational will be considered for reservation.

What amounts to backwardness?

In K.C.Vasanth Kumar v. State of Karnataka[1437]the supreme court of India characterised the backwardness. Five judges had expressed their views in different manner.

According to *Chandrachud .C.J,* two tests should be conjunctively applied for identifying backward classes, one they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and secondly, they should satisfy the means test, that is to say, the test of economic backwardness, laid down by the State Government in the context of the prevailing economic condition.

From the above view one can comes to know that the backwardness means the economic backwardness and that was comparable to scheduled castes and scheduled tribes since they are economically backward.

Desai, J was against the caste being regarded as a major determinant of backwardness. He was argued that,‘ If state patronage for preferred treatment accepts caste as only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system which contradicts secular principles and also run against Article -16(2).Also, caste based reservation had been usurped by the economically well- placed section in the same caste.

According to Desai J, the only criterion which can be realistically devised is the one of economic backwardness. Adoption of an economic criterion would translate into reality of two Constitutional goals; one is to strike at the perpetuation of the caste stratification of the Indian

[1436] Read more at: https://www.brainyquote.com/quotes/aristotle_140848
[1437] A.I.R 1985 SC 1495

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society and to take a firm step towards establishing a casteless society; and secondly, to progressively eliminate poverty.

According to *Chinnappa Reddy, J* 'poverty, caste, occupation and habitation are the principal factors contributing to social backwardness'. As regards caste, his view was that the caste-system has firm links with economic power and that,' caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste'.

According to *Sen.J,'* the predominant and the only factor for making special provisions under Article 15(4) or reservation of posts and appointments under Article 16(4) should be poverty, and caste or sub caste or a group should be used only for purposes of identification of persons comparable to scheduled castes and scheduled tribes'.

According to Venkataramaiah ,J, the relevance of caste factor as an index of backwardness. The expression backward classes can only refer to certain castes, races, tribes or communities or parts thereof other than scheduled castes , scheduled tribes and Anglo-Indian community, which are backward and caste or community is an important relevant factor in determining social and educational backwardness'. He however, suggested caste-cum-means test as a 'rational test' to identify backward people for purposes of Article 15(4) and 16(4) for all members of a caste need not be treated as backward.

From the above different opinion as expressed by the Supreme court judges, it comes to mean that, caste is not only the criteria to be applied in determining the backwardness but also the poverty and economic condition of the community to be looked into in determining the backwardness of the community.

In State of Kerala v. N.M.Thomas[1438] justice Krishna Iyer who was a liberal interpreter observed that,' A word of sociological caution, in the light of experience, here and elsewhere the danger of reservation it seems to me is three –fold. Its benefits by and large, are snatched away by the top creamy layer of the backward caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the weaker section label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross fertilisation of castes by inter-caste and inter-class marriages'.

In Indra Sawhney v. Union of India[1439],(the Mandal Commission case),the mandal commission was appointed by the government of India in terms of Article-340 of the Constitution in 1979 to

[1438] A.I.R 1976 SC 490
[1439] A.I.R 1993 SC 477

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investigate the conditions of socially and educationally backward classes. One of the main recommendations made by the Commission was that,‘ besides the Scheduled Castes and Scheduled Tribes for other backward classes which constitute nearly 52% component of the population, 27% government jobs be reserved so that the total reservation for all SCs, STs, and OBCs, amounts to 50%.

But, unfortunately no action has been taken by the government based on the recommendation of the Mandal Commission report. In 1990 the V.P.Singh Government at the Centre issued an office memorandum accepting the Mandal Commission recommendation and announced 27% of reservation to OBCs for the educationally and socially backward classes in vacancies in civil posts and services under the Government of India. This memorandum led to widespread disturbances in the country.

In 1991, the Narasimha Rao government modified the memorandum of V.P.Singh government in two aspects. One was the poorer sections among the backward classes would get preference over the other sections; secondly, 10% vacancies would be reserved for other economically backward sections of the people who were not covered by any existing reservation scheme. The Constitutional validity of the memorandum was questioned before the Supreme Court of India. It was considered by the 9 judges bench, six opinions were delivered. The leading opinion was delivered by justice Jeevan Reddy, Kania C.J, Venkatachallah, Ahmadi J.J. Two judges like Pandian and Sawant j .j in separate opinions concurred with Reddy J. Three judges, Thommen, Kuldip Singh j.j in separate opinions dissented from Reddy,J. on several points.

Justice Reddy opined that,

1. A measure of the nature contemplated by Article 16(4) can be provided not only by the Parliament/ Legislature but also by the executive through administrative instructions in respect of Central/State services and by the local bodies and other authorities as contemplated by Article 12 in respect of their services’.
2. The provision made by the executive under Article 16(4) becomes effective and enforceable by itself without its being enacted into a law made by a legislature.
3. The Court has reiterated the view expressed in Thomas case that, Article 16(1) permits classification for ensuring attainment of equality of opportunity assured by Article 16(1) itself. Article 16(1) is a facet of Article 14 it permits reasonable classification. A classification may involve reservation of seats or vacancies, as the case may be. Therefore appointments/posts can be reserved in favour of a class.
4. Article 16(4) permits reservation in favour of any ‘backward classes of citizens’. Backward classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further

classification or special treatment is permissible in their apart from or outside of Article.16(4).

As per the backward classes were concerned the court observed that, 'Backward classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment if permissible in their favour apart from or outside of clause(4) of Article 16.

5. Even under Article 16(1) reservations cannot be made on the basis of economic criterion alone.
6. As per the backwardness concerned the court has expressed that,' the accent of article 16(4) is on social backwardness. The social backwardness has an integral connection between caste, occupation, poverty and social backwardness. The social, educational an economic backwardness are closely intertwined in the Indian Context .As regards identification of backward classes, caste may be used as a criterion because caste often is a social class in India. But caste cannot be the sole criterion for reservation.
7. Backwardness under Article 16(4) need not be social as well as educational as is the case under Article 15(4). Article 16 (4) does not contain the qualifying words socially and educationally as does under article 15(4). It is not correct to say that, 'backward class of citizens in article 16(4) are the same as the socially and educationally backward classes in Article 15(4).Therefore backwardness contemplated by Article 16(4) is mainly social backwardness.
8. The court directed the government to identify the backward classes by appointing a commission/authority. This body would evolve proper and relevant criteria and test the several groups, castes, classes and sections of people against those criteria.
9. Another important recommendations made by the court is that the **'creamy layer',** the socially advanced members of a backward class, should be excluded from the benefit of reservation. Such exclusion would benefit the truly backward people and thus, more appropriately serve the purpose of Article 16(4).
10. Inadequate representation- Justice Reddy opined that, not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. This matter lies within the subjective satisfaction of the State under Article 16(4). However, there must be some material upon the basis of which the opinion is formed by the State.
11. The total reservation cannot exceed 50% in any one year. Article 16(4) speaks of adequate representation and not proportional representation. The power

under Article 16(4) must be exercised in a fair manner and within reasonable limits. Therefore, reservation under Article16 (4) should not exceed 50% of the appointments or posts 'barring certain extraordinary situations' as explained hereafter. Accordingly 27% reservation in favour of backward classes together with reservation in favour of Scheduled Castes and Scheduled Tribes comes to a total of 49.5%.

12. If a member belonging to Scheduled Castes gets selected in the open competition on the basis of his own merit, he will not be counted against the quota reserved for the Scheduled Castes; he will be treated as open competition candidate.
13. The court has divided the total reservation of 50% into 'vertical' and 'horizontal' reservations. The reservation in favour of SC,ST and other backward classes(OBC) under Article.16(4) may be called as vertical reservation whereas reservation made in favour of physically handicapped under article 16(1) can be referred as horizontal reservation. Horizontal reservation cut across the vertical reservations what is called interlocking reservations.
14. The court further stated that, there should be a periodic revision of lists of OBC s so as to exclude those who have ceased to be backward or to include new classes.
15. **As per reservation in promotion** the court has made the significant point that, reservation in promotion. Under article reservation is permissible only at the stage of entry into the state service and not at the subsequent promotional stage. Once they enter the stage of recruitment and service efficiency of administration demands that these members too compete with others and earn promotion like all others. They are expected to operate on equal footing with other'.
16. The court also said that, 'it would not be impermissible for the state to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.
17. The court has been pointed out that, 'for the reserved category in service, the minimum standards can be prescribed.[1440]Justice Reddy expressed that, 'It may be permissible for the Government to prescribe a reasonable lower standard for Scheduled Castes and Scheduled Tribes/Backward Classes-consistent with the requirements of efficiency of administration-it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public also should be kept in mind'.

[1440] Article 335 demands some standards be prescribed.

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Thus, court said that, overall reservation should not exceed 50%, and minimum standards have to be laid down for recruitment to the reserved posts. After Indra Sawney case verdict, the reservation has become the bane of the contemporary Indian life.

The creamy layer test

The Supreme Court has clearly and automatically laid down that the 'socially' advanced members of a backward class the creamy layer has to be excluded from backward class and the benefit of reservation under Articl.16(4) can only be given to the class which remains after exclusion of the creamy layer. This would more appropriately serve the purpose and object of Article 16(4). The court further said that, 'exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. The backward class under Article 16(4) means the class which has no element of creamy layer in it. It is mandatory under Article.16(4) as interpreted by this court, that the State must identify the creamy layer in a backward class and thereafter by excluding the creamy layer extend the benefit of reservation to the class which remains after such exclusion.

The Kerala Legislature has passed the law in 1995[1441] declaring that there was no creamy layer in the State of Kerala. The validity of the law was challenged in the Supreme Court of India. The court has declared the Kerala Law that, there is no socially advanced section in any backward class in the State as unconstitutional as being violative of Article 14 and 16(1). As per the court, the Act has shut its eyes to the realities and facts; it has no factual basis. The declaration is a mere cloak and is unrelated to facts in existence. Further the court has emphasized that, 'equality is the basic feature of the Constitution, and neither the Parliament nor any State Legislature can transgress this principle. Non-exclusion of creamy layer will not only be a breach of Article.14 but even of the basic structure of the Constitution and therefore, totally illegal.

The court further observed that, 'the unreasonable delay on the part of the Kerala Government and the discriminatory law made by the Kerala Legislature have been in virtual defiance of the rule of law and also an indefensible breach of the equality principle which is a basic feature of the Constitution. They are also in open violation of the judgements of this court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the Constitution.

Thus, the court has directed the government of Kerala to make provision for the exclusion of the creamy layer among the backward classes in the State.

The 77th Constitutional Amendments after Indra sawney case

[1441] The Kerala Creamy Layer case ,AIR 2000 SC.498

In Gen. Manager, Southern Rly v. Rangachari [1442] the court has been directed that it would be operative only prospectively and wherever reservation had been provided in promotions, it would continue for a period of five years. Therefore the court by majority held that, Article 16(4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection posts. This proposition of the supreme court of India also reiterated in number of cases.[1443]

The 77th Constitutional Amendment[1444] has been brought into effect which permitted the reservation in promotion to the Scheduled Castes and Scheduled Tribes. This amendment has been introduced clause (4A) to Article 16 of the Constitution of India. The amended article 16(4A) reads that, 'Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State'.

Article 16(4A) permits reservation in promotion posts only for the members of the Scheduled Castes and Scheduled Tribes but not for other Backward Classes. The Supreme Court has emphasized that Article 16(4A) ought to be applied in such a manner that a balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes as well as for other members of the society.

RECENT JUDICIAL PRONOUNCEMENT ON RESERVATION IN PROMOTIOM

B.K.Pavitra & Ors vs Union Of India & Ors on 9 February, 2017[1445]

The appeal involve the question of validity of the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002 (the impugned Act). The Act inter alia provides for grant of consequential seniority to the Government servants belonging to Scheduled Castes and the Scheduled Tribes promoted under reservation policy. It also protects consequential seniority already accorded from 27th April, 1978 onwards.

The validity of the Act was challenged before this Court by way of Writ Petition (Civil) No.61 of 2002 titled ***M. Nagaraj and others v. Union of India and others***. The issue referred to larger Bench in the writ petition along with connected matters was decided by this Court on 19th October, 2006. While upholding the constitutional validity of the Constitution (seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution

[1442] AIR 1962 SC 36
[1443] Like State of Kerala v. Thomas, Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India etc.
[1444] Article 16(4A) came into force from 17-6-1995.
[1445] Bench: Adarsh Kumar Goel, Uday Umesh Lalit , CIVIL APPEAL NO. 2368 OF 2011 , Writ Petition (Civil) No.14672 of 2010

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(Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001, individual matters were remitted to the appropriate Bench. Thereafter, the matter was remitted back to the High Court for deciding the question of validity of the said enactment.

The question of law framed for determination by the Court is as follows;

1. "Whether the State Government has shown the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation for Scheduled Castes and Scheduled Tribes in matters of promotion.

2. Whether the extent of reservation provided for promotion in favour of the persons belonging to Scheduled Castes and Scheduled Tribes at 15% and 3% respectively, in Karnataka is justified?

The facts of the case

The reservation in promotion was introduced in the State of Karnataka vide Government Order dated 27th April, 1978. The reservation in promotion was provided to the SCs and STs to the extent of 15% and 3% respectively but up to and inclusive of the lowest Group-A posts in the cadres where there is no element of direct recruitment and where the direct recruitment does not exceed 66? %. A roster of 33 points was issued applicable to each cadre of posts under each appointing authority. Prior to 1st April, 1992, there was no carry forward system of the vacancies. It was introduced on 1st April, 1992. In the stream of graduate Engineers, the reservation in promotion was available upto and inclusive of third level, i.e., Executive Engineers upto 1999 and on the date of filing of the petition (in 2002), it was available upto second level, i.e. Assistant Executive Engineer. In Diploma Engineers, it was available upto third level, i.e. Assistant Executive Engineer – Division II. According to the appellants, Assistant Engineers of SC/ST category recruited in the year 1987 were promoted to the cadre of Assistant Executive Engineers while in general merit, Assistant Engineers recruited in 1976 were considered for promotion to the said cadre. The representation of the SC/ST group was as follows:

EE Cadre 19.9%

SE Cadre 23.95%

CE Cadre 4.3% (being a selection post)

Engineer-in-chief 44.44%

Thus, according to the appellants, SC/ST candidates got promotion early and on account of consequential seniority, percentage of SC/ST candidates was much higher than the permitted percentage and all top positions were likely to be filled up by SC/ST candidates without general merit candidates getting to higher positions. This aspect was considered in the judgment of this

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Court dated 1st December, 2000 in **M.G. Badappanavar v. State of Karnataka**. This Court applying the principles laid down in Ajit Singh Januja v. State of Punjab (Ajit Singh I); Ajit Singh (II) v. State of Punjab and R.K. Sabharwal v. State of Punjab issued a direction to the State of Karnataka to redo the seniority and take further action in the light of the said judgments. Pointing out the consequence of accelerated seniority to the roster point promotee, it has been averred in the writ petition that the roster point promotee would reach the third level by the age of 45 and fourth, fifth and sixth level in next three, two and two years. The general merit promotee would reach the third level only at the age of 56 and retire before reaching the fourth level. This would result in reverse discrimination and representation of reserved category would range between 36% to 100%.

The Stand of the State and the contesting respondents who have been given promotion under the reservation, is that inter se seniority amongst persons promoted on any occasion is determined as per Karnataka Government Servants (Seniority) Rules, 1957 (1957 Rules). By amendment dated 1st April, 1992 provision was made to fill-up backlog vacancies which was upheld by this Court in **Bhakta Ramegowda v. State of Karnataka**. On that basis, Government order dated 24th June, 1997 was issued for fixation of seniority of SC/ST candidates promoted under reservation. Thus, all candidates promoted 'on the same occasion' retained their seniority in the lower cadre. This aspect was not considered in Badappanavar (supra). Extent of reservation for SC and ST was 15% and 3% respectively on the basis of census figures of 1951, though the population of SCs and STs has substantially increased. As per census figures of 1991 population of SC and ST was 16.38% and 4.26% respectively. The stand of the appellants that the SC/ST candidates reach level four at 45 years or become Chief Engineers by 49 years or there is reverse discrimination has been denied.

In the light of the above pleadings and judgment of this Court in M. Nagaraj (supra), the matter was put in issue before the High Court. The contention raised on behalf of the appellants was that grant of consequential seniority to candidates promoted by way of reservation affected efficiency of administration and was violative of Articles 14 and In spite of 85th Amendment having been upheld, law laid down in Badappanavar (supra), Ajit Singh II (supra) and Union of India v. Virpal Chauhan remained relevant in absence of 'backwardness', 'inadequacy of representation' and 'overall administrative efficiency' being independently determined. The State Government had not provided any material or data to show inadequacy of reservation to the members of SC/ST nor the State has given any thought to the issue of overall administrative efficiency.

On the other hand, the submission on behalf of the State was that reservation to SCs and STs to the extent of 15% and 3% respectively could never be said to be excessive in view of progressive increase in population of SCs and STs.

The High Court referring to this Court's judgment in M. Nagaraj (supra) observed that concept of "**catch up" rule and "consequential seniority"** is judicially evolved concepts to control the effect of reservations. Deleting the said rule cannot by itself be in conflict with "equality code"

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under the Constitution. The 85th Amendment gave freedom to the State to provide for reservation in promotion with consequential seniority under Article 16(4-A) if **'backwardness', 'inadequacy of representation' and 'overall efficiency' so warranted.** There is no fixed yardstick to identify and measure the above three factors. If the State fails to identify and measure the above three factors, the reservation can be invalid. Examining whether the State had in fact measured the above factors, the High Court observed that Order dated 27th April, 1978 was issued by the State of Karnataka after considering the statistics available about the representation of SCs and STs in promotional vacancies. On 3rd February, 1999, the policy was modified to limit reservation in promotion in cadre upto and inclusive of the lowest category of Group-A posts in which there is no element of recruitment beyond 66? %. The said order was further amended on 13th April, 1999 to the effect that reservation in the promotion for SCs and STs will continue to operate till their representation reached 15% or 3% respectively and promotion of SCs and STs and against backlog was to continue as per order dated 24th June, 1997 till the said percentage was so reached in the total working strength.

What the Karnataka State law say about?

As per the Karnataka Scheduled Castes, Scheduled Tribes and other Backward Classes (Reservation of seats in Educational Institutions and of appointments or posts in the services under the State) Act, 1994 (the Karnataka Act 43 of 1994), seniority in the lower cadre is maintained in promotional posts for the persons promoted "on one occasion". Since reservation had not exceeded 15% and 3% for SCs and STs while population of the said categories had increased, there was adequate consideration of the above three factors of "backwardness", inadequacy of representation" and "overall efficiency". Section 3 of the Act provided for an inbuilt mechanism for providing reservation in promotion to the extent of 15% and 3% respectively for the SCs and STs. The State Government collects statistics every year. The High Court held that contention that if all the posts in higher echelons may be filled by SCs and STs, the promotional prospects of general merit candidates will get choked or blocked could not be accepted as reservation in promotion was provided only upto the cadre of Assistant Executive Engineers. It was further observed that there was no pleading that overall efficiency of service would be hampered by promoting persons belonging to SCs and STs.

Section-3. Determination of Seniority of the Government Servants Promoted on the basis of Reservation.- Notwithstanding anything contained in any other law for the time being in force, the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes promoted in accordance with the policy of reservation in promotion provided for in the Reservation Order shall be entitled to consequential seniority. Seniority shall be determined on the basis of the length of service in a cadre.

Provided that the seniority inter-se of the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes as well as those belonging to the unreserved category, promoted

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to a cadre, at the same time by a common 5 order, shall be determined on the basis of their seniority inter- se, in the lower cadre.

Provided further that where the posts in a cadre, according to the rules of recruitment applicable to them are required to be filled by promotion from two or more lower cadres,-

(i) The number of vacancies available in the promotional (higher) cadre for each of the lower cadres according to the rules of recruitment applicable to it shall be calculated; and

(ii) The roster shall be applied separately to the number of vacancies so calculated in respect of each of those lower cadres;

Provided also that the serial numbers of the roster points specified in the Reservation Order are intended only to facilitate calculation of the number of vacancies reserved for promotion at a time and such roster points are not intended to determine inter-se seniority of the Government Servants belonging to the Scheduled Castes and the Scheduled Tribes vis-a-vis the Government Servants belonging to the unreserved category promoted at the same time and such inter-se seniority shall be determined by their seniority inter-se in the cadre from which they are promoted, as illustrated in the Schedule appended to this Act.

Section-4. Protection of consequential seniority already accorded from 27th April, 1978, onwards.- Notwithstanding anything contained in this Act or any other law for the time being in force, the consequential seniority already accorded to the Government servants belonging to the Scheduled Castes and the Scheduled Tribes who were promoted in accordance with the policy of reservation in promotion provided for in the Reservation Order with effect from the Twenty Seventh Day of April, Nineteen Hundred and Seventy Eight shall be valid and shall be protected and shall not be disturbed.

In M. Nagaraj the Court considered constitutional validity of 77th, 81st, 82nd and 85th Amendments. In doing so, the Court was concerned with the question whether the amendment infringed the basic structure of the Constitution. It was held that equality is part of the basic structure but in the present context, right to equality is not violated by an enabling provision if exercise of power so justifies. In this regard, the court has made the following observations;

“At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law, are designed to secure among other things, justice both social and economic’’.

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Further,the court reiterated the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet "exercise of power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article.14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, clause (4- A) will be governed by the two compelling reasons—"backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact situation.

(vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

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(viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment."

It is clear from the above discussion that exercise for determining 'inadequacy of representation', 'backwardness' and 'overall efficiency', is a must for exercise of power under Article 16(4A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised. In the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4A), it is the 'catch up' rule which is fully applies. It is not necessary to go into the question whether the concerned Corporation had adopted the rule of consequential seniority.

The matter of reservation in promotion has taken up in 27th july, 2018 by the Supreme court of India. The Honourable President of India Ram Nath Kovind has gave an assent to the bill.[1446] The constitutional validity of the bill is yet to be decided by the Supreme court of India.

Conclusion

[1446] the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Bill, 2017

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The protection of the down trodden communities in India is need of an hour. The reservation in promotion is one of the means to achieve the goals of treating the unequal's as equally by the welfare state. The reservation in promotion to be guaranteed to the exploited sections of the society not amounts the unconstitutional practice. The Supreme Court of India is regarded as the guardian of individual rights and liberties. The welfare of the all is the ultimate motto of the apex court.

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RIGHT TO HOUSING AS HUMAN RIGHT: JURISPRUDENTIAL PERSPECTIVE

- *Advocate Lahane Kanad Bharat*[1447]

INTRODUCTION

The human right to Housing is an evolving and at the same time controversial issue in International and National Human Rights systems has arises. Before moving to Right to Housing we required to understand concept of Human Right and importance of these rights. Human rights are moral principles or norms that describe certain standards of human lives. It is stated about the Human rights that its usually inalienable in nature. That for the overall development of the human being and to live a person as human these rights plays vital role. Further human rights are the basic rights and freedoms which belongs to every person. These rights are there from birth of person till death. These basic rights are based on shared values like dignity, fairness, equality, respect and independence. Further human rights are relevant for all the human beings. Further the idea of human rights are originated from the Magna Carta (1215), The Habeas Corpus Act (1679), The Bill of Rights of 1689 and thereafter world war II the awareness regarding protection of these valuable rights start rooting at International Level and finally these rights codified internationally as Universal Declaration of Human Rights (1948). That the importance of the Human Rights in the relationships that exist between Individual and the Government that has power over the Individuals. The unlimited power of the Government control or limits by the Human Rights. That it is fundamental duty of the state to look after the basic needs of the Human beings/ individuals and also protect their freedoms.

That Right to Housing is the one of the important Human Rights[1448] This right was recognized as one of economic, social and cultural rights which is the component of the right to an adequate standard of living under International Human Rights Law. Despite the central place of this right within the global legal system, scholarly researches reveal that, over a billion people are not adequately housed; millions live in health threatening conditions or in other conditions which do not uphold their human rights and their human dignity at different parts of the globe. That now the Right to Housing is recognized as the Second Generation of the Human Rights and it plays very important role at International as well as National Level. That while discussing the

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[1448] Article 25(1) of the Universal Declaration of Human Rights (1948) "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

International aspect the National Aspects i.e. Indian Perspectives on Right to Housing is core theme of this research paper.

GENERATIONS OF THE HUMAN RIGHTS

Broadly the Human Rights are divided into three different Generations; that rights are very well established but the evolution and development of these rights are divided into these different three generations. The first generation of the Human Right is Civil- Political, the Second Generation of the Human Right is Socio- Economic and the third Generation of the Human Right is Collective Development.

That the Civil-political human rights include two types norms pertaining to physical and civil security (for example, no torture, slavery, inhumane treatment, arbitrary arrest; equality before the law) and norms pertaining to civil-political liberties or empowerments (for example, freedom of thought, conscience, and religion; freedom of assembly and voluntary association; political participation in one's society).

That the Socio-economic Human rights similarly include two types norms pertaining to the provision of goods meeting social needs (for example, nutrition, shelter/ Housing, health care, education) and norms pertaining to the provision of goods meeting economic needs (for example, work and fair wages, an adequate living standard, a social security net).

Finally, collective-developmental human rights also include two types: the self-determination of peoples (for example, to their political status and their economic, social, and cultural development) and certain special rights of ethnic and religious minorities (for example, to the enjoyment of their own cultures, languages, and religions).

While development of the Human Rights into various generations; the Meaning of the Right to Life also differs. That the concept of the right to life is multi-dimensional and is constant evolving and developing phenomena. That the right to life is guaranteed under the Indian Constitution as one of the golden fundamental rights.[1449] That the right to Life has expanded its meaning and included the second generation of the Human Right as the important facet of the Fundamental Right i.e. Second Generation of the Human Rights like Housing[1450]. That the Conventionally, Human Rights Have Been Divided into two broad categories: civil and political or first-generation rights —including the right to life, the right against arbitrary arrest and detention, and the right to freedom—and social, economic and cultural rights or second-generation rights, such as the right to health and the right to social security. Like most other Constitutions from which it drew inspiration, the Constitution of India was framed such that only first-generation rights were fundamental rights which could be enforced by courts of law; on the other

[1449] Article 21 of the Indian Constitution reads: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'
[1450] Olga Tellis v. Bombay Municipal Corporation AIR 1985 SCC (3) 545

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hand, several second generation rights1 were encompassed as non-binding aspirations in the nature of directive principles of state policy.

In the early years after Independence, Indian courts unwaveringly followed this framework of rights conceptualized by the Constituent Assembly and were generally willing only to enforce first generation rights. Then, in the 1970s and 80s, an interesting phenomenon came about—due to strong judicial activism, the courts expanded the scope of several fundamental rights, particularly Article 21 of the Constitution, to include second generation rights within their ambit. Contextually, *Olga Tellis v. Bombay Municipal Corporation* (*Olga Tellis*) was one of the pioneering cases through which the Supreme Court brought socio-economic rights within the sweep of Part III of the Constitution (encompassing fundamental rights)—holding that the right to shelter was a fundamental right and thus impacting millions of slum/pavement dwellers in India. It reflected the gradual transition of the Supreme Court from merely recognizing fundamental rights, which are framed negatively as negative obligations (in the nature of commands preventing the state from acting in a certain manner), to elevating them to the level of positive duties to be performed by the state. By including the right to shelter within its reach, the Supreme Court attributed a new socio-economic dimension to Article 21.[1451] And that is why *Olga Tellis* was a milestone in the recognition of second-generation human rights by Indian courts.

HUMAN RIGHTS UNDER INDIAN CONSTITUTION

That it is very well-known principle of the Human Rights that Human Rights does not exist in vacuum, these rights cannot be enforced until and unless individual state/ country are required to implement through their regional/ municipal legal system. That the India is also one of the original signatories to the International Covenant on Civil and Political Rights and therefore the framers of Indian Constitution were influenced by the concept of Human Right and recognised as well as guaranteed most of the Human Rights which were subsequently embodied in the International Covenant 1966. The Preamble of the Indian Constitution reflects the inspiring ideals with the specific mention of "dignity of the individual".

That the Constitution of independent India came into force on 26th January. The impact of the Universal Declaration of Human Rights on drafting part III of the Constitution is apparent. India has acceded to the Universal Declaration of Human Rights as well as to the subsequent International Covenants of Economic, Social and Cultural rights and Civil & Political Rights adopted by the Central Assembly of the United Nations. Fundamental Rights enshrined in Part III of the Constitution have emerged from the doctrine of natural rights. Fundamental Rights are the modern name for what have been traditionally known as Natural Rights. The Natural Rights transformed into fundamental rights operate as a constitutional limitation or a restriction on the

[1451] Vijayashri Sripati, Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead, American University International Law Review, vol. 14 (1998): p. 413.

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powers of the organs set up by the Constitution or the State action. Judicial Review, Justiciability or Enforcement became an inseparable concomitant of fundamental rights. As no right of freedom can be absolute, limitations have been imposed to each fundamental right in the interest of securing social justice. Enforcement of fundamental rights can even be suspended or prevented in emergency. Directive Principles enshrined in Part IV of the Constitution epitomise the ideals, aspirations the sentiments, the precepts and the goals of our entire freedom movement. The wisdom of the forefathers of the Constitution was justified in incorporating non-justiciable human rights in the concrete shape of the directive principles. That the Major of the Human Rights are there in the Indian Constitution.

That the following tabular chart provides for the Indian Constitution and Human Rights perspectives;

Indian Constitution and Universal Declaration for Human Rights

Sr. No.	Nature of Right/s	Universal Declaration	Indian Constitution
1.	Equality before law	Article 07	Articles 14
2.	Equality of opportunity in matters of public employment	Article 21(2)	Article 16(1)
3.	Protection of certain rights regarding freedoms of speech, etc,	Article 19	Article 19(1) A
4.	Protection in respect of conviction for offences	Article 11(2)	Article 20 (1)
5.	Protection of life and personal liberty	Article 9	Article 21
6.	Prohibition of trafficking in human beings and forced labour	Article 14	Article 23
7.	Freedom of conscience and free Profession practice and	Article 18	Article 25 (1)

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	propagation of religion		
8.	Protection of Interests of minorities	Article 22	Article 29 (1)
9.	Right of minorities to establish and administer Educational Institutions	Article 20(3)	Article 30(1)
10.	Right to property	Article 17 (2)	Not a fundamental rights after amendment 44, but now in Article 300A
11.	Remedies for enforcement of rights conferred by this part	Article 8	Article 32

Covenant on Civil and Political Rights and Indian Constitution

Sr. No.	Nature of Right/s	Convention on Civil And Political Rights	Indian Constitution
1.	Prohibition of trafficking in human beings and forced labour	Article 08(3)	Articles 23
2.	Equality Before the Law	Article 14(1)	Article 14
3.	Prohibition of discrimination on ground of religion, race, caste, sex or place of birth	Article 26	Article 15
4.	Equality of opportunity in matters of public employment	Article 25(c)	Article 16 (1)
5.	Protection of certain rights regarding freedom of speech	Article 19 (1,2)	Article 19

6.	To assemble peaceably and without arms	Article 21	Article 19(1b)
7.	To form association or unions	Article 22(1)	Article 19 (1c)
8.	To move freely throughout the territory of India	Article 12 (1)	Article 19 (1 d,e,g)
9.	Protection in respect of conviction for offences	Article 15(1) Article 14(7)	Article 20(1)(2)
10.	No person accused of any offence shall be compelled to be a witness against himself	Article 14 (3g)	Article 20 (3)
11.	Protection of life and personal liberty	Article 6(1) Article 9(1)	Article 21
12.	Protection against arrest and detention in certain cases	Article 9 (2,3,4)	Article 22
13.	Freedom of conscience and free profession, practice and propagation of religion	Article 18(1)	Article 25

Indian Constitution and covenant on Economics, Social and Cultural Rights

Sr. No.	**Nature of Right/s**	**Convenant on Economics, Social and Cultural Rights**	**Indian Constitution**
1.	Equal pay for equal work	Article 7 a (1)	Articles 39 d
2.	Provision for just and humane conditions of work and maternity relief	Article 7 b	Article 42

3.	Right to work, to education and public assistance in certain cases	Article 6(1)	Article 41
4.	Opportunity for children	Article 10(3)	Article 41 f
5.	Compulsory education for children	Article 13 (2a)	Article 45
6.	Living wage, etc, for workers	Article 7(a)(11) Article 7 (d)	Article 43
7.	Nutrition and standard of living	Article 11	

JURISPRUDENTIAL PERSPECTIVES OF RIGHT TO HOUSING

That the Right to Housing is one of the important Right/ sacred right and basis of the human being to live their life with dignity. That rights have their inception I the writings of Thomas Hobbes, John Locke and Rousseau who talk about the basic human rights which people have by birth. As, per the basic derivation that we can take out from these writings are that the need of such rights arises when there was state of nature and to protect people these were like shields.

Taking, a look from the Indian scenario we can see that these rights are guaranteed by the constitution and even suspension of such rights can be done but not of the right of life and personal liberty. With the passage of time the content of right have gone changes and the right of life and liberty which is put to question in the case now also includes right to livelihood establishing a wider area, which has been done by judiciary itself. Showing that not only in enforcement but also in conceptualization[1452] of these rights' judiciary plays an active role.[1453]

UTILITARIANISM

The window which such a contention is opening is of the theory of Utilitarianism, in the words of Chandrachud, C J which have been stated has been stated in the judgment that the rough

[1452] N K Jayakumar, Lectures in Jurisprudence 191 (2nd ed., 2014).
[1453] Ibid.

edges[1454] of justice should get soften by human compassion and these pavement dwellers should not be deprived of their right to housing.

The question which arises is that what about the rights of the society at large the theory of Utilitarianism states that the 'greatest happiness principle' should be followed. It calls for the maximization of aggregate happiness[1455] the sum of happiness that we are getting. The political morality which arises in the case that the rights of pavement dwellers are getting infringed by the authorities as they are being evicted from their homes. In the words of Bentham utility is the principle of having good consequence[1456]

On the other hand, Mill rejects the hedonistic utilitarianism principle stated by Bentham. He is different from the latter one is that his central idea is of distinction between higher and lower quality pleasures.[1457] He determines the value of pleasure by ranking of the same in preference not by its intensity or duration.

Thus, it is evident that the utilitarianism principle of Bentham is having the applicability over these rights of Housing, as the greater good is being kept in focus t-and the good to all sects which are getting affected is being done. The individual interest is being contested that there is an infringement of fundamental right of Article 21 as right to life is dependent on right to livelihood.[1458]

RIGHTS

That the Jurisprudentially analyze is the theory of rights. Salmond defines a legal right as an interest recognized and protected by rule of justice. A correlation between rights and duties is also drawn as when there is an existence of right there is also someone's duty to full fill those rights. That failing to perform the duty gives rise to the window to claim for the rights.

That Hohfeld's Jurisprudential theory plays a very critical role his idea is distributed over the parameters of claim, duty, privilege, no claim, immunity, disability, power and liability. Thus, relying on the jural correlatives and opposite of these legal concepts. Thus, a clear picture can be drawn by the following table-

[1454] Ollga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.
[1455] Justice Spring, 2006-2, available at: http://www.myoops.org/course_material/mit/NR/rdonlyres/3D83C642-7566-4625-8CAC-3934BABC3217/0/bentham2006.pdf.
[1456] Ibid.
[1457] Justice Spring, 2006-2, available at: http://www.myoops.org/course_material/mit/NR/rdonlyres/332DBFA2-8808-4DA7-B09B-E5F12FF41C6C/0/mill_utilitarian.pdf.
[1458] Ollga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.

Form of Right	Correlative	Opposite
Right	Duty	No Right
Privilege/ Liberty	No Right	Duty
Power	Liability	Disability
Immunity	Disability	Liability

That the Individual should have the right to Housing as it is basic Human Right and simultaneously it provides duty on the shoulder of the government to provide this right and further to protect the same.

SOCIAL ENGINEERING

While, the above rights and claim jurisprudential applicability over the Right to Housing as Human Right and its facet seen in the Jurisprudential perspectives and the concept of social engineering [1459] is also there. It is being propounded by eminent jurist Roscoe Pound. He devised that any law should have the applicability, interpretation and framing while considering the social fact. Pound saw legal history as 'the record of a continually wider recognizing and satisfying of human worth or claims or desires through social control'. Here, the question that arises is that why only sociological school has been considered why other schools are not that much sufficient for the application. It is because that the historical approached by using historical method and to reach the same position philosophical school also showed no distinction bringing us to the conclusion that they are no more fundamental[1460] for the social problems.

These sociological theories were being developed by philosophers who were belonging to Socio-Philosophical School presents three types "the so-called Neo-Kantians, who, on the whole, are philosophical and sociological in tendency, the teleologists or social utilitarian's, whose tendency is analytical and sociological, and the Neo-Hegelians, who may be described as historical and sociological in tendency". Pound devised a study of social utilitarianism v.

[1459] Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harvard Law Review, 593-619 (1911).
[1460] Ibid

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individual utilitarianism. "Men tend to do what they think they are doing. Hence professional and judicial ideals of the social and legal order are a decisive factor in legal development".[1461]

A comparison is also being drawn between public policy and private rights and they should be treated on the same plane.[1462] It was said that public policy was "a very unruly horse, and when once you get astride it you never know where it will carry you".[1463] Hence, it's all about prioritizing that which one should be given the preference. The social security should be achieved by proper implementation of the legislation which doesn't encroaches upon the individual rights.

CONCLUSION

Reaching, on the concluding part it can only be said that all the above stated jurisprudential principles are having the applicability over Right to Housing as Human Right and having its Jurisprudential justifications. The utilitarianism happiness as well as the tussle between the social and private rights has been clearly justified having the umbrella of social engineering.

[1461] James A. Gardner, The Sociological Jurisprudence of Roscoe Pound (Part I), 7 Vill. L. Rev. 1 (1961). available at: http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1
[1462] Roscoe Pound, A Survey of Social Interests, 57 Harvard Law Review, 1-40 (1943).
[1463] Richardson v. Mellish, 130 Eng. Rep. 294.

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A CASE STUDY OF ROHINGYA CRISIS IN MYANMAR & INDIA'S CONCERN

- *Nimishamba Shashidhar*[1464]

ABSTRACT

India is neither a signatory to the 1951 Refugee Convention nor does it have a domestic legislation in order. Yet, India boasts of abiding by the principle of non-refoulement and bringing refugee protection under the expansive understanding of Article 21 of the Constitution. Despite this, it continues to be a host to the largest number of refugees across South East Asia. India has adopted an ad-hoc administrative policy to accord protection to refugees ever since independence. This poses problems of human rights abuses of refugees, lack of basic amenities and discrimination between refugees themselves. In this paper I have tried to focus on the "world's most persecuted minority Rohingya". Oppression and persecution of Rohingya frequently occurs in Rakhine province of Myanmar. They are deprived from their own citizenship, rights, education, home and even food. They have fled Myanmar to Bangladesh and looking asylum in some other neighbouring countries. As far as India's concern, it came suddenly in limelight because government is planning to deport 40, 0000 Rohingyas settled in Jammu and Kashmir to Myanmar, because of potential security threat and considering some additional things such as Economic burden, demographic misbalance and over populated country like India has not directly offered shelter and asylum to these persecuted ethnic people. Hence in the consideration of all these things India has thought of to take very pragmatic decisions. In my view India has been taking its steps very carefully. India is offering huge financial assistance and stuffs of basic necessities to Bangladesh on the Humanitarian ground. It has also appealed to Myanmar to take certain steps to finish the crisis.

INTRODUCTION

India and Myanmar have got the robust and rugged relationship in their own legacy. They have shared long historical, cultural, ethnic and religious background together. Concerning as the soil of Buddha, India has been receiving the pilgrims from Myanmar. The expansion of Buddhism directly from India to Myanmar has vehemently impacted the people of this country.

Who are Rohingya's

They are the world's most tormented minority, belong to the Sunni Muslim sect. they cover the one third population of Rakhine state Myanmar.

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They are denied citizenship. They had claimed that Rohingya were not the part of the original ancestors of Burmese society. They lost all those rights which they could have got as a citizen of Myanmar. Their all basic facilities such as access to health, education ect taken away. Government have justified the decisions have been taken, that Rohingya are illegal migrants came from Bangladesh they were not enlisted under the 135 official ethnic groups [12]. Unfair rules and laws of Myanmar government have been compelling to hundreds of thousands of Rohingya to run away from the country since the late 1970s. Recent violent attacks by the Military forces on them have created very critical issue.

What's India's concern over Rohingya crisis?

Undoubtedly, India has unique history to provide asylum many people came from different countries offered every kind of securities and necessities. But today's scenario has been changed. India has become overpopulated country, struggling for offering basic necessitates food, cloth, shelter, education and jobs to the citizen of its own country. Historically India has followed the idea of "Atithi Devo Bhava". But there is limit to Atithi. India cannot accommodate the hundreds of thousands of asylum seekers without triggering any kind of socio economic tensions.

India has revealed the opinion on Rohingya immigration that if it will offer asylum them or accommodate them as a refugees, would become the reason of heavy economic burden. Some of the leaders have said country is not in a position to admit the burden of Ronhingya Muslim. But the stability in Myanmar is much needed because of various reasons.

The massive exodus of Rohingya Muslims from the Rakhine region of Myanmar has resulted in one of the largest humanitarian crises of recent times. Historically regarded as stateless entities by the Government of Myanmar, the Rohingyas have been fleeing Rakhine in the wake of a military crackdown by the Myanmar army. Nearly a million Rohingyas have left Rakhine and entered the neighbouring Bangladesh as well as Indonesia and Malaysia as refugees. India too faces the challenge of addressing over 40,000 refugees who have entered the country. [1465]

The ongoing debate on the Rohingya crisis tends to be focused on the charges of ethnic cleansing and concerns about extremism and terrorism emanating from Rakhine.[1466] Yet the underlying causes and the potential consequences of the crisis are dimly understood.

India's response to the Rohingya issue is calibrated on an understanding of the history and complexities of Myanmar politics of ethnicity and legitimacy. New Delhi has to balance between its security concerns and moralism on humanitarian issues. Initially, it was conditioned predominantly by its security concerns. India, through its consulate in Rakhine's capital Sittwe, has long been keeping tabs on the influence of foreign Islamist radical groups on the Rohingyas,

[1465] . http://www.worldometers.info/world-opulation/myanmarpopulation/.
[1466] http://defenceforumindia.com/forum/threads/the-indiancommunity-in-myanmar.7100/

and warned Myanmar of possible attacks by the ARSA prior to the August incident. In February, India had also warned of an increased presence of Pakistan-based and funded terror organizations like Lashkar-e-Toiba, seeking to exploit Rohingya resentments. Also the influence of Bangladeshi radical organizations such as the Jamaat-e- Islami initially, and then its youth wing, the Islamic Chatra Shabir, within the refugee camps is causing alarm in both Dhaka and New Delhi. Even organizations such as the Rohingya Students Organisation (RSO) were known to have links with "like-minded" groups such as the Harkat ul-Jihad al-Islami (HuJI) along with Hizb-e- Islami of Afghanistan and the Hizbul Mujahideen.[1467] On India's decision to deport 40,000 Rohingya refugees, the government, in its affidavit to the Supreme Court, said that some of the Rohingyas with militant background were found to be very active in Jammu, Delhi, Hyderabad, and Mewat. Prime Minister Narendra Modi during his visit to Myanmar in September described India and Myanmar as "partners" in their concern over "extremist violence" in Rakhine State.[1468]

Even though the issue of terrorism dominates the security narrative on India's approach to the Rohingya issue, India's Act East Policy is linked to land connections with Myanmar. This policy, has two major planks — economic development in northeast India and balancing China's influence. China has not only declared its open support for Myanmar's "anti-terror" operations, but also expanded its economic and political influence in the country. In fact, it was the heavy-handed criticism by the West and call for sanctions for atrocities against Rohingyas that forced Myanmar again to rely on Beijing to offset any major backlash in the international fora. In such a situation, any open criticism of Myanmar could undermine India's influence. India is also dependent on Myanmar military's cooperation to deal with the insurgent groups in the Northeast, who in the past found sanctuary on the Myanmar side of the border. Geopolitics also drive India to take a soft approach to Myanmar's crackdown on the Rohingyas, fearing the country might otherwise again grant safe havens to North-East insurgents. China has set up a gas and oil pipeline running from the Rakhine port of Kyaukphyu to Kunming. Beijing has backed Myanmar's violent crackdown, hoping it will bring security to a region important for China's energy security.[1469] India, for its part, is working on the Kaladan transport project, linking Sittwe to Kolkata. New Delhi believes the best way to reduce tension in Rakhine is through such development efforts.

As the refugee and humanitarian crisis unfolded in the month of September, with Bangladesh bearing the economic and physical burden of more than 600,000 refugees, Dhaka's diplomatic overdrive made New Delhi modify its position on the Rohingya issue and acknowledge that there is now a refugee crisis. India also urged the Myanmar government to exercise "restraint and maturity" and stressed the need to focus on the "welfare of the civilian population." Even while India's government exercises caution and restraint in its approach to the Rohingya issue, civil

[1467] http://www.aljazeera.com/news/2017/08/india-plansdeport-thousands-rohingya-refugees170814110027809.html
[1468] Sultan Shahin, India's 'Look East Ploicy Pats off, Asian Times, https://www.globalpolicy.org/component/content/article/1 62/27908.html, 2003.
[1469] https://www.mea.gov.in/Portal/ForeignRelation/myanmar -july-2012.pdf.

society and human rights groups are quite critical of Myanmar's handling of the Rohinyga issue, and wants New Delhi to take an active role in seeing the refugees back to their homeland with peace and dignity.[1470]

Implementation of international Humanitarian treaties Convention in India

There is no law in India which contains specific provision obliging the state to enforce or implement the international treaties and conventions including implementation of humanitarian law that directly deals with principles of International Humanitarian Law. The UNCHR must invent or discover permanent solutions or relief to refugees and must see that they should not be transferred to a country where they apprehend that they may be tortured, and an International declaration for welfare and protection of refugees has to be complied by states to see that standards of minimum behaviour of states with refugees is not condemned and their protection, relief and welfare is restored on humanitarian grounds. There is need for protection of rights of refugees and improve their situation in India with mission to assist asylum seekers in realizing basic human rights and accessing the justice system. India continues to grant asylum and provide direct assistance to some 2,00,000 refugees of neighbouring states. A positive development was seen in 2012 when government agreed to issue long term visa to refugee and asylum seekers. Role of Judiciary : Indian Judiciary is the guiding sentinel which preserves the rule of law so in a recent case before Supreme Court as to Chakma refugees from Bangladesh in - National Human Rights Commission Verses .State of Arunachal Pradesh1 Wherein the Supreme Court has laid down that the State of Arunachal Pradesh was under Constitutional obligation to protect and safeguard the life, health and well being of Chakmas so the courts directed the state to take measures necessary for ensuring life and personal liberties of Chakmas.[1471] It was noted that a large number of Chakma migrants had crossed the Bangladesh Border and entered Assam, Tripura and Arunachal Pradesh. The Supreme Court held that Chakma refugees who had come from Bangladesh due to persecution (when Bangladesh was under Pakistani rule) cannot be sent back to Bangladesh as they may be killed there and thus be deprived of right to life under Article-21. The state was directed to protect each and every Chakma and repel any attempt to drive them out of the State and India is expected to respect International Treaties and Convention of humanitarian law. However in Shishuwala Pal Verses. Union of India2 In this instant case the petitioner who was admittedly refugee had entered India in 1971 from East Pakistan (now Bangladesh) were claiming themselves to be Indian citizen on the basis of their long stay in India and being said to be relatives of some Indian citizens. The petitioners had not shown what steps they had taken for acquisition of Indian citizenship. It was held that mere long stay which was unauthorized did not confer citizenship rights. The petitioners were permitted to enter into India as refugees. The Apex Court in Rev Mons Sebastiao Francisco Xavier dos Remedios Monterio Verses. State of Goa3 Examined the scope of Geneva Convention Act 1960 and observed the

[1470] http://www.aljazeera.com/news/2017/08/india-plansdeport-thousands-rohingya-refugees170814110027809.html 10. http://www.unhcr.org/4cd96e919.pdf

[1471] http://www.thehindu.com/opinion/lead/making-up-for lost-time/article19621257.ece

efficiency of the Act and thus the act by itself does not give special remedy it does give indirect protection. The Indian government offered Rev father Monterio Indian Nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese nationality he could only stay in India on taking out a permit. He was therefore rightly prosecuted under the law applicable to him since no complaint was made about the trials as such the appeal was dismissed. In Arunachal Pradesh Verses. Khudiram Chakma4 It was stated that Chakmas are foreigners in accordance with Citizenship Act – 1955 and therefore they are not entitled to all fundamental rights enshrined in Part III of the Constitution. The right to enjoy asylum has to interpret in the light of instrument as a whole. It implies that although an asylum seeker has no right to be granted admission to a foreign state equally a state which granted him asylum must not later return him to country. However the Supreme Court in Louis De Raedt Verses.[1472] Union of India5 Held that Article 21 of Constitution protects life and personal liberty of all persons. So aliens of Indian Territory shall not be deprived of those rights except according to procedure established by law.

Complexities for Bangladesh to cope with Rohingya Refugees Rohingya has been flushing out to Bangladesh after the violent attack of military forces. Rohingya Muslims are killed, womens are raped and distorted her body and children are murdered. Military forces have moved towards the sittwe, capital of Rakhine, forcing to hundreds of thousands of people cross the 271 Km boundary to Bangkadesh. People have ignored the fear of drowning and commenced the journey through the bay Bengal to reach the Bangdesh shore. But not everyone is lucky to accomplish their journey. Police has recovered hundred of bodies from the sea. Bangladesh has been receiving new arrivals from 25 August 2017 onwards every day. Among the total refugee around 60 percent of the children, a prediction by the UNICEF on September 14 [14] . The UN Migration Agency, International Organisation for migration has appealed for an immediate fund of $18 million for humanitarian assistance. Bangladesh is facing severe problem of space shortage and limited resources.[1473]With the help of International committee of the Red Cross, Bangladesh has proposed that Myanmar should maintain security in Rakhine under the supervision of International relief agency. It has also appealed the international community to put pressure on Myanmar to discontinuation of violent them. Since 2012 thousands of Rohingya fled their homes, became asylum seeker and looking for shelter and home in some other countries such as Bangladesh, Thailand, Philippines, Indonesia and Malasiya. This time the Myanmar military forces have said, it aimed only to cleansing “Terrorist”, the asylum seekers have said insolent objectives to push the Rohingya out of Myanmar. But no matter why such kind of persecution and oppression is conducting and who are conducting but ultimately but is “genocide”. India’s concern over Rohingya crisis Lately, a worrisome crisis erupted in Myanmar has drawn the attention of most of the international thinkers, policy makers, strategists, and the international organisations. In fact neighbouring countries of Myanmar will not be separated

[1472] www.thehindu.com/opinion/lead/there-is...rohingya-inall-of-us/article19626127.ece

[1473] http://defenceforumindia.com/forum/threads/the-indiancommunity-in-myanmar.7100/

from the impact of this crisis. As far as the matter of India, it is axiom that it can't be drift away from the outcome of this ghastly situation. But the central government of India has not yet taken any kind of initiative steps on the issue of Rohingya Muslims. After this, some debates and discussions have started among the writers, thinkers, security analysts and even policy makers about the government role at the international platform. More concerning thing is that despite taking the courageous steps regarding Rohingya, Indian government has tried to raise the issue of deportation of Rohingya refugees from the country. The utterance started by deliberately deportation of unfortunate Rohungya refugees would undermine the image on International scenario. Many questions have been arising on the Indian foreign policy in the Modi regime. Has India forgotten the idea of India, which is known for the home of refugees. It is a country which offered the home for to the Parsis, the Tibetian, and the Jews cannot deport the minority people back where this group of already being persecuting, oppressing and tormenting. Such kind of callous steps have been executing by India is against the idea "Atithi Devo Bhava". If India is doing such thing the idea of India is being threatened today. [1474]Although all discussions are still going on but recently main concerning point of India is "Potential Security Threat". In other words I can say India is adopting more pragmatic approach today than earlier. No doubt Rohingya Muslims have been tormenting, persecuting and oppressing in their own home. They are being force to abandon their own home, people, village and even country looking outside for shelter. But India has to take some steps wisely by considering some domestic and foreign issues. Undoubtedly, India has unique history to provide asylum many people came from different countries offered every kind of securities and necessities. But today's scenario has been changed. India has become overpopulated country, struggling for offering basic necessitates food, cloth, shelter, education and jobs to the citizen of its own country. Historically India has followed the idea of "Atithi Devo Bhava". But there is limit to Atithi. India cannot accommodate the hundreds of thousands of asylum seekers without triggering any kind of socio economic tensions.

India's stand on Rohingya Muslim from Economic perspective India has revealed the opinion on Rohingya immigration that if it will offer asylum them or accommodate them as a refugees, would become the reason of heavy economic burden. Some of the leaders have said country is not in a position to admit the burden of Ronhingya Muslim. But the stability in Myanmar is much needed because of various reasons. The mainstay of the economy of North East India is agriculture. Small scale of industries such as plywood factory, sawmills, fruit preservation, etc. exist but their tiny role in the economy does not bear much significance. Myanmar can safely serve of the consumer goods and can accomplish the need of basic necessities for the peoples of India's Northeastern states. It will take less time and less cost to fulfill the need of this region than any other route of Indian region. Second factor is that India's North East region is abundant

[1474] www.thehindu.com/opinion/.../can-india-ignore-therohingya-crisis/article19686341 9. 11. http://www.equalrightstrust.org/ertdocumentbank/Rohing

in natural resources in terms of forests and minerals, India is contemplating to forming Special Economic Zones in its northeast region and think of to invite foreign investors from ASEAN countries. Thirdly, from the energy point of view Myanmar is bestowed with abundant energy deposits of natural resources gas in offshore areas. One of the most significant offshore area is locates in Rakihne province namely the Shwe gas field. China has been making plan to extract the natural gas from this area. India can also get the advantage from this field. It is true that Government of India is forbiding Rohingya Muslim to influx in Indian Territory as refugees. But we can't deny that the central government is projecting several plans to assist Rohingya Muslim in Bangladesh. Indian government has launched "Operation Insaniyat" to assist Rohingya refugees who have influxed in Bangladesh. [1475]

CONCLUSION

From the above discussions, I have tried to focus the every aspect of India Myanmar Relations. Both sides are very significant for each other. Basically, for India, Myanmar is strategically very important. Both countries have maintained healthy relations. Both countries have been sharing between similar kind of interests associated with political, social, economical, trade and commerce, cultural, educational. A lot of projects have signed between two sides which could be fruitful for the development of North east Region. So it is the first priority of both sides to build welcoming environment for each other so that all plans could be turn into action. Some debates and discussions are going on inside the country upon India's Stand. But there is no strong reason behind that. India is completely following the "idea of India", the Principle of "Atithi Devo Bhava". India has been providing economic assistance to Rohingya Muslim fled Myanmar to Bagladesh by their perilous journey on the humanitarian ground. Obviously India has bounded with some concerning points. Like India can't compromise with country's security with any cost. Economically, it is true India is overpopulated country already it has provided asylum to 40000 Rohingya Muslim. Thirdly India's some major developmental projects with Myanmar have signed. So it is very difficult to India to take any kind of straight forward decision against Myanmar Military force and goverment, which can laid down the hiccups between both countries. India doesn't want to create any kind of unwelcoming environment between both sides which would interrupt the developmental work of both countries. So India has to take very restraint steps and balanced approach regarding Rohingya issues, followed pragmatic position then only it can maintain its leadership position in this region. To conclude refugee problem in India today is a global issue. A successful stream of humanitarian crisis has highlighted the plight of victims as well as the threat of forceful repatriation to starvation and found them in a hopeless situation and on the edge of clawing for mere survival. A myriad of specialized and regional human rights instruments have sprung from the foundation of International bill of human rights. So Article – 51 A has cast on every citizen the duty to promote harmony among all the people of India to have compassion for living creatures and to develop humanism and abjure

[1475] Department of Population Ministry of Labour, Immigration and Population MYANMAR (The Myanmar Population and Housing Census Report. 2014- 2016; 2:12-15.)

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violence. Thus humanitarian legality and concern for refugees' status is writ large in Indian Ethos. So legal, socio-economic medical, psychological, educational, vocational protection is the need of the hour. So UNHCR should work with host Government, U.N country teams, civil society to find out comprehensive solutions for refugees in years to come.

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THE POCSO ACT – RELEVANCE & ISSUES

Mr. Ashok Kumar[1476]

INTRODUCTION

The PoCSo or The Protection of Children from Sexual offenses Act, 2012 has been a landmark piece of legislation in dealing with sexual abuse against children. Though it has several loopholes but it is the first substantive legislation followed in pursuance of the nation's child protection policies. This qualitative extensive research aims at critically analyzing the act as well as mentioning the loopholes in it with the help of certain judicial pronouncements.

objective of the Act as mentioned is the Act is, [1477]"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto."

Constitutional backing to the validity of PoCSo Ac is found in Article 15(3) which provides that the State has the power to make special provisions for women and children. This provision in our Constitution thus makes the Act Constitutionally valid.

LAWS IN INDIA

A large proportion of children in India (Fifty three percent) face some form of child sexual abuse. The need for stringent laws had been felt many times but it was only in 2012 that a law on the same was actually passed. The Parliament of India passed the 'Protection of Children against Sexual offences Bill, 2011' regarding child sexual abuse on May 22, 2012 formulating it into an Act. Its implementation began with a notification issues in November 2012. This was the first legislation protecting children against sexual offences and to be applied uniformly across India.

LAWS BEFORE POCSO ACT

Goa Children's Act, 2003 was the only specific piece of child abuse legislation before the 2012 Act. Child sexual abuse was prosecuted under the following sections of Indian Penal Code:

- I.P.C. (1860) 375- Rape
- I.P.C. (1860) 354- outraging the modesty of a woman

[1476] Teacher, kendriya Vidyalaya N0. 2, Delhi Cantt.
[1477] The Pr0tecti0n 0f Children fr0m Sexual 0ffenses Act, 2012 (N0. 32 0F 2012)

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- I.P.C. (1860) 377- Unnatural offences

However, the IPC could not effectively protect the child due to various loopholes like:

- IPC 375 doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" peno-vaginal intercourse.
- IPC 354 lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.
- In IPC 377, the term "unnatural offences" is not defined. It only applies to victims penetrated by their attacker's sex act, and is not designed to criminalize sexual abuse of children.

UNIQUE FEATURES OF THE ACT

Firstly, setting up of Special Juvenile Courts and appointment of Special Public Prosecutor- In the past, it has been observed that the trials took unnecessarily long time to dispose of the matter, but the new bill suggests disposing the case within one year. The essence of the bill lies in the fact that it is more child-friendly while recording of evidence, reporting and during investigation and trial.

Secondly, a support system from Police administration- Under this act, the statement of the girl child is to be recorded by a woman police officer who is not below the rank of sub- inspector. The presence of parents and other relatives during medical examination of the victim is allowed under the act. In the case of a victim girl, a medical examination is to be conducted by women doctor.

Thirdly, this act provides an arrangement for victim child for their special protection and care.

Fourthly, the act has an implication of the point that the person, who has attempted to commit the crime under the act, is liable for punishment. Just like in rape cases where the burden of proof is on the accused, here also the burden of proof of his innocence is on the accused. It should be noted that the act provides punishment for false accusation as well.

JURISPRUDENCE

According to the author, applicable school of thought for "Prevention of Children from Sexual offences Act 2012" is Positivist School of Law. The main thinkers of positivistic school law are Jeremy Benthem (The father of English Positivism), John Austin, H L A Hart and Kelsen.

Jeremy Benthem defines law as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state. He gave the concept of utilitarian individualism based on pleasure and pain in which he stated that any act which increases the overall quantum of pleasure or happiness is justified. If we take into consideration "Prevention of Children from Sexual offences Act 2012", then the concept of utilitarianism of Bentham can't be justified because the

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act itself can't be justified because of its nature, no matter what is the quantum of happiness that the act is responsible for.

Under the scheme of Austin, the law is the rule of guidance laid down for one intelligent being by another intelligent being who has power over the former being. POCSO Act 2012 can be explained under Austin's scheme as Austin has described the positive law as "aggregate of rules set by man politically superior for men who are politically inferior." 'Sanctions' under the scheme of Austin can easily be compared to some of the punishments mentioned in the POCSO Act 2012. However, Austin's view that Positive law includes rules set by those who are not political superiors is an undue extension.

In Hart's view, there is no necessary logical connection between the content of law and morality. He asserts that the existence of legal rights and duties may be devoid of any moral justification. According to the author, Hart was correct in stating that there is no logical connection between law and morality, and if there is any connection, it is very difficult to identify that connection because the concept of "morality" in itself is very vague and don't appeal to reason.

LOOPHOLES

The POCSO Act, which branded itself as a piece of legislation for protecting children from undue harassment has come with certain loopholes which need to be taken care of at the war footing. The primary loophole in the legislation is the executive machinery and the execution part.

The Police, NGOs and media should be cautious while dealing with the cases involving child rights and sexual abuse. Despite the Act making it mandatory that the abused or assaulted child has to be produced before the CWC, the police skips this process at times. Even when the Committee approaches the police, they show lethargic attitude. They show disrespect to the quasi-judicial body, making CWC a toothless bird. Even the NGOs violate child rights by revealing the identity of the child.

Presently, the POCSO recommends a punishment of six months' imprisonment to a policeman who does not record a complaint of sexual offence by a child victim. Though, the increase in the punishment could backfire, but stringent measures need to be adopted. Sensitization in the executory bodies is the key of getting maximum benefit out of the legislation.

JURICIAL VIEW

Various aspects of law and issues related to POCSO Act were dealt with in these judicial pronouncements which gave it a more detailed judicial interpretation.

1. **Shankar Kisanrao Khade v. State of Maharashtra**[1478]

Hon'ble Supreme Court have held that relying on several judgments by the Apex Court, present Court applied "crime test", "criminal test" and the R-R Test and not "balancing test" to award death sentence. To award death sentence, "crime test" has to be fully satisfied, i.e. 100% and "criminal test" 0% i.e. no Mitigating circumstances favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused not a menace to the society no previous track record etc. Rarest of rare case test depends upon the perception of the society i.e. "society centric" and not "Judge Centric" i.e. whether the society will approve the awarding of death sentence to certain 22 types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Supreme Court have also pleased to elucidate some judicial principles for awarding death penalty.

2. **State of Maharashtra v. Dattatraya @ DattaAmbo Rokade**[1479]

Hon'ble Bombay High Court have dealt with various legal aspects in respect of circumstantial evidence, in respect of test identification parade, in respect of recovery under Section 27 of the Indian Evidence Act, 1872, from any open place, in respect of extra judicial confession. In para No.17 all these citations the Lordship pleased to elucidate, aggravating and mitigating circumstance to be considered while confirming death penalty.

3. **State of Uttar Pradesh v. Munesh**[1480]

"It is held that the primary concern both at National and International level is about the devastating increase in rape cases and cases relating crimes against women in the world. India is no exception to 23 it. Although the statutory provisions provide strict penal action against such offenders, it is for the Courts to ultimately decide whether such incident occurred or not. The Courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds. In the instant case, the accused had committed rape, which repels against moral conscience as he chose a girl of 11 year to satisfy his lust and subsequently murdered her. The incident took place in the year 2002. Punishment of life imprisonment was awarded."

4. **Deepak Gulati v. State Haryana**[1481]

[1478] (2013)5 S.C.C. 546
[1479] 2014 ALL M.R. (Cri.) 2078
[1480] 2013 Criminal Law J0urnal 194 (S.C.)
[1481] 2013 Criminal Law J0urnal 2290 (S.C.)

"It is held that rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces women to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore, a rape victim is placed on higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated 24 crime, rape tantamount to serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks."

5. Narendra Kumar v. State of (NCT) Delhi[1482]

"It is held that conviction can be based on sole testimony of prosecutor provide it lends assurance of her testimony."

6. Salil Bali v. Union of India[1483]

"It is held that juvenile justice (Care and protection of children) Act, 2000 is in tune with provisions of Constitution and various declarations and convention adopted by World Community represented by United Nations. Said Act cannot be held to be ultra vires Constitution nor it can be struck down."

7. Joginder Singh v. State of Maharashtra[1484]

It is held that applicant preferred an application for seeking anticipatory bail - The offence was punishable under Section 354(A) of the Indian Penal Code, 1860 - The question was, whether applicant 25 was entitled for anticipatory bail - It is held that applicant had co-operated with the investigation agency - Custodial interrogation of applicant would not be necessary - Registration of offence against applicant had exposed him to social obloquy and that he had been humiliated in society as well as at work place - Registration of offence was sufficiently deterrent factor - Therefore, bail was granted to the applicant."

8. Nishu v. Commissioner of Police, Delhi and ors.[1485]

Facts- Petitioner is a minor who was kidnapped on 25.10.2013 by a group of nine persons who had kept her confined up to 8.11.2013. The accused persons, in different combinations, had repeatedly raped her and that one of the accused, named, Pradeep is a constable in Haryana Police. After being recovered, medical examination of the girl was done, but neither the copy of

[1482] AIR 2012 S.C. 2281
[1483] (2013)7 S.C.C. 705
[1484] 2014(3) B0mbay C.R. (Cri.) 91
[1485] 2014 (3) ACR 2516 (SC)

the report was not furnished nor any FIR under Section 376 D of the Indian Penal Code or the provisions of the PoCSo Act registered against the accused persons. Petition under Article 32 has been filed seeking directions from the Court for registration of FIR under above mentioned sections; for the arrest of the accused. Also the appropriate actions against the officers of the Delhi and Haryana police by way of departmental proceedings for their refusal/failure to register the FIR under the aforesaid sections of the Indian Penal Code as well as the provisions of PoCSo.

Decision- In view of the arguments asserted by the counsels of both the respondents, court held that no order or direction to the first Respondent would be justified in view of the fact that the case has been registered by the Haryana Police and has been investigated by the authorities of the State of Haryana. The Hon"ble Court also find out that as the charge sheet has been filed against all the nine accused and the trial has commenced in the meantime it will be wholly inappropriate to exercise our jurisdiction under Article 32 of the Constitution.

9. Ashish Kumar and ors. v. State of U.P. and ors.[1486]

Facts- FIR was lodged by the victim's father Deesaa Police Station at P.S. Rauja, district Shajahanpur under sections 147, 354 A, 352, 323 and 506 of IPC and Sections 7/8 of PoCSo. After investigation, the police laid charge-sheet under Sections 352, 323 and 506 IPC only. As a result, Victim"s father filed an affidavit alleging therein that on the date of the incident that is 30th october, 2014, the victim's age was about 16 years and as she had alleged molestation, etc. in her statement, offences punishable under sections 147 and 354A of IPC and sections 7/8 of PoCSo Act were also made out. Upon receiving such affidavit, the learned Magistrate perused the police report and passed the impugned order dated 19.03.2015 thereby directing return of the charge-sheet for being laid before the Special Court constituted under PoCSo Act. In the order impugned it was observed that from the material available in the case diary offences punishable under Sections 323, 353, 354 and 506 IPC and Sections 7/8 of PoCSo Act were prima facie made out, but as it was not empowered to take cognizance of the offences punishable under the PoCSo Act, therefore, the charge sheet is to be returned for presentation before the Special Court.

Decision - Court observed that as the instant matter arises out of case which is based on a police report and not on the complaint, after submission of the charge-sheet, the matter goes to the Magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial or not. The Magistrate cannot exclude or include any section into the charge-sheet after investigation has been completed and charge-sheet has been submitted by the police. The same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 CrPC as the case may be which means that after submission of the charge sheet it is open for the prosecution to contend before the

[1486] MANU/UP/0439 /2015

appropriate trial court at the stage of framing of charge that on the given state of facts the charge of certain other offences should also be framed. The Hon"ble High Court held that in a case which is triable by a Court of Session though the Magistrate cannot add or alter a charge but he is empowered by sections 2o9 and 323 of the Code to commit the case to a Court of Session. Since under Section 31 of the PoCSo Act a Special Court constituted under the said Act is deemed to be a Court of Session, the Magistrate, if he finds that offences triable by a Special Court under the PoCSo Act are also made out, he is empowered to commit the case to the Special Court by taking aid of the provisions of section 2o9 of the Code. But such commitment arises after the Magistrate takes cognizance of the offences laid in the charge sheet.

10. Vijaykumar v. The State of Karnataka[1487]

Facts- The petitioner has been working in the Girls Hostel attached to the Kittur Rani Chennamma Residential School and he has been ill-treating, harassing and sexually exploiting the girl students in the said Institution. Another accused Smt. Jyothi (A- 2) has been giving assistance to the said person in order to facilitate the petitioner. The Principal of Kittur Rani Chennamma School, Almel has lodged an FIR for such act. The Police have investigated the matter and submitted the charge sheet. They have recorded the statements of the girl students, Head Master and others during the course of investigation. Petition is filed before this Court by A-1 for grant of bail on the ground of parity as A-2 has been granted bail by the Court.

Decision- In the instant case, Court observed that none of the girls have stated as to whether any one of them has been exploited by anybody. Every student has stated that some students were called by the petitioner and he used to exploit her every day except that nothing has been stated in the statements. Even the other witnesses have also stated in the similar fashion that they received information that the accused has been exploiting the girls in the said hostel. But nobody has stated that who was the girl actually exploited out of the girls examined by the Police. Therefore on the basis of lack of strong reasons, the court has not rejected the bail application and held that petitioner is entitled to be enlarged on bail.

CONCLUSION

After the extensive study, it can be clearly said that the piece of legislation aims at bringing positive changes in the society, but the approach towards the same must be changed. The legislation is a bit ahead of its time and in order to get the best out of it, mass sensitization is the only way out.

[1487] MANU/KA/044 3/2015

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AGREEMENT ON TECHNICAL BARRIERS TO TRADE – SCOPE OF A TECHNICAL REGULATION & THE ENVIRONMENTAL ISSUES ARISING THEROF

- *Ashna Lamba*[1488]

ABSTRACT

This paper has been divided into two parts. The first part seeks to analyze the scope of a technical regulation within the aegis of the Agreement on Technical Barriers to Trade (hereinafter the TBT Agreement). This includes the definition of a technical regulation and what constitutes a violation within the TBT Agreement. The second part of the article analyses the contemporary environmental issues arising from the interpretation of a technical regulation. This primarily includes eco-labeling schemes and the Non Product Related Processes and Production Methods (hereinafter Npr-PPM's) and their interpretation in various cases as well as the position of various countries pertaining to this issue.

INTRODUCTION

The TBT Agreement came into force in the year 1995. The objective behind the enactment of such an agreement is to ensure that states while introducing technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade. This agreement recognizes the right of the member states to protect plant, animal and human life, environment and consumer interests whilst ensuring that such measures do not act as a disguised restriction on international trade. All products, including industrial and agricultural products, shall be subject to the provisions of this agreement.[1489]

WHAT IS A TECHNICAL REGULATION?

Article 1.1 of the TBT Agreement defines a technical regulation as Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

[1488] Amity Law School, Delhi (GGSIPU)
[1489] TBT Agreement, Article 1.3

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Therefore, a measure constitutes a technical regulation when:

(i) it is a document: It was held by the Appellate Body of the WTO in the US Tuna-II case that a document is something written which furnishes evidence or information upon any subject.[1490]

(ii) it applies to an identifiable product or group of products: An example of this is that only those products prepared from Sardinia pichardus could be marketed or labeled as preserved sardines.[1491]

(iii) the document must lay down one or more characteristics of the product, prescribed or imposed in either a positive or a negative form, or their related process and production methods. An example of this would be that only those packaging materials can used which are recyclable and environment friendly. Thereby, this measure lays down the characteristics of the product by specifying that they should be recyclable.

(iv) The compliance with technical regulations is mandatory. Any violation of such a regulation is reported to the Dispute Settlement Body.

Contemporary environmental issues:

A contemporary issue confronting the international trading system is the harmonization of the international trade laws and the environmental protection. It is a known fact that the environmental deterioration has been taken place at an exponential rate. Therefore, it falls upon the WTO to make certain that the laws adopted by the members of the WTO are environmental friendly.

ECO-LABELING

It is the process of marking products with a distinctive label indicating their environmental safety and performance to make the consumers aware of the product they are buying. Eco-labeling schemes have gained prominence in the recent years due to the increasing environmental deterioration.

However, even this measure has certain drawbacks. In certain cases, labeling of products may not produce a desired outcome. It is also true that voluntary labeling schemes produce insufficient results. An example of this would be the egg labeling scheme introduced by the EC. The third world countries had to indicate whether the eggs were produced in a cage, barn or free range system. This was a voluntary scheme, however, since the EC found a need to make it mandatory reflects the insufficiency of the voluntary labeling schemes. However, the EC rejected even the mandatory labeling scheme for the reason that it would be difficult to implement.

[1490] ABR, US – Tuna II (Mexico), [185].
[1491] ABR, EC – Sardines,

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It is pertinent to note that both mandatory and voluntary labeling schemes are permitted within the TBT Agreement.

NPR- PPM's

A technical regulation has been defined as a document that lays down **product characteristics** or **their related** processes and production methods [1492]

The Appellate Body in the EC-Asbestos case held that the heart of the definition of a technical regulation is that a document must lay down product characteristics. Product characteristics include not only any objectively definable features and qualities *intrinsic* to the product, such as a product's composition, size, hardness, flammability and density, but also "distinguishing marks" of a product, such as the means of identification, the presentation and the appearance of a product.[1493]

Going by the aforementioned definition and interpretation, it is clear that only those processes and production methods that reflect in the characteristics of the product have been addressed by the TBT Agreement.

In the EC Seal Products the term 'their related ppm's' indicates that the subject matter of a technical regulation may consist of a PPM that is related to product characteristics. In order to determine whether a measure lays down "related" PPMs, a Panel will have to examine whether the PPMs at issue have *a sufficient nexus* to the characteristics of a product in order to be considered related to those characteristics.[1494]

During the **Uruguay Round negotiations**, Mexico proposed to insert "their related" before the processes and production methods. In introducing its proposal, Mexico made it clear that the intent was to exclude PPMs unrelated to the characteristics of a product from the coverage of the TBT Agreement, so that the TBT Agreement only addresses a narrow selection of PPMs. Mexico's proposal was adopted in the final TBT text. [1495]

Many a times countries mandate that a product is to be produced in a particular manner which is environment friendly. However, such a production process does not reflect as a distinguishable characteristic in the final product. These are known as non-product related process and production methods.

This causes a rising concern among the developing countries, who argue that environmental concerns of the developed concerns are borne by the developing countries. They also raise a

[1492] Annex 1.1, TBT Agreement.
[1493] ABR, EC-Asbestos [67]
[1494] ABR, EC-Seal Products [5.12]
[1495] WTO Secretariat, "Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics", WTO Doc. WT/CTE/W/10, 29 August, 1995, [146].

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concern that they do not have the requisite technological knowhow to shift environment friendly production methods. This impedes international trade. Moreover, many countries allege that these eco-labeling schemes lack transparency and that there needs to be a greater clarification of rules in this regard.

Another rising concern is whether these eco-labeling and NPR-PPM schemes fall within the aegis of the TBT Agreement. Therefore, there seems to be little agreement on whether NPR PPM's fall within the ambit of the TBT Agreement. While some state that only those processes and production methods are covered which reflect in the final product, others argue that even NPR PPM's which are non-detectable fall within the TBT Agreement.

The definition of standards in the TBT Agreement also gives no guidance as to this issue.

The definition of standard has been given in Annex 1.2 of the TBT Agreement. It has been defined as:

"Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or **related processes and production methods**, with which compliance is *not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

The difference between a technical regulation and a standard is that while a technical regulation is mandatory to comply with, standards are voluntary in nature.

PROVISIONS FOR THE ENVIRONMENT PROTECTION IN THE TBT AGREEMENT

The *Preamble of the TBT Agreement* provides for the protection of the environment as a legitimate policy objective, so long as the measure does not cause arbitrary or unjustified discrimination between countries where the same conditions prevail or act as a disguised restriction on international trade.[1496]

Similarly, *Article 2.2 of the TBT Agreement* requires that technical regulations (a) pursue a legitimate policy objective and (b) not be more trade-restrictive than is necessary to fulfill a legitimate objective keeping in mind the risk that non-fulfillment would create.[1497] Article 2.2 of TBT outlines that protection of human health and protection of environment is a legitimate objective.

The trade restrictiveness of a measure can be scrutinized in two-steps. *First*, it is examined if whether measure makes any material contribution to the achievement of the legitimate objective. *Second*, it is analyzed whether a less trade restrictive measure could have made the same

[1496] Recital 6, Preamble, TBT Agreement.
[1497] PR, US-Clove Cigarettes, [7.333].

contribution.[1498] A measure is *trade-restrictive* if it imposes any kind of limitation on imports, discriminates against imports or denies competitive opportunities to imports.[1499]

Furthermore, a measure is said to be necessary within Art. 2.2 when (a) the measure is *indispensable*; and (b) no other alternative measure existed which were less inconsistent with the provisions of the GATT, and which could have been reasonably adopted by the respondent country.[1500]

In the US Clove Cigarettes case, the Appellate Body held that TBT Agreement and GATT, 1994 overlap and share similar objectives. It was also held that TBT being a specialized legal regime, GATT, 1994 can be used to interpret various provisions of the TBT Agreement.[1501]

Article XX of GATT, 1994 and *Article 2.2 of the TBT* agreement seem quite similar prima facie. However, GATT, Article XX is used when a measure has found to be violating any provision of GATT. Meanwhile, Article 2.2 of the TBT Agreement is in the form of a positive obligation where members while pursuing a legitimate policy objective have to ensure that their regulations do not create any unnecessary obstacles to international trade. An important consideration in this provision is the risk of non-fulfillment of the measure.

The GATT Tuna Case I

This was the first case to test the legitimacy of an environmental regulation under the WTO jurisprudence. The trade and environmental controversy results from the use of particular tuna fishing techniques, such as small and medium gauge driftnets, that have high dolphin mortality rates. The PPM issue is therefore the result of tuna and dolphins being, when certain types of catch techniques are used, effectively joint products, so giving rise to significant negative environmental externalities through high dolphin mortality rates. The US therefore, enacted the Marine Mammal Protection Act (hereinafter MMPA)

On 5 November 1990, Mexico complained to the GATT that its tuna exports to the United States had been prohibited because it refused to comply with the MMPA. The primary basis for the Mexican complaint was the extra-territorial application of the US MMPA. The failure of Mexico and the United States to resolve the issue within 60 days led to the establishment of a GATT Panel on 6 February 1991. The Panel's findings were published on 16 August 1991. The MMPA regulations were found to constitute a quantitative restriction under Article XI.1 such that the MMPA was GATT-incompatible[1502]

[1498] ABR, Brazil — Measures Affecting Imports of Retreaded Tyres, [156]
[1499] PR, US — Tuna, [7.455].
[1500] AB Korea — Beef, [164,170]; AB, EC-Asbestos, [164].
[1501] AB,US- Clove Cigarettes [90, 100]
[1502] ABR, US-Tuna I [5.19]

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The US in argued that the MMPA could be justified by Article XX, General Exceptions, Paragraphs (b) and (g) of GATT. With respect to XX(b), the issue was whether the MMPA provisions could be applied extra-territorially. The Panel found that the US measures did not meet the requirement of necessity, that it had not exhausted all reasonable options to ensure consistency with the GATT and that the calculation of the permitted dolphin mortality rates was unpredictable (GATT, 1991, 5.28). With regard to Article XX(g), the Panel rejected the extra-territorial US application of nationally determined conservation policies (GATT, 1991, 5.32). Further, it stated that, even if these were acceptable, the unpredictable dolphin mortality rate would not be a GATT consistent measure.

The 1991 GATT Panel Report on tuna however, was never adopted in spite of strong support from the EU and many other intermediary countries. This was because Mexico and the United States agreed a bilateral solution outside the GATT. There was no consensus therefore in favour of adopting the Report such that the Panel Decision in the first tuna case did not become part of formal WTO decision.

The GATT Tuna Case II

The second GATT tuna case resulted from a complaint by the EU on 11 March 1992 against the original tuna Panel Decision. The Netherlands then complained on 3 July 1992 and joined the EU as co-complainant on 14 July. A second tuna GATT Panel was established on 25 August 1992. The EU had been affected by the US MMPA as an intermediary processor and sought the removal of the US restrictions on imports of 'dolphin-safe' tuna after the failure to adopt the first GATT Panel Report. The reason for their complaint was that the United States had not amended the MMPA, such that the inconsistencies identified in the original complaint by Mexico and ruled upon in the first (unadopted) Panel Report remained with respect to third countries.

The Panel proceedings were suspended in the autumn of 1992 after the United States made several amendments to the MMPA and passed the International Dolphin Conservation Act into law. The latter was enacted as part of the Conservation of Dolphins Agreement, known as the La Jolla Agreement, under the auspices of the Inter-American Tropical Tuna Commission. The ten signatories of the La Jolla Agreement, including Mexico and the United States, agreed limits on dolphin mortality rates together with requirements for observation and monitoring along with penalty provisions.

The United States was one of eleven signatories, along with Mexico, of the 1995 Declaration of Panamá. This called for a lifting of the US embargo on tuna imports from other signatory countries in return for a legally binding treaty on a variety of dolphin conservation measures. The United States agreed to lift the embargo once the Declaration had been ratified by four countries. In preparation for this, the US Congress passed the International Dolphin Conservation Program Act (IDCPA) in mid-1997. President Clinton thus amended the MMPA to comply with the second GATT Panel ruling and thereby avoided a complaint under the WTO DSU.

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In attempting to redefine 'dolphin-safe' tuna to include net-caught fish with zero dolphin mortality however, the IDCPA has split the environment movement.

US-Shrimp Case

The 1973 US Endangered Species Act required US shrimp trawlers and other shrimp vessels in US waters to use turtle-excluder devices (TEDs) 'when fishing where there is a likelihood of encountering sea turtles'. TEDs are now regarded as the international standard for protecting turtles because of their low cost, effectiveness and ease of use. In 1996, India, Malaysia, Pakistan and Thailand lodged a WTO complaint against the US embargo on the grounds that such import bans cannot be applied extra-territorially. The US defence, unlike in the tuna cases, rested upon GATT Article XX exceptions alone rather than incorporating Article III on national regulations.

The WTO shrimp Panel Report, found that the measures were discriminatory in that the United States took no account of methods other than TEDs used to protect sea turtles. Further, prior certification, technical and financial assistance along with longer transition periods were only negotiated with selected countries, mainly in the Caribbean. The prohibition of imports of shrimp from non-certified WTO Member countries therefore constituted a quantitative restriction under Article XI of GATT.[1503] The US argument that the ban on non-certified shrimp imports fell within the remit of Article XX(g) was rejected by the Panel on the grounds that sea turtles are not an exhaustible resource and that such 'unilateral measures could jeopardise the multilateral trading system'. The Article XX(g) finding conflicted with that of the second GATT tuna Panel (GATT, 1994) but the latter had no basis in WTO case law because neither tuna Decision was adopted.

The United States appealed against the Panel Decision on the grounds that sea turtles are endangered and should be regarded as exhaustible under Article XX(g) and that its import restrictions were therefore justified. The WTO Appellate Body Report, published 12 October 1998, reversed the original Article XX(g) Decision in finding that endangered sea turtles are an 'exhaustible resource' and therefore that environmental and conservation objectives are a legitimate trade measure. The Appellate Body however, found that the US protective measures were 'arbitrarily' discriminatory and thus inconsistent with the *chapeau* to Article XX and therefore illegal under Article XI of GATT.

In response to the findings of the Appellate Body, the United States amended its Endangered Species Act and, in March 1999, published its Revised Guidelines for shrimp imports. In October 2000, the United States was then subject to a DSU Article 21.5 complaint from Malaysia concerning the compliance of the US Revised Guidelines with the Appellate Body ruling and the failure of the United States to negotiate a WTO-compatible multilateral agreement on sea turtle conservation. The Panel Report, published in June 2001, found that the US Revised

[1503] ABR, US-shrimp [7.16].

Guidelines violated Article XI but were justified under Article XX(g).The Panel refused to rule on US intentions with respect to securing a multilateral sea turtle agreement.

Although the United States lost the WTO shrimp–turtle case, it did so because its measures were discriminatory and not because it sought to protect the environment The shrimp–turtle case therefore represents a landmark decision in WTO case law since the Appellate Body recognised the validity of the US Endangered Species Act. US Trade Representative (USTR) Robert Zoellick stated that the Decision 'shows that the WTO as an institution recognizes the legitimate environmental concerns of its Members'. The US State Department has since intensified its efforts to negotiate a multilateral agreement on sea turtle protection in the Indian Ocean and Southeast Asia.

The issues involved in the WTO shrimp turtle case are broadly similar to those of GATT tuna–dolphin. Both sets of cases arose because of significant negative environmental externalities resulting from the joint production of tuna/dolphins and shrimps/sea turtles respectively. XX(g) as including conservation, first developed in the second GATT tuna case. This interpretation was based upon the broader application of the meaning of exhaustible resources in Article XX(g) to include all living beings, but particularly endangered species, in the light of the objective of sustainable development as laid down in the Preamble to the WTO Agreements (1998c, 134).

In all these cases, there is no consensus on whether these measures fall within the scope of a TBT Agreement. It has only been recognised and acknowledged that there is a dire need to protect the environment and the exhaustible natural resources.

CONCLUSION

Many countries rely on older and traditional technology since they do not have sufficient resources to shift to more environment friendly technology. The developing countries are deeply skeptical about the introduction of Non-product related processes and production methods. They believe that this would result in impediment of international trade. It also doesn't help that there is a lot of ambiguity with regard to NPR-PPM's. Protection of environment has been recognized as a legitimate concern in both GATT and the TBT Agreement. However, there are no clear guidelines in the WTO jurisprudence about the implementation of mandatory environmental regulations. The time has come for WTO as an institution to give clear guidelines in relation to protection of environment. Trade and environmental concerns need to be harmonized for a better future.

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SWITCHING FROM LITIGATION TO MEDIATION IN BUSINESS CONFLICTS: IN RESOLVING WORKPLACE CONFLICTS

- ***Dr. Nusrat Fatema***[1]

ABSTRACT

Companies have a system of hierarchy which is followed to maintain balance, discipline, and easy flow of work. The complex structure and the role of various stakeholders makes it a tough job to not have any conflict. One of the key stakeholders in the good will of the company are the employees themselves and the relationship between them and with the employer. Internal conflict, be howsoever small affects the whole system. Researchers have analyzed the lack of systematic analysis into such types of conflict and many employees still left with no tool to redress their grievances.

There are various reasons which can pave way for conflict, and thus it is very essential to identify the root cause and to resolve the conflict. Mediation being a form of alternate dispute resolution provides numerous benefits over the judicial proceedings. Most of the organizations starting from 1970s have stated using ADRs for dispute resolution. Workplace mediation, being the new trend has been adopted by corporates in countries like USA, Australia, Europe, etc. The success of such process depends upon the mutual consent of the parties and the readiness to accept the mistake if any and resolve the conflict. In this article, the author argues in favor of the effectiveness of the mediation with effective communication in workplace conflicts leading to overall benefit to the company. Time immemorial, the process is continuing to work in an effective way. The way it has been used and how can this be used to make it more beneficial will be highlighted along with suggestions and conclusion.

Keywords: Dispute, Mediation, Workplace, Employee, Communication

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INTRODUCTION

By failing to prepare, you are preparing to fail

- Benjamin Franklin

The option of taking disputes to the court is always open, however, the most advisable method to settle these disputes as suggested by many experts will be **mediation** instead. This will help you save the expensive legal battles and will be less time consuming, stating some of its perks. In this article, what is mediation and why mediation is the best method to settle business disputes will be discussed.

The productivity of the employees can be directly correlational to the workplace and the nature. With globalization at its peak business owners and corporates promote competition and push the employees to perform better and get better results and better clients, compete with oneself. But can a person be doing any of these while having a conflict be it for whatsoever reason, in an effective way. The answer will be negative. A harmonious work environment with highly competitive spirits is possible only when there is effective communication. Lack of proper management and personal vendetta can cause improper judgment. In a condition when there is no procedure for removing conflict than judicial process, it angers the workforce.

The growing trend of out of court settlement is on the upper side of the graph which is exponentially growing. The long pending cases and the costs added to it makes it cumbersome and a tedious job which allows mandatorily requires the hiring of a lawyer, paying of court fees, and the fear of losing cases, going for appeal. To avoid the process in whole and to still be able to resolve the disputes in an effective way which are the alternate dispute resolutions. The arbitration and conciliation act, 1996[2] was enacted to guide the outside court settlements. More than the traditional methods of solving the dispute the current trend is going for alternate settlements. one of such process is mediation. Mediation requires the parties to negotiate and resolve the conflict with the help of a neutral third party who is known as a mediator. Mediation is not only used for

[2] See Section 30, Arbitration and Conciliation Act, 1996

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resolving conflicts, but it has paved its way into negotiation of contracts, partnerships, new business ventures, etc.[3]

Business mediation can be used to resolve both internal and external conflict. More often than not, the source of the conflict stems from parties feeling they are not heard, not appreciated, or misunderstood. The mediator is a neutral observer who is not emotionally invested and can get through to the heart of the matter in order to open up discussions as to how to resolve the dispute. In mediation, the parties are voluntarily participating in the process and, as a result, fear and anxiety are greatly reduced. The neutral and safe environment that the mediator provides opens up the door to effective communication between the parties.[4] A skilled mediator is trained to work through the emotionally charged atmosphere that often accompanies work related or business disputes. Often times, all that is required is a simple apology or slight change in company policy to make one or both parties happy with the outcome.

Rather than resort to litigation where there is a clear winner and a clear loser, the mediator strives to guide the parties to work toward a resolution that is agreeable to everyone. In this way the mediator evens out the playing field and everyone walks away a winner in some respect. When mediation is successful, the parties leave the process feeling validated and satisfied. The changes to the inner workings of the business that come out of the mediation process will likely have far-reaching positive effects on the morale of employees, which can only better the business as a whole. Turning to a more positive method of dispute resolution demonstrates that the business is interested in fostering good communication[5] and values its employees as well as the eventual consumer. While litigation provokes hostilities, mediation is based upon the ideals of respect and cooperation. Business owners recognize how important it is to foster this kind of feeling in the workplace.[6]

Mediation may be a process during which an impartial third party — a mediator — accelerates the answer of a dispute by advocating voluntary agreement by the parties themselves to the legal dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to succeed in their own agreement. Mediation is usually better understood by describing it in contrast to other, more familiar dispute-resolution procedures.[7] Mediation is neither negotiation nor arbitration. Mediation differs from a proper court proceeding during a sort of ways

[3] John Conbere, Designing Conflict Management Systems to Resolve Workplace Conflicts, 2 J. ALT. Disp. Resol. 30 (2000).
[4] Meriem Kalter, Katalien Bollen & Martin Euwema, The Long-Term Effectiveness of Mediating Workplace Conflicts, 34 NEGOT. J. 243 (2018).
[5] Putnam, K. H. Roberts and L. W. Porter (eds) Handbook of Organizational Communication: An Interdisciplinary Perspective. New York: SAGE
[6] Vickers, M.H. (2006). Towards employee wellness: Rethinking bullying paradoxes and masks. Employee Responsibilities and Rights Journal, 18, 267–281.
[7] **D.** B. Lipsky and R. L Seeber, "The Use of ADR in **U.S.** Corporations: Executive Summary." Available at http:// www.ilr.cornell.edu/depts/ICR/NEW/execsum.html.

and is seemed to have many advantages over such proceedings. A magistrate orders a choice during a court case, whereas during a mediation, if any outcome is to be made or agreement is to be reached, the parties create the choice or settlement themselves. The non-confrontational nature of mediation is another apparent advantage, therein parties to a mediation could also be less vulnerable to the smashing of relationships that always related to a protracted adversarial proceeding.

Talking so much of conflict and resolving, there is no universally accepted definition of a conflict. It can range from a healthy competition an end up in unhealthy violence. so basically, when one person is unsatisfied or frustrated with the other party who may be your colleague order employer about some concern which is related to a workplace and working environment so can be termed as a business conflict.[8] The disagreement between the parties and lack of communication skills to resolve the dispute/conflict results in restoring to various methods to resolve the conflict by the employer or manager.[9] The relationship between two individuals can be affected by various factors like mutual dependence, incompetence, different approaches to a single problem, personal relationship affecting the business environment, unequal treatment working in a team, Not being used to opposition are just to name a few.[10]

In a situation of workplace conflict, the resort which is available to people is to leave the matter as it is or to remain frustrated and in worst case scenarios proceed for a legal battle. In either of the case, the results are not fruitful and for every person it will be hinderance and can even cost the employer a valuable employee who they could have retained if they recognized and resolved the dispute. The cost of replacing a capable enough will not be a desirable outcome for the organization. Retention of qualified employees is a more appropriate measure than replacing, as many people in India have also enacted the keyman insurance policy for their benefit.[11] The hierarchy of organization is essential to understand the outcomes of the mediation policy undertaken by company.

[8] Harkavy, J. (1999). Privatizing workplace justice: the advent of mediation in resolving sexual harassment disputes. Wake Forest Law Review 34, 156–63.
[9] Fl. **&** Migureanu, **G. (2009).** The Advantages of Mediation as a Modality to Solve Conflicts, *Magazine of Commercial Law* no. **7-8 /2009.**
[10] Camevale, P. J. D., & Pmitt, D. G. (1992). Negotiation and mediation. Annual Review of Psychology, 43, 531-582.
[11] See Section 56 of the Income Tax Act, 1961

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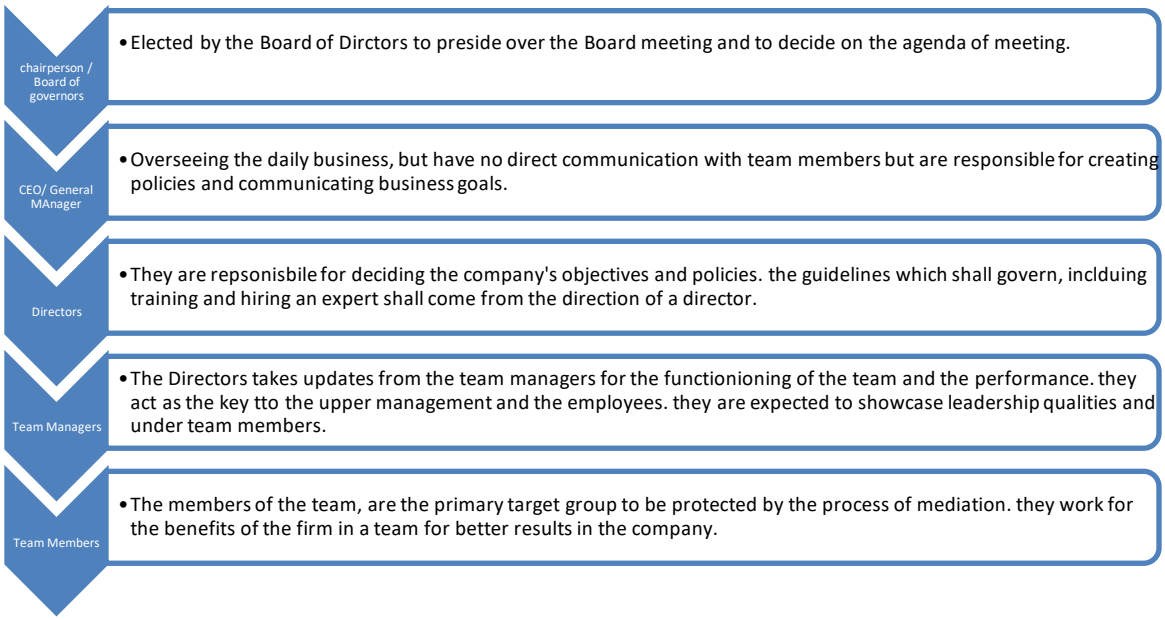

Sources of conflict in workplace:

Various researchers have identified three broad category of sources which can result in a conflict in a workplace: first one being Scarcity of resources leading to conflict of interest. Second, the continuous strive to perform better than others and to maintain that identity can result in conflict. And lastly the desire to be socially acceptable and the views which will be appreciated. The attributes which a healthy workplace should promote often lag behind, which is also one of the hidden yet big source of conflict.[12] Lack of effective communication within the employees and not solving the existing problems, but continuing with silence and anger, blasts like a bomb in a later date, ending up in serious violations of law, seeking redressal from the court of law. working together in a team is one of the keep attributes which every employer looks for when they hire a person for the job, the importance is seen one there is a team and team conflict, difference in opinions, the want to prove one idea better than the other, manipulating people, using personal bias are few of the examples of corporate conflicts.

Are the employees only responsible for workplace conflicts? The answer is no, because employer might not have direct control over the relationship, but indirectly it very much exists. There is a concept of corporate politics, which exists but nobody talks about it or raises concern considering it to be a taboo. The reason being corporates are governed by their own guidelines drafted by the makers, subject to minimum standard rules set by the law of the land. Like corporate governance, these guidelines are unique to a company. The employer controls the relationships as hiring, promotions, personal bias, ganging up on one person, treating employees unequally are some of the instances which are the start point of a conflict. Employer constantly

[12] James E. McGuire, *Mediation in Fiction: A Grail Quest*, DISPUTE RESOLUTION MAGAZINE, Summer 2007, at 24

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promote competition in the nature of being healthy for productive striving for attainment of goals, the goal of company now becomes goals of individuals, but what the employer forgets to ensure that the goals can be achieved together, the various skills of each person be used together. Employers preach always thinking in a group will always keep you a team player and restrain from thinking individually and growing ahead in career. Such opinion promotes the person to compete within oneself, working late hours and to produce better results.

Importance of resolution of workplace conflict:

The skill set primary is identification of conflict before resolving them. The longer a person ignores a dispute, the repercussions are higher to deal with. In a workplace, a mediation forum is one where a person can share their concerns with respect to employment. Being a team member, it will be difficult to work where two employees are always ready to bite each other. And being a team leader, if personal bias dominates logical judgment, then such serious issues need to be addressed for the benefit of every individual as well as the team and the company as a whole.

A dispute to be resolved if dragged in a court, can become difficult to resolve in a stipulated time. Courts follow a particular procedure and have certain powers which empowers them to adjudicate on the disputes. the matter will remain unpursued if courts were the only option. Reason being, when it comes to weighing down the expenditure, time to the result and the dispute, the matter may seem trivial to the parties as well as to the court. So, an alternative i.e., mediation helps to recognize even smallest of concerns of the employees aimed to provide them a safe and healthy workplace which should continue making every employee a better individual for the society.

When is mediation most suitable?

- Mediation is often useful in any conflict where the parties are willing to enter into a discussion in good faith with the sole intention to resolve their disputes.
- Mediation is effective when a party is ready to talk and share their side of story without which the whole process seems worthless.
- The parties should be ready to advocate for themselves and be a better judge for their own rights and liabilities. Though they have the privilege of hiring a lawyer for the same purpose, but they can certainly negotiate upon the end result of the discussion maximizing the personal benefits or lowering the negatives.

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The various criticisms which are attached to the process of judicial process can be eliminated by switching to a more constructive and positive approach which is mediation. The added benefit of the process is that if a person is not satisfied with the result of mediation, then the gates of court are always open, which is the worst-case scenario for a mediation to be unsuccessful. Mediation as I term is resolving of dispute in private and not in front of people, be this I mean, the judicial proceedings are treated as public record and are easily available for access, but mediation is a sealed process. The parties enter into mediation by signing a confidentiality agreement, and any confession is not public record, which helps in protecting the right to privacy of the parties to the mediation proceeding. In many circumstances, effective conflict resolution skills can create the distinction between encouraging and adverse outcomes. Mediation on the face of it, other than solving disputes, also helps in added advantage which may not be in direct connection with the process like building better understanding to resolve the conflict, create awareness and the insight provided for achieving one's goals without hampering the goals of other people.

As a conflict in a team can highly undermine the performance if the conflict is between two members, which will be automatically elevated by having mutual respect for each other when the conflict is resolved. In a business conflict, there is a moment of self-awareness, where the parties examine the goals and duties which they owe towards the company and towards co-workers and this self-examination helps to see through and decide for the benefit of greater good. It is important that the organization understand and define the term right based and interest based which are the systems of management. Right based approach will be pre-dominantly governed by the relevant statute or policy or law in writing. And interest-based approach focuses on meeting the minds of the parties to reach a desirable outcome.

Mediation becomes suitable in reducing the formal complaints of discrimination, which is a mechanism in the US, the employment related complaints in the tribunal like UK and India. There are two ways of dealing with the situation, hiring an expert trained adequately for resolving disputes otherwise provide training to some members of the company to act for resolving the disputes. External mediators are required to intervene when the dispute is complex or involves the management. When the parties agree to put the formal procedures on hold and handle the same either themselves or through mediation. Commonly, mediation is best utilized after a conflict first arises, as the lengthier a dispute goes on, the better the prospects that individuals' relationships will knock down, or that they bring in formal complaints. However, the procedure can assist to even restore interactions after official dispute procedures, too. Restoring communication is the first step to such process.

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Mediation is not always the preferred method to settle disputes by employees because to calculate the damage down to a person, the method is chosen by the people. Incidents of bullying, harassment, sexual harassment which are of serious nature, cannot be settled down in a closed room with so much pain. Giving of official warnings, dismissal, examining by the POSH committee, transfer, and initiation of criminal proceedings are the steps which is restored to in case of such disputes, where employer's responsibility should not be to make the matter go away in thin air, but to take requisite action.

Effectiveness of Mediation in business conflict:

1. Reduced Costs – To resolve the difficulty of business conflict within the court, the principal requirement is hiring of an attorney or lawyer. The lawyer should be efficient enough to bring out the facts, pull out the evidence on record, prepare pleadings then ready to justify his fees. Of course, individuals do have the choice to represent their own side. However, barren of the sufficient legal expertise and background, it is highly likely to distort yourself. What is more, if the dissenting party features a professional jurist on their side, your lack of experience may be directly taken advantage of. Aside from the charge of the attorneys, there are quite few different fees that require to be paid off before you will start your litigation. Filing fees, service fees, witness fees, court fees, and within the event that you simply might want to file for an appeal, appeal fees also are necessary payments that require to be made. Choosing to undergo mediation are often much easier on the pockets of both parties. For the foremost part, only mediation fees got to be paid, and therefore the legal professional or attorney hired for the case is an unbiased party who merely takes on the role of a mediator to bring all evidence and opinions to light.

2. Faster Dispute Settlement – lawsuits can take months or maybe years before a choice is really made. That is for the reason that there are several changed legal mechanisms that individuals can employ so as to reexamine the judgement of the courts. For instance, if a party agrees that they are not satisfied with the consequences of the primary trial, they will appeal for a better court to re-evaluate their case within the sort of an appeal. The courts of appeal are terribly busy especially because majority of these who lose a legal battle will often shot to exercise any avenue so as to possess the choice overturned in their favor.[13]

[13] Rome, D. L. (2001) 'Resolving Business Disputes. Fact-Finding and Impasse', Dispute Resolution Journal 55(4): 8–15.

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For this reason, business conflict, not being of such a nature, can take a lengthy period of your time, especially when both parties still seek appeals when a choice is designed to profit the opposing party. Mediation on the contradictory hand, can take as little as fortnight to flourish in a choice, this is often because they are far less argumentative, allowing the parties to dispute their points of view within a more conducive environment. What is more, any data divulged throughout a mediation cannot be used as evidence in court of law, so parties feel less vulnerable when volunteering their thoughts, opinions, and arguments.[14]

3. Sets a Positive Tone – lawsuits more than being seen as a device to threat people and thus see you in court is a common phrase used to threat, it is extremely rare that after a legal battle there is reconciliation in the relationship between parties. When a workplace conflict arises, after the same being resolved, there is a high probability that the parties will continue to work in the same organization or even in the same team, keep enmity will only cause mental damage which is a direct conclusion from the lawsuit

Mediation being a method is often far less aggressive, the true objective of the dispute is delivered to light – which is that the best interest of the company as well as individual parties. This makes it easier for participants to return to a compromise, albeit it sacrifices their own intentions.[15]

4. Confidentiality: One among the prominent benefits of mediation over litigation is that the incontrovertible fact that the proceedings are private and confidential. Privacy is especially important to individuals who value to keep their lives and feelings private. Without the safeguard of confidentiality, parties would be unwilling to speak freely, and therefore the discussion which is necessary to resolve disputes would be seriously curtailed.

The dispute between employee and employer becomes a complicated situation, because one party is in a dominate position than the other and can thus manipulate and undermine the decision of the mediator. Research have found that superiors often do not comply with the outcomes of mediation and thus leaves the subordinate with no recourse to the situation. Thus, it is important to have both the parties acting in good faith with the aim of fulfilling their part of obligations.in long run. Employees and employers see the action as one positive and showcased trust in the process. Mediation is seen as a positive outcome for the organization and employees irrespective of the various hierarchical position which the corporate has adopted.

Types of mediation:

[14] Rebecca Nesbit, Tina Nabatchi, Lisa Blomgren Bingham, "Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement" SAGE Publications, Apr. 2012 https://doi.org/10.1177%2F0734371X12436981
[15] Tillet, G. (1999) Resolving Conflict: A Practical Approach. Sydney University Press: Sydney.

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The primary kind is the Evaluative which is when the mediator also functions as an expert and provides legal and substantive answers to the claims which is based on the information so received by the parties. It guides the parties on the basis of the strengths and weaknesses of the facts of the case, which is conveyed to the mediator. Another method known as Facilitative, where the mediator is being the facilitator adopts the problem-solving techniques to design a process and reach the end result of settlement of the dispute. Last being the transformative one, where the role of mediator is just to listen and acknowledge, it provides the parties opportunities to self-examine and clarify the goals and the interest.

Out of the different methods of Alternate dispute resolution, why does mediation fit best for the purpose is often asked. To answer that, it needs to be understood that mediation is not about fighting, it is about settling, it is about understanding both the parties, and not one parties dominating the proceedings. Unlike arbitration, where the order of arbitrator is final and can be applied as a decree from a civil court, which means the parties are bound to accept arbitration, which is not the case in mediation. In arbitration, the arbitrator is required to be registered and has powers of a civil judge while adjudication, while a mediator can be any neutral third party. Even as in Judicial system, the notion of justice varies from person to person and justice for one, may not be thought as justice for all, which is when the mediator makes the parties believe it is in the best interest of both the parties and not a single party. A fair negotiation and a fair result are why people prefer to resolve the dispute through mediation.

Fair grievance processes

Organizations should and must have proper written policies, guidelines which will define the important terms and be applicable to the entire organization affecting the dispute resolution mechanisms. The employer has to play a primary role in setting up a fair grievance redressal system. The guidelines should include what disputes to be submitted for resolution, the person who will resolve, their minimum qualification, consent of parties, how a decision will be reached, in case of any dissatisfaction with the result then whom to approach, the guiding laws, the evidence collected, the privacy of the parties, the confidentiality agreement, fair process, no use of dominant position to affect the decision, role of mediator, expert traits of mediator, conclusiveness of mediation, etc. Organizations typically have multiple ways for employees to work out interpersonal or organizational differences. The existence of a grievance system may also improve employee morale because employees feel they have options for pursuing conflict resolution[16]

[16] Anonymous, "Managing Workplace conflicts, https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingworkplaceconflict.aspx

One of the important skills of a mediator is effective negotiation, in which interests of both the parties are taken into consideration, articulated and the end result is determined. Mediation is not win-lose situation, it is win-win situation, where both parties are happy to settle the dispute in an amicable way.[17] A negotiator and a good negotiator have some basic differences, like a good negotiator will be able to put forward the points in a way which will make the parties think and decide. A manger cannot be a mediator due to reasons like, he/she may not understand the conflict being part of the same organization, he/she may have personal bias for one party or vendetta for one party, he/she may or may not be a good negotiator which may result in breaking down the process and leaving the parties to no conclusion or trust in the system. But seeing the other side, a manager who knows both parties well, may understand their say and point of view in person. Since the manager is one of their own, the parties may feel more comfortable to share and settle. So, having both positive and negative aspects, I think a manager of every company should be able to build that confidence amongst the people, to trust with the dispute, the judgment and the manager in turn can showcase not only good negotiation skill, but trust and confidence and ability to keep aside personal bias. These primary traits including expertise like a mediator should be acknowledged with the success of the process as a whole.[18]

In a settlement of dispute, the most important trait remains as negotiating the interests in a dispute. Negotiation is a key skill which has remarkable advantages and surprising results. Active listening is a key trait of negotiation, as you can counter only if you know and understand what the other party has to has. A negotiator has to listen to both the parties and the same does not mean overstepping the power, interrupting in between, or asking irrelevant questions, asking to repeat oneself, etc. listening with empathy will help parties build confidence. The role is to listen and make the other party understand if they have any difficulty in understanding the same. To ask questions in between is banned, but it is important to ask necessary questions to let the party open up and share their concerns and interests. Since, it is a conflict, everything seen will not be of positive tone, but such statements have to be redirected from being problems to be seen as opportunities to resolve. As a substitute of playing the blame game, reformulation concentrates on discovering solutions.[19] It looks to the future, not the past.

[17] Mahony, D.S., & Klaas, B.S. (2008). Comparative dispute resolution in the workplace. Journal of Labor Research, 29, 251–271.
[18] Nannan Wang, A systematic Approach to Effective Conflict management for program" SAGE Publications, jun. 2020, https://doi.org/10.1177%2F2158244019899055
[19] Manning, C. (2006). Transformative and facilitative mediation case studies: Improving relationships and providing solutions to interpersonal workplace conflict. Journal of the Institute of Arbitrators and Mediators Australia, 25, 81–89.

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While devising a system of procedure for redressal, there are certain key parameters worthy of consideration other than proving training or appointing a mediator. Devising guidelines and the mechanism to be followed. There just should not exist a system which is not worthy of use, but a system so effective to deal with the concerns of the people. Organizations with distrust amongst people, the participation of employee is crucial to be effective. People should be aware of such a system being in existence in their corporate structure. Employee having grievance against employer or any senior management offer prefer staying silent because it is considered to be marching against the top management without any certainty of results. There should be a code of conduct for the mediator to abide by like impartiality, rationality of judgment, keeping personal bias aside, etc.

Although a mediator is responsible for overlooking the proceedings of mediation and act as a facilitator, the mediator is not vested with the power to impose upon his solution amongst the parties. And let the parties speak for their conclusions together by ensuring effective communication. The mediator may come up with a solution keeping the interests of the parties in mind but cannot impose upon the same. This can be demerit, because for serious mishandlings, mediation can be of zero use, because even if the parties agree to do something but does not, what recourse and use was the entire process of. An organization can also act as a facilitator by trying to negotiate the dispute but cannot enforce them as a court of law could. It may even lead to resignation of one party or resorting to judicial proceedings. For any discussion or agreement which is made in the course of a mediation proceedings is sealed and bound by confidentiality clause, inadmissible in a court of law as a piece of evidence.

Analyzing why after being a best method to resolve workplace conflicts many corporates are feeling in the same, that is because of three primary reasons. The first one being ineffective communication. Communication is a very key essential to negotiate a dispute, in the sense the negotiator should be able to make the party speak and also listen to the other party without being stubborn on their own needs.[20] Right way of communication can change this nuance. the next problem seems to be with the cost associated, ask the manager of the workplace a person may think to be appropriate to be negotiating or mediating the dispute by himself, in a situation like this where they do not consider the skills set required in a negotiator and thus in an attempt to save money, are reluctant in hiring an expert for the same, which leads to failure.[21] Last but important reason is not treating the conflict with enough importance to realize the damage it can cause.

[20] ibid
[21] IGBINOBA, EBEGUKI EDITH (2014) *Managing Workplace Conflicts in Business Environment: The Role of Alternative Dispute Resolution (ADR).* European Journal of Business and Management, 6 (36). pp. 74-82. ISSN 2222-1905 (Paper) ISSN 2222-2839 (Online)

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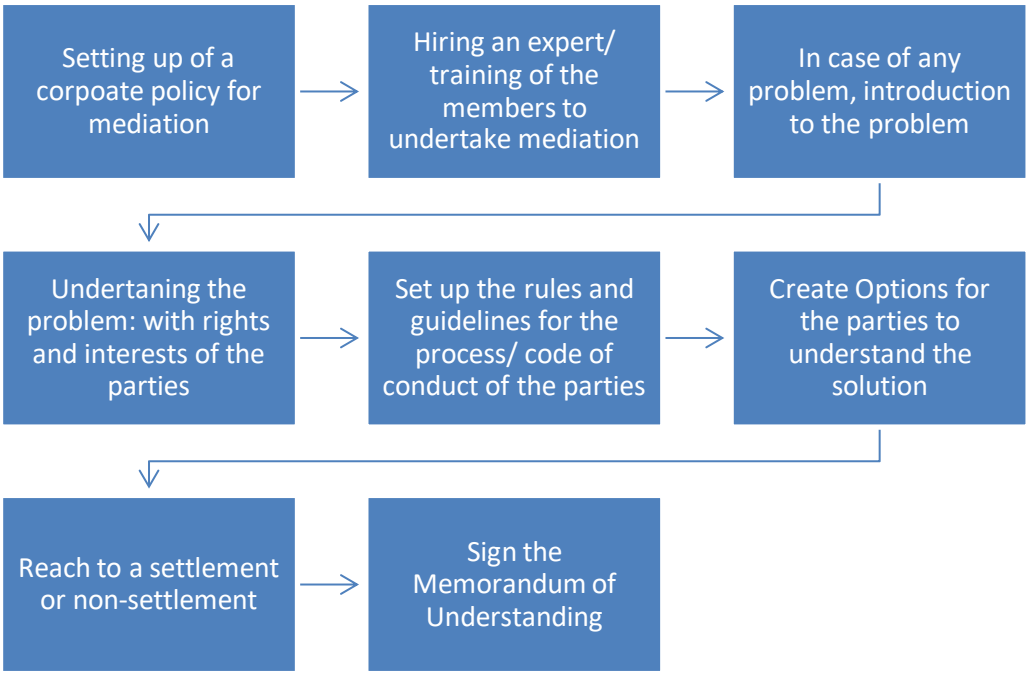

As conflicting goals can be highly appreciated as a competitive spirit, but alternatively can result in conflict, such cannot be ignored and should be considered as worthy enough to resolve the dispute.[22] All the three reasons are interconnected and has to be met effectively in order for the process to strive positive outcome. An expert/ mediator by ensuring effective communication should be able to settle any dispute which arises in a workplace.[23] A downward spiral of negativity and recrimination can be one of qualified reasons for a workplace conflict which will not let the team function effectively and the process should stop as soon as it can.[24]

The success of mediation also depends upon the perceptions which people carry, which is clearly a personal trait and can be wide ranging. As mediation may be cheaper, but still involves cost to it, which can act as a barrier. The biggest barrier is acknowledgment of dispute, if both the parties do not agree to the existing of a dispute, then everything is nullified.[25] Keeping the emotional balance during a dispute is especially important to resolve a conflict, because if it overpowers then reaching a logical conclusion and weighing the pros and cons can be a difficult task. Rather than disregarding them or viewing them as an uncomfortable distraction, an emotionally intelligent mediator will recognize their own emotive states as well as those of the other party.

[22] Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 L. REv. 565, 572 (1997)
[23] Supra at 3
[24] George Magureanu, Mediation a Conflict Solving Modality in the Banking Area, 2012 FACTA U. Danubius JUR. 138 (2012).
[25] Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood? **I I*** OHIO ST. J.ON Disp. RESOL. 297, 301-16 (1996) (reviewing the lead up to and aftermath of the Pound Conference).

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This will diminish their disruptive effect, while delivering insights for more emotionally nourishing outcomes.[26] The mediator in a business conflict is required to keep the best interest of the employees and the company in mind while reaching a conclusion.

Resolution benefits everyone

Resolving conflicts is advantage for both employees and employers as well. When there are more people working in a group, it is not uncommon for people to have difference in opinions for ideas, for process, etc. the problem arises when the employer ignores such conflict. So, it is important that employees have a mutual sense of respect for each other and their ideas, it is not necessary that you must agree to everything others say but draw a line of difference between conflict of interest in work and conflict of interest for personal purpose. Interpersonal conflicts cannot be easily resolved if effective steps are not taken. Business owners when only care for results but not how those results are achieved, it is a drawback which is overlooked. But the two are interconnected, so for better results, better relationships must be promoted, does this mean putting down the competitive spirit? The answer is negative, promote healthy competition, but not disgracing or being disrespectful to others. No matter who is in charge resolving, any person involved in employee conflict solution can benefit from mediation training which are provided by many HR organizations or communities, by way of conducting workshops or skill course.

There is a better way to resolve your dispute: mediation by employing a specialist (mediator) who concentrates not on rights but on concerns—the needs, requirements, or concerns that motivate each side's situations. If mediator raises question why a dispute is crucial to you, the answer will reveal your interests.[27]

The only benefit of mediation is not that it is a non-adversarial approach to resolve disputes, it is also a price-effective choice to litigation.[28] Legal battles are often time-consuming and expensive, which businesses, especially small businesses, will have difficulty affording. If it is an expert appointed from outside, then the fees of the mediator, or if employees are provided training, then such charges are the only expenditure. The paperwork involved in the process is the memorandum of understanding which outlines the outcome reached by the parties mutually by using the aid of a mediator. As well as being legally binding, the agreements reached in mediation are "emotionally binding" since the parties had a transparent voice within the process, put effort and work into the agreement, are proud of the result, and are less likely to renege its terms.

[26] Kaarst-Browne, M. (1999) 'Telling Tales: Management Gurus Narratives and the Construction of Managerial Utility', Journal of Management Studies 12(6): 540–61.
[27] PON staff, "Mediation and Conflict Resolution Process" Harvard Daily Blog https://www.pon.harvard.edu/daily/conflict-resolution/mediation-and-conflict-resolution/
[28] Daniel Watkins, A Nudge to Mediate: How Adjustments in Choice Architecture Can Lead to Better Dispute Resolution Decisions, 4 AM. J. MEDIATION 19 (2010).

Conclusion

The fundamental principle of mediation is self-determination. Mediation is a process relied upon by the parties to be entering uncoerced and willingly within an ultimate target of reaching the best of possible solutions.[29] The experts are of the opinion that issues involving an individual with declining capacity are not suitable to mediation since mediation believes participation by parties who are capable of self-determination.

For many reasons, mediation seems to be a beneficial way of resolving disputes in business amongst the employer and employee or amongst employee and employee. Mediation is informal, flexible, and less hostile than a court of law. It is not argumentative. It presents parties the occasion to discuss poignant (emotional) as well as legal issues and to act towards a resolution that coagulates present relationships rather than shattering them. Nevertheless, the use of mediation must not be whole heartedly embraced without a critical assessment of its potential to deny the employee the due right of a formal proceedings by substantive procedure if chosen by, in other words, the process has to be fair and equitable and not coerced to give up on other legal remedies. The increased demand of working in teams has led to many unresolved conflicts which should be able to hamper the performance if not resolved by using professional help. Although, mediator has no power or authority to give or impose a decision, but the success of mediation in business conflict is due to the nature of the conflict and effective communication being facilitated by the mediator.

[29] Bernadine Van Gramberg, "The Rhetoric and Reality of Workplace Alternative Dispute Resolution", Journal of Industrial Relations, ISSN 0022-1856, 48(2) 175–191