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Jurisperitus: The Law Journal *is a non-annual journal incepted with an aim to provide a platform to the masses of our country and re-iterate the importance and multi-disciplinary approach of law.*

This journal is an initiative by Legal Education and Awareness Foundation, a registered Non-Governmental Organization, which aims at providing legal education and awareness to all parts of the country beyond any social and economic barriers.

We, at Jurisperitus believe in the principles of justice, morality and equity for all.

We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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INDEX

S No.	TITLE	Author(s)	Page
1	GLOBAL ANALYSIS OF WRONGFUL PROSECUTION	TATSAT BHATT	**1**
2	FAKE NEWS OF COVID-19	ALISHA SINGH & ABHAY KUMAR	**19**
3	A CRITICAL ANALYSIS OF SCHEDULED CASTES SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT 1989 AND THE SUPREME COURT JUDGMENTS	PALLABI PAUL	**25**
4	THE EXIGENCY OF A NOTABLE DISTINCTION BETWEEN SECTION 354 & 376 OF THE INDIAN PENAL CODE – A CASE ANALYSIS	SHREYALI YADAV	**41**
5	STRENGTHENED FAMILY BONDS VS. DOMESTIC CONFLICT AND VIOLENCEE DURING COVID-19	PRAPTI BHATTACHARYA	**46**
6	CASDAGLI V. CASDAGLI	SHARMEEN SHAIKH	**54**
7	A PROPOSAL: TO BALANCE THE FACTORS OF GENDER JUSTICE AND RELIGIOUS FREEDOM	AYUSHI VERMA	**59**
8	THE 4 WAY SPLIT OF 44 LAWS	ARJUN. A, PONMANI CHAKKARAVARTHY& ANULEKHA SRINIVASAN	**62**
9	A FOUCAULDIAN ANALYSIS OF THE NATURE OF AMERICAN PENAL ENFORCEMENT	ABHIJIT VADAVALLI	**73**
10	PREDATORY PRICING: LEGAL SCENARIO IN INDIA	LAHAMA MAZUMDAR	**80**

11	UNCONSTITUTIONALITY OF THE CITIZENSHIP AMENDMENT ACT	ESHA RATHI	**92**
12	LEGAL STATUS OF PROSTITUTION AND THE RIGHTS OF WOMEN: A CRITICAL ANALYSIS	SHUBHAM KUMAR THAKUR	**96**
13	COMPETITION LAW WITH REFERENCE TO PATENTING AND TRADE SECRETS IN PHARMACEUTICAL PRODUCTS	SHIVAM GUPTA	**108**
14	CRIME AGAINST WOMEN AND ITS IMPACT ON THEM	GAURAV GUPTA	**119**
15	NATIONALISM AND SOCIAL EXCLUSION: A CHRONICAL OF THE OUTSIDERS	SAKSHAM KHUNGER & SIMRANJOT KAUR	**135**
16	THE LAW RELATING TO EXPERTS AND SCIENTIFIC EVIDENCE : A BETTER WAY FORWARD	UPASANA BORAH	**146**
17	ROLE OF FORENSIC SCIENCE IN CRIME SCENE OCCURRENCE	UPASANA BORAH	**158**
18	MSMES AS A FORM OF BUSINESS	PRIYATAM BHARDWAJ	**170**
19	TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2ND ED.) BY RICHARD SUSSKIND	TRIVENI SINGAL	**183**
20	RAPE LAWS IN INDIA: AN ANALYSIS OF 2013 AND 2018 AMENDMENTS	DEEPIKA KANDA	**188**
21	PRIVACY RIGHT AND THREATS TO HUMAN SECURITY: LEADING TO PERSONAL DATA PROTECTION BILL 2019	BHAKTI VAKIL	**201**
22	STUDENT PROTESTS: IS IT A GODSEND OR ANATHEMA FOR STUDENTS	SHAURYA SHUKLA	**213**
23	CHINA & COVID – 19: AN INTERNATIONAL LAW STUDY	SIDDHANT NANODKAR & DIVYA TYAGI	**219**

24	GENDER PERSPECTIVES TO ELECTRICITY ACCESS IN INDIA: CRITICAL APPRAISAL OF LEGAL AND POLICY FRAMEWORK	AKASH SHUKLA	**230**
25	ADAPTION FROM CIVILIZED NATIONS: JULIAN J ROBINSON V. THE ATTORNEY GENERAL OF JAMAICA	SUYASH GAUR	**238**
26	MARITAL RAPE IN INDIA- A LOST BATTLE	NANDINI TRIPATHY	**247**
27	MEDICAL NEGLIGENCE AND LAW IN INDIA – AN ANALYSIS	NANDINI TRIPATHY	**260**
28	THE GRAND FALLACY: HOW COVID-19 HAS EXPANDED PUBLIC HEALTH LAW CONCERNS FOR India	MAHIMA MEHRA	**270**
29	ROLE OF CIVIC SOCITIES & NGOs IN ACHIEVING WOMEN EMPOWERMENT IN INDIA	S. SANKAR GANESH & A. TAMILARASI	**280**
30	LEGALIZING MERCY KILLING IN INDIA: PROS AND CONS	KAVLEEN KAUR KHURANA	**294**
31	CASTE-BASED VIOLENCE: PREDICAMENT OF LAWS OR EXECUTION	HARSHIT JAIN	**300**
32	MAJORITARIAN DEMOCRACY- THE DEMON FOR HUMAN RIGHTS	KRISHA KAMAL	**310**
33	PRODUCT LIABILITY OF MEDICAL DEVICES IN INDIA	SHUBHADA SONWALKER & MUSKAAN GARG	**318**
34	THE LONG WALK TO DECRIMINALIZATION OF HOMOSEXUALITY IN INDIA AND LGBTQ+ RIGHTS UNDER THE DIMENSION OF ARTICLE 21	BANDANA SAIKIA & HARSHITA JAIN	**329**

35	OFFENCES RELATING TO FALSE EVIDENCE, PUBLIC JUSTICE. (SECTIONS 197, 212, 213, 215-219, 221-223, 225 A)	ABHISHEK ANAND & SHEIKH INAM UL MANSOOR	**346**
36	VICTIM COMPENSATION AND REHABILITATION IN INDIA	DIVYANSH SINGH	**351**
37	INTERNET GAMING & ITS INTERFACE WITH INTELLECTUAL PROPERTY RIGHTS AND CENSORSHIP LAWS IN INDIA	MANU SHARMA	**369**
38	K. VEERASWAMI V. UNION OF INDIA AND OTHERS	NIKHIL TUPAKULA	**383**
39	ANTI-DEFECTION LAW: A FLAWLESS BRIDLEWAY TOWARDS POLITICAL INTEGRITY OR A CHIME TOWARDS POLITICAL DISSENT	SHANTANU SETH	**391**
40	INFRINGEMENT OF COPYRIGHT IN THE DRAMATIC WORKS	ANOOP KUMAR & RANJANA	**402**
41	IMPORTANCE OF INSOLVENCY AND BANKRUPTCY CODE AND THE EFFECT OF ITS SUSPENSION DUE TO COVID-19	NIKITA MITTU	**414**
42	AN IN-DEPTH ANALYSIS OF ARBITRATION IN INDIA WITH A SPECIAL REFERENCE TO THIRD PARTY FUNDING	VATSALA	**421**
43	APPEAL	MD. AFTAB	**434**
44	DEPENDENCY ON CYBERSPACE: A BOON OR A RISK?	SAHANAA SUDHAKAR	**444**
45	SIGNIFICANCE AND NEED OF TRANSPARENCY IN JUDICIAL APPOINTMENTS AND TRANSFERS	TUSHAR AGARWAL	**457**

46	ANALYSIS OF THE PERSONAL DATA PROTECTION BILL, 2019	AYESHA MAJID	**464**
47	IS MEDIATION A BETTER ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN INDIA?	PRATEEK MISHRA	**470**
48	CONSTITUTIONAL AMENDMENT PROCEDURE IN INDIA AND USA: A COMPARATIVE ANALYSIS	HEMENDRA SINGH	**480**
48	FREE LEGAL AID: A RIGHT OF ACCUSED NOT STATE'S CHARITY	BHAVYA GUPTA	**489**
49	RIGHTS OF ARRESTED PERSONS IN INDIA	TEJASI KULKARNI	**493**
50	OVERVIEW OF SHIP DISMANTLING INDUSTRY IN INDIA	APOORVA CHANDRACHUR	**501**
51	THE PM CARES FUND UNDER RTI: AN ANALYSIS	SANJOLI VERMA	**514**
52	THE CONSTITUTION WHICH SHOULD HAVE BEEN SUPREME- THE PLIGHT OF THE CHINESE PUBLIC	RAUNAK CHATURVEDI	**521**
53	THE MAHA (BIG)- JAN (PUBLIC) SCRUTINY	URMISHTHA JAGTAP	**527**
54	DOMESTIC VIOLENCE UNDER INDIAN ISLAMIC LAW	YOSHITA KUMAR & SHREYANSH LAKHTAKIA	**537**
55	THE STAGGERING DEFICIENCY IN THE ANTI-DOWRY LAWS	AKASH KRISHNAN & KUSHAGRA GAHOI	**548**
56	LEGALITY OF NARCO ANALYSIS TEST IN INDIA	DIVYANSHU GUPTA	**556**
57	REVISITING POLYGAMY: THE NEED FOR ACKNOWLEDGING THE RIGHTS OF MUSLIM WOMEN	SHUBHANGI KOMAL	**566**

58	JUDICIAL SEPARATION: HINDU AND MUSLIM PERSONAL LAW AND DIVORCE	CHHAVI SOMPURA	**578**
59	LIVE – IN – RELATIONSHIP: A BANE IN LONG RUN	SRISTI NIMODIA	**585**
60	SOCIAL IMPACTS OF DECRIMINALISING ADULTERY: AN ALTERNATIVE APPROACH	SAYAN DEY & ANUSHKA MANDAL	**594**
61	CRITICAL ANALYSIS OF THE DNA PROFILING BILL 2019 AND WHY IT IS FLAWED	SOWMYA M & S. YESESWINI	**600**
62	IMPACT OF CRYPTOCURRENCY ON CURRENCY COMPETITION	ANJALI GANDHI	**612**
63	INTERNET MEME LAW: THE NEED OF THE HOUR	ARPINDERDEEP SINGH.	**620**
64	THE UNBREAKABLE BARRIER OF DOMESTIC VIOLENCE	AYUSH RAJ & AISHWARYA SHANKAR	**632**
65	VAISHALI SATISH GANORKAR AND ANOTHER V. SATISH KESHAORAO GANORKAR AND OTHERS	ISHITA AGARWAL	**643**
66	COMBATING INDIA'S WEAK IP ECOSYSTEM	MADHUMIDHA VISWALINGAM	**651**
67	RULE OF CASTE: THE EVERYDAY LIFE OF A DALIT	ABHIKARAN DEO AGRAWAL	**660**
68	RESERVATION IN INDIA: THE AGE-OLD CASTE SYSTEM OR FACILITATING ACCESS TO DESERVED ONES	AFREEN ANSARI & ASHNA CHAUHAN	**668**
69	ORGAN TRAFFICKING – A GORDIAN KNOT	DEVADHARSHANI S. & POONGUZHALI R P.	**679**
70	LAW AND SOCIAL TRANSFORMATION: MADRAS DEVADASIS (PREVENTION OF	MALLIKA TEWARI	**693**

	DEDICATION) ACT, 1947 AND THE SOCIAL CHANGES IT FUELLED		
71	IMPACT OF RELIGION IN LAW MAKING	REHAN AHMAD & PRAKHAR AGRAHARI	**702**
72	DOMESTIC VIOLENCE: A BURGEONING MENACE IN TIME OF COVID-19 PANDEMIC	PALAK PANDEY & ANANT VIKRAM SINGH	**710**
73	VIOLATION OF ARTICLE 21 (RIGHT TO SPEEDY TRIAL) WITH SPECIAL REFERENCE TO MILITARY VETERANS (ESMs) AND THE ISSUANCE OF THEIR DISABILITY PENSION	DEEKSHITA DAS	**722**
74	A STUDY OF SURROGACY IN INDIA	DIKSHA GARG & ANDREW SALDANHA	**730**
75	THE CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 1977: A WAY TOWARDS REGIONAL COOPERATION ON TRANS-BOUNDARY WATER DISPUTES	ANSHU SINGH	**738**
76	AMATUER BUTCHER-WHAT COLOURS DO THEY REFLECT IN CONSTITUTIONAL SPECTRUM BEFORE PCA	MUKESH M.	**747**
77	ABORTION- THE DILEMMA OF RIGHT TO LIFE OF UNBORN OR THE WOMEN'S RIGHT?	SRISHTI GARG	**754**
78	FORCE MAJEURE IN THE TIME OF COVID-19	JYOTIKA & NANDITA MISHRA	**762**
79	RELEVANCY OF PRE AND POST CONTRACTUAL DEALINGS: MULTI-JURIDICAL ANALYSIS	SONU MEHTHA AND ADITYA SARANGARAJAN	**774**
80	ADOPTION IN INDIA – LEGAL PERSPECTIVE	S. SANKAR GANESH & S. MUTHU PRABA	**783**

81	CONSTITUTIONAL PERSPECTIVE ON ABORTION IN INDIA	ARTI CHAUHAN & GAURAV KUMAR ARYA	**799**
82	DEVELOPMENT OF AVIATION LAW IN NATIONAL AND GLOBAL DOMAIN	SIDRAH JAMI	**805**
83	DRUG LAWS IN INDIA – POLICIES AND PAPER	DEYASINI DAS & AHIR MITRA	**810**
84	DEVADASI SYSTEM AND ITs CURRENT LEGAL SITUATION IN SOUTH INDIA	AKSHITA AGARWAL & SOHAIL SEN	**821**
85	GLOBAL ADMINISTARTIVE LAW:- SEPARATION OF POWER AND GLOBAL ADMINISTRATIVE LAW	ASTHA GARG	**831**
86	AN ANALYSIS OF 115QA OF IT ACT: INCOME OF SHAREHOLDER OR COMPANY?	SOFIYA MHAISALE	**843**
87	DAM CONSTRUCTION: POTENTIAL SOCIO-ECONOMIC AND ECOLOGICAL POLICIES TO MITIGATE THE IMPACT OF DESTRUCTIVE DEVELOPMENTAL PROJECTS	TASHA BLUEWIN JOSEPH	**850**
88	BRAIN FINGERPRINTING TEST OR BRAIN MAPPING IN CRIMINAL INVESTIGATION	PRITHIVI RAJ & ANTRA PANDIT	**862**
89	AN OVERVIEW OF CITIZENSHIP AMENDMENT ACT 2019	MANISH JAISWAL	**876**

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ISSN: 2581-6349

GLOBAL ANALYSIS OF WRONGFUL PROSECUTION

- TATSAT BHATT

"Injustice anywhere is a threat to justice everywhere."[1]

While Dr. King was fighting for a greater cause for equality and justice for all, despite the strong criticism, he managed to spread a word out to his supporters giving a voice to all who were the victims of the injustice in the society. Non-violence was the biggest weapon he carried with himself.

I hereby pledge myself - my person and body - to the nonviolent movement. Therefore I will keep the following Ten Commandments: Meditate, Remember, Walk and Talk, Pray, Sacrifice, Observe, Seek, Refrain, Strive, and Follow.[2]

Sticking to the sense of injustice in the world, wrongful prosecution prevails as one of the most vital topics as we speak of Freedoms and Rights. Article 14 (6) of the International Covenant on Civil and Political Rights makes it required for nations to have a legal system for giving pay and restoration to the individuals who have been illegitimately indicted by the State. This arrangement, received by numerous nations over the world, comes from a straightforward, normal rule: If the State, in its presentation of sovereign capacities, has illegitimately removed the life or freedom of an individual, it needs to cure it.

The article 'Learning from Error in American Criminal Justice'[3] by James Doyle suggests that researchers look at wrongful convictions from the accident model, as in hospitals. The problems, however, that wrongful convictions are rarely recognized when they occur and typically are discovered years after the conviction (if at all). The research dilemma is this: even if governments could implement every reform on the agenda of the innocence paradigm, it would be exceedingly difficult to identify and track wrongful convictions.

Writing about the law governing evidence and trial procedure, Morgan served: Our system does not guarantee either the conviction of the guilty or the acquittal of the innocent. Certain

[1] Letter from Birmingham [King Jr.], https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (accessed 17.20 IST, 28 May, 2020)
[2] King, Why We Can't Wait, 69
[3] Doyle, James, ―Learning From Error in American Criminal Justice, ‖ The Journal of Criminal Law & Criminology 100 (January 2010): 109.

safeguards are erected which make it more difficult to convict the innocent than to acquit the guilty, but all that our system guarantees is a fair trial. It is a price which every member of a civilized community must pay for the erection and maintenance of machinery for administering justice that he may become the victim of its imperfect functioning. (p. 220)[4]

The tort of malicious prosecution has deep roots in English legal history, as English courts were concerned with the improper use of judicial proceedings as early as the tenth century.[5] The tort developed through the ages as a mechanism to provide those who were wronged by an abuse of the criminal process with a remedy against the abuser. Today, while the specific elements of malicious prosecution slightly differ from state to state, there are four core elements to the claim. The plaintiff must show (1) that the defendant initiated or procured a criminal proceeding against the plaintiff; (2) that the proceeding terminated in the plaintiffs favor; (3) that there was no probable cause to support the defendant's charges; and (4) that the proceeding was instituted primarily for a purpose other than to bring an offender to justice.[6] To make matters slightly more complex, malicious prosecution is probably best understood as one tort in a family of torts that work to ensure the proper use of judicial proceedings. In addition to malicious prosecution which applies to criminal proceedings[7] there is a separate tort that applies to civil proceedings, and its somewhat unimaginative title is the wrongful use of civil proceedings.[8] The elements for this tort track the elements for malicious prosecution. The plaintiff must show that (1) the defendant initiated or procured civil proceedings against the plaintiff; (2) that the defendant acted without probable cause; (3) that the proceedings were initiated primarily for a purpose other than to secure the proper adjudication of a claim; and (4) that except in ex parte proceedings, the matter terminated in the plaintiff's favor.[9]

Police Investigations

In the Netherlands, measures have been executed to diminish unjust feelings. One measure originates from the Anglo-Saxon framework. The Dutch Government attempted to incorporate adversariality with its inquisitorial framework inside the two its police power and its open examiner's office. Having seen that limited focus was one of the fundamental issues, it changed its everyday practice. One new measure utilized was the trying of various speculations and hypotheses. All degrees of police and examiners, administrators notwithstanding, became

[4] Rattner, Arye. "Convicted but Innocent: Wrongful Conviction and the Criminal Justice System." *Law and Human Behavior*, vol. 12, no. 3, 1988, pp. 283–293. *JSTOR*, www.jstor.org/stable/1393679. Accessed 29 May 2020.
[5] John T. Ryan, Jr., Note, Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?, 64 Geo. Wash. L. R
[6] See Restatement (Second) of Torts § 653 (1977)
[7] Id. §§ 653, 654
[8] Id. § 674
[9] Id

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accustomed to having their thoughts challenged with these elective speculations and hypotheses. This had never been done in the Netherlands, and they feel that it makes their cases more grounded.

The Netherlands additionally permits the defense lawyer to approach open case documents and cross examinations, just as access to the examiner's case before the preliminary to guarantee straightforwardness in arraignment and police strategies for examination and cross examinations. In the Netherlands criminal justice framework, the investigator is the one in control, yet the police complete examinations, so a third significant measure was to build up an assistance level understanding among indictment and police so they will comply with specific rules and gauges. At last, inside the police power, the Netherlands have increasingly concentrated specialists working with police in groups. These specific wrongdoing investigators work with the police to create hypotheses of the case as opposed to simply test police proof from the police.

In the United States of America there are two levels of proof: (1) probable cause and (2) beyond a reasonable doubt. In the United States of America criminal justice system, there are a series of filters in place. A patrol officer picks up a case and follows all the procedures similar to what people see on TV. If charges are filed, the information goes to the prosecutor. Then a defense team comes in. Then there is the trial, jury and judge. These are all filters. Then the United States of America has courts of appeals, the Supreme Court, and post conviction commissions. One participant asked how wrongful convictions cases in the United States of America make it through all these filters.[10]

Now, since them being just the initial filters, once facts get into the court record, the filters are not effective because the facts are not questioned later on in the process. The lack of filters later on in the judicial process, such as questioning factual information, puts more pressure on law enforcement earlier on in the process. It can be sensed that some type of recording, especially video recordings, of the eyewitness procedures may help improve the system by providing a record of the procedure.

It can be very well recognized that in the clinical world people definitely realize what turns out badly, and it is accounted for, including the close to misses, as an issue of schedule, by associations, for example, the Joint Commission on Accreditation of Healthcare Organizations (presently known as The Joint Commission or TJC), a non-benefit association that authorizes human services associations, including hospitals[11]. The NTSB likewise runs a close miss report

[10] International Perspectives on Wrongful Convictions, National Institute of Justice (NCJ 234631)
[11] For more information on the TJC, see www.jointcomission.org

program. The National Transportation Safety Board (NTSB)[12] conducts autonomous examinations of common flying mishaps (just as other significant transportation mishaps). NTSB's examinations are directed by Go Teams. These groups are made out of as meagre as three or upwards of at least twelve agents appointed on a rotational premise. These examiners are every master answerable for an unmistakable part of the examination, and each coordinates a working gathering dependent on their skill, which goes about as a subcommittee of the examination. These working gatherings are staffed by agents of the gatherings to the examination.

The Indian justice system works on the principle of, "*Fīat jūstitia ruat cœlum*"[13]. In spite of this, occurrences of malicious prosecution[14]/ conviction and improper detainment of honest people are very normal. In every such case, people who are unjustly arraigned, ensnared and imprisoned for a few valuable long stretches of their lives, even on a decent absolution, have very little to pick up. Other than being compelled to live under social shame, absence[15] of legal arrangements or state systems accommodating rehabilitative, helpful and compensatory measures to such casualties and their relatives (who endure similarly), irritates their distress. Courts in India have regularly communicated their interests on the pitiable states of the under trial detainees and in proper cases, to a degree, made up for an inappropriate done to such casualties of vindictive and unjust indictment, confinement and conviction.

Nonetheless, there is no uniform instrument which guarantees cure in every single such incidence of "miscarriage of justice"[16].

As per the Law Commission of India, the standard of miscarriage of justice provided under Article 14(6) of the ICCPR is insufficient to overcome the shortcoming of the criminal justice system in India. Law Commission has acknowledged that such limited definition[17] would fail

[12] For more information on the NTSB, see http://www.ntsb.gov/abt_ntsb/invest.htm
[13] Legal Maxim meaning, *"Let justice be done though the heavens fall."*
[14] Hon'ble Bombay High Court in *Dhanjishaw Rattanji v. Bombay Municipality, AIR 1945 Bom. 320* has held, *"To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question..."*
[15] *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi, 247 (2018) DLT 31*, Hon'ble High Court of Delhi has observed, *"There is at present in our country no statutory of legal scheme for compensating those who are wrongfully incarcerated..."*
[16] Hon'ble Bombay High Court in *Bibhabati Devi v. Ramendra Narayan Roy, (1947) 49 BOMLR 246* has held, *"...That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect?"*
[17] As per Article 14(6) ICCPR, standard of miscarriage of justice is invoked only when a new fact establishes factual innocence of the victim after a final conviction order by the final appellate court and after all avenues of appeal have been exhausted.

to cater to all situations. Commission opined that a situation where, though, the victim is finally acquitted, however, had to undergo illegal and wrongful detention, torture in police custody, long incarceration, etc. is not covered under the limited parameters provided under this Article. Law Commission has further acknowledged that limited technical advancement and lack of zeal of investigative agencies hardly leaves any scope of discovery of *"new facts proving factual innocence of the convict"*. At the same time, as per the Law Commission, if the standard of miscarriage of justice is set as long period of incarceration, it would leave out cases where the victim may not be in prison during his period of prosecution (being released on bail), however, suffered on account of such wrongful prosecution, prolonged trial, social stigma, loss of employment, etc. Therefore, the Law Commission has proposed that the standard to determine "miscarriage of justice" in India should be of wrongful prosecution[18]. As per the Law Commission,

"the standard of wrongful prosecution should be the most effective for identifying the cases of miscarriage of justice as it directly targets procedural and prosecutorial misconduct, which appears to be one of the primary sources of factual errors that results in innocent people being held guilty of offences they did not commit."[19]

It is hard to take out the erroneously sentenced from the criminal system completely. A procedure of law that never got a guiltless in it's probably be restricted to the point that it would get not many of the liable also. Prejudiced justices are subsequently inescapable in a criminal justice framework, ought to have the option to comprehend why the framework as built prompts and decrease further a portion of the causes.

Causes of Wrongful prosecution

In 1998, the Pittsburgh Post Gazette summed up its investigative reports of prosecutorial misconduct as follows:

hundreds of times during the past 10 years, federal agents and prosecutors have pursued justice by breaking the law. They lied, hid evidence, distorted facts, engaged in cover-ups, paid for perjury and set-up innocent people in a relentless effort to win indictments, guilty pleas and convictions. Rarely were these federal officials punished for their misconduct. . . . Perjury has

[18] *"...Since the qualifying threshold of this standard is wrongful prosecution, it would include both the cases where the person spent time in prison as well as where he did not; and cases where the accused was adjudged innocent by the trial court or where the accused was convicted by one or more courts but was ultimately found to be not guilty."* (**Para 5.13** of the Law Commission's 277 Report).

[19] India: Wrongful Prosecution-Victim's Rights And State's Obligations, Sanjeev Kumar & Abhishek Goyal, February, 2019, https://mondaq.com/india/Litigation-Mediation-Arbitration/777794/Wrongful-Prosecution-Victim39s-Rights-And-State39s-Obligations

become the coin of the realm in federal law enforcement. People's homes are invaded because of lies. People are arrested because of lies. People go to prison because of lies. People stay in prison because of lies, and bad guys go free because of lies. (Moushey 1998, 40)[20]

A new practice known as "jumping on the bus" has taken the prosecutorial ethic to the rock-bottom depth. Informants sell information on unsolved cases to an inmate, or prosecutors and federal agents feed this material to an inmate. The inmate memorizes the case, thereby seeming to have inside knowledge when he comes forward with information to trade in exchange for a reduced sentence. In the absence of evidence, this practice is used sometimes against a person only believed to be guilty. Sometimes it is used to close unsolved cases, and sometimes it occurs at an inmate's initiative. Formerly, self serving accusations by criminals were treated only as leads to be investigated. If the leads proved helpful, evidence still had to be marshalled. Today the accusation is the evidence. Thus, the criminal element itself has a big say in who goes to prison.[21]

Each law, guideline, or change has unintended outcomes. A case can be made that the exclusionary rule changed the way of life of the criminal equity framework and prompted the forced request deal. By discharging crooks known to be liable, the exclusionary rule transformed the criminal equity framework into a lottery for police, professional and lawbreakers the same. The outcome was dampened examiners who started to find in the supplication deal an approach to game the framework back toward conviction. The unintended result of the exclusionary rule was social change. The criminal equity framework de-accentuated quest for reality and concentrated on sentencing the litigant.

When we comprehend that the law has been lost, it is straightforward why there are blameless people waiting for capital punishment. As significant all things considered to get these honest people off death row, new survivors of the framework can be put there quicker than guiltlessness ventures can save them. Besides, the distraction with capital offenses and with cases in which DNA proof can resolve the uncertainty about blamelessness leaves most by far of unjustly indicted people without a prayer.

In the United States Of America Department of Justice-funded study of victim experiences of wrongful convictions[22] the authors quote one victim, "For [several] years, I had been quite comfortable with my role as the victim. When the exoneration happens, that exoneree becomes

[20] Roberts, Paul Craig. "The Causes of Wrongful Conviction." *The Independent Review*, vol. 7, no. 4, 2003, pp. 567–574. *JSTOR*, www.jstor.org/stable/24562560 Accessed 29 May 2020.
[21] ibid
[22] ICF Incorporated, Study of Victim Experiences of Wrongful Conviction, Acknowledgments (2013), at iv https://www.ncjrs.gov/pdffilesl/nij/grants/244084.pdf

the victim, and I, the rape victim, become the offender. The roles switch, and it's a role you don't know what to do with."[23]

Another victim said that when she learned the wrong person had been convicted of assaulting her, "I was a mess. I was absolutely hysterical [and] distraught. This was way worse than being attacked. This was horrible because … now I was a perpetrator."[24]

Wrongful convictions can be hideously expensive, squandering resources that could be better devoted to serving the needs of crime victims.[25] The State of Illinois spent hundreds of thousands of dollars to compensate the men for the time spent in custody when they were, in fact, innocent. For instance, a seven-month joint investigation by the Better Government Association and the Centre on Wrongful Convictions, tracking the cost of wrongful convictions between 1989 and 2010, found that those costs totaled $214 million.[26] Nearly three-fourths of this sum comes from settlement awards and judgments (often taxpayer dollars); however, incarceration costs, court of claims costs, and lawyer fees are also included in this total. Wrongful convictions in California within about the same time period cost approximately $129 million.[27]

While in India, The Law Commission of India had suggested the standard of 'wrongful prosecution' be applied in India. This standard will be applicable to cases where the police or prosecution maliciously, falsely or negligently investigated or prosecuted a person who was found not guilty of the crime. While stating that India must fulfil its international commitments, the Commission recommended certain specific amendments in the Code of Criminal Procedure (CrPC), 1973 in order to incorporate the provisions for compensation. The Commission even presented a draft amendment bill for the CrPC. However, Parliament has not paid any heed to the observations and recommendations of the Law Commission to date.

Moreover, as a result of lack of financial resources and knowledge about Supreme Court judgments, many individuals may not even think of directly approaching the Supreme Court to seek compensation. A statutory right to compensation will provide a legal remedy to the

[23] Id at v
[24] Id at 44
[25] BISHOP, JEANNE, and MARK OSLER. "PROSECUTORS AND VICTIMS: WHY WRONGFUL CONVICTIONS MATTER." *The Journal of Criminal Law and Criminology (1973-)*, vol. 105, no. 4, 2015, pp. 1045. *JSTOR*, www.jstor.org/stable/26402743. Accessed 30 May 2020.
[26] John Conroy & Rob Warden, A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied, BetterGov.Org (June 18, 2011), http://www.bettergov.org/investigations/wrongful convictionsl.aspx
[27] Cal. Innocence Project, Wrongful convictions have cost California taxpayers $129 million, https://californiainnocenceproject.org/2012/10/wrongful-convictions-have-cost-ca-taxpayers-129-million/ (last visited May 29, 2020).

citizens and will subsequently make the state officials, in particular, the police, institutionally liable.[28]

Unlawful arrests and confinement cause loss of years, yet can likewise make social disgrace and ostracisation significantly in the wake of being discharged. This is obvious from incredible story by people who have been casualties of bogus arraignments. For example, in her book Prisoner No. 100[29], political extremist Anjum Zamarud Habib describes her encounters of having gone through five years in prison before being discharged by the Delhi High Court. Anjum writes in her book, "I am a free individual today yet the injuries and scars that prison has exacted on me are troublesome, yet difficult to mend".

In various decisions, the Supreme Court of India has perceived giving of remuneration as an essential open law solution for infringement of fundamental rights, including improper detainment and captures. For example, the Supreme Court, a year ago, gave a pay of 50 lakhs to previous ISRO researcher Nambi Narayanan, 24 years after he was wrongfully confined on the charge of releasing authority insider facts to a government operative racket.

The way that the instalment of remuneration was requested 24 years after the improper capture is a genuine token of the need to address wrongs brought about by unlawful captures in an opportune way and to save freedom. This calls for legal acknowledgment of the privilege to pay in instances of illegitimate captures and detainment, which the casualties of such allegations can benefit without sitting tight for an additional quite a while of case under the watchful eye of the courts.[30]

Miscarriages of justice extend beyond criminal cases; there are forms of wrongful imprisonment (such as unlawful detention without trial) that do not result from a wrongful conviction; and wrongful conviction does not necessarily lead to imprisonment. In addition, wrongful conviction can be understood in a narrow and strict sense of established innocence or in the broader senses of a conviction that has been wrongly obtained or that has been overturned for any reason.[31]

The criterion applied by the Court of Appeal in England and Wales in quashing a conviction, for example, is that it is "unsafe" (Sec. 2[1][a] Criminal Appeal Act 1995). In practice, this

[28] Jailed for years: Why India needs a right to compensation for wrongful arrests & detention, Anurag Bhaskar, July 2019 https://theprint.in/opinion/jailed-for-years-why-india-needs-a-right-to-compensation-for-wrongful-arrests-detention/260336/

[29] Prisoner No.100: An Account of My Nights and Days in an Indian Prison, Anjum Zamarud Habib

[30] Supra note 28.

[31] Grounds, Adrian T. "Understanding the Effects of Wrongful Imprisonment." *Crime and Justice*, vol. 32, 2005, pp.2. *JSTOR*, www.jstor.org/stable/3488358 Accessed 30 May 2020.

may be because of fresh evidence that in the view of the appeal court could have resulted in a not guilty verdict if it had been known to the trial jury. The North American surveys cited above (Borchard 1932; Radelet, Bedau, and Putnam 1992; Huff, Rattner, and Sagarin 1996; Anderson and Anderson 1998) focus on cases in which they are satisfied that innocence is established beyond reasonable doubt, that is, on "factual innocence." Huff, Rattner, and Sagarin (1996) acknowledge that this excludes a number of important groups, including those who have been unjustly held for long periods before trial and then exonerated, and those for whom there remains substantial doubt about their guilt but their innocence is not yet proven.[32]

Despite the recognition that miscarriages of justice may be quite numerous, there is a lack of empirical research on the psychological effects of wrongful conviction and imprisonment. Simon (1993) out- lined the immediate and longer-term psychological features that may follow false arrest and detention, noting that the experience can be a traumatic psychological stressor. However, there have not been systematic psychiatric or psychological studies of samples of individuals released after wrongful conviction.[33]

For example, in the New York Times Magazine of December 10, 2000, an article by Sara Rimer and Taryn Simon, "Life after Death Row,[34]" featured interviews with six men exonerated and released while awaiting execution. Their accounts of permanent dislocation in time, and inability to recover their previous lives, or free themselves from the experience of prison, vividly echo those given by the men in this study. For example:

Life is sort of messed up right now. I feel like I'm in prison right now. My wife would ask me: "Where are you going? When are you going to be home?" It was like she was the warden. Chronologically, I'm thirty-seven; psychologically and most of the time I'm older than that. But sometimes, like when I go out, I'm only twenty-five years old-I didn't lose those twelve years; they took those years. My point of view is that when you have time like that taken from you and come back into society, what is so called normal society, you tend to automatically go back to that age you left behind. You're living at that age again, you're catching up to the world. It's like life has stopped. (Rolando Cruz, Illinois, convicted 1985, released 1995; Rimer and Simon 2000, p. 104) Every day there are times when I feel like I'm in prison again. I have flashbacks. Sometimes I feel like I'm in prison for hours at a time. I know I'm not, but I can't stop feeling

[32] Ibid at 9
[33] Ibid at 11
[34] Sara Simmer, Life after Death Row, https://www.nytimes.com/2000/12/10/magazine/life-after-death-row.html (Accessed on May 29, 2020)

like I'm in prison. I'm not sure I still want to live, but I'm not suicidal. (Ronald Williamson, Oklahoma, convicted 1988, released 1999; Rimer and Simon 2000, p. 107)[35]

The most important task for an innocent person to valuate his life with money on deprivation of his liberty. One may accept the remuneration awarded but that can never fill up the lost years of his life to struggle to prove innocence. The Justice system in criminology demands a high time reform that can help save innocent lives.

When 13-year-old Aarushi Talwar[36] was found dead with her throat slit in her bedroom in Noida, India on May 16, 2008, authorities immediately turned to her parents for answers. And because suicide by throat-cutting is rare, police were certain they were dealing with a homicide. At first, the primary suspect was 45 year old Hemraj Banjade, who was hired help at Rajesh and Nupur Talwar's home, that is, until he too was found dead just one day after Aarushi Talwar. His body was found partially decomposed on the terrace of the Talwar home.

With two murders now on their hands, the authorities began to bungle the investigation, including by not securing the crime scene after Aarushi Talwar's death and for allowing the media and a curious public alike to venture into the home hours after the murder. Nevertheless, the investigation quickly found its target, those with the most access and potential motive for the two killings, Talwar's parents themselves.

The Allahabad High Court overturned the CBI's court judgment in 2017 due to a lack of direct evidence. There were no eyewitnesses, said the judges. The CBI had also failed to provide a strong motive, in their opinion. The judges also noted that the Supreme Court has previously established that if there's no direct evidence, reasonable doubt should override suspicion.

It took four years, but the parents did manage to get acquitted on Oct. 12, 2017 and have remained free ever since. The case remains legally unsolved and the family points fingers at the CBI, local police, and the media for ruining an investigation that should've resulted in their daughter's murderer being identified.

The CBI was not content with this decision. Former CBI Director AP Singh, particularly, felt his bureau had been dealing with a highly manipulated environment and scarce opportunities for evidence.

"Only weakness we found [with our investigation] was that scene of [the] crime had been badly tampered [with] on the first day itself," said Singh. "As a result, after that, we got nothing of value from the scene of the crime. That was the major lacuna in the entire investigation."

[35] Supra note 31 at 12.
[36] *Nupur Talwar v. CBI* (2012) 11 SCC 465

ISSN: 2581-6349

It was Singh himself who famously stated in court that though they lacked enough evidence, the CBI believed the parents were involved. When he wanted to close the case, the court didn't allow it and instead ordered the Talwars to stand trial on charges of murder.[37]

With reference to the above case in India, the Talwar parents spent 4 years in jail and were finally acquitted. The main issue that is to be looked upon is the societal acceptance and the self-respect and dignity they lost in the 4 years in jail.

Even if we keep aside the time, the problem that exists is would they ever be able to normalize with the fact that after losing their own daughter, spending years for innocence, how will they earn their livelihood and will society accept them? The society plays an important role, as even today, acquitted are looked upon with a prejudiced lens of shame.

False and Lost Confessions of Witnesses

Safeguarding the innocent, the investigation can't concentrate only on bogus admissions. The innocent are in danger not just when police extricate untruthful admissions the bogus admission issue yet additionally when police fail to acquire honest admissions from hoodlums, the lost admission issue. The lost admission issue emerges in light of the fact that limitations on cross examinations can decrease the quantity of admissions police get, which will thus keep police from understanding wrongdoings.

Likewise, honest admissions ensure the innocent by helping the criminal justice framework separate a blameworthy suspect from the perhaps guiltless ones, while the inability to acquire an honest admission makes a danger of mix-up. Lost admissions can likewise make hurt a blameless who has been incorrectly charged. The inability to acquire an admission from the genuine culprit can deny proof expected to forestall an unjust conviction or to absolve an honest individual who has just been improperly sentenced.

Blackstone's adage that ten guilty should go free rather than one innocent be convicted"[38] remains true today. But Blackstone's adage also re- minds us that the acceptable trade offs are not unlimited. In evaluating an interrogation regime, the risk to innocents from inadequate crime control must also be assessed.

[37] Inside The Still-Unsolved Murder Of 13-Year-Old Aarushi Talwar By Marco Margaritoff July, 2019 https://allthatsinteresting.com/aarushi-talwar

[38] WILLIAM BLACKSTONE, COMMENTARIES *358; accord William O. Douglas, Foreword to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11 (1957); see also Scott E. Sundby, The Reasonable Doubt Rule and the Meaning of Innocence, 40 HASTINGS L.J. 457, 458-59 (1989); see generally Alexander Volokh, n Guilty Men, 146 U. PA. L. REV. 173 (1997) (humorously reviewing the state of Blackstone's adage today)

With these competing risks in mind, we are in a position to evaluate reforms designed to protect the innocent by reducing false confessions. The normative force of these recommendations depends on proof that the benefits from reducing false confessions are not outweighed by the competing risks to the innocent from lost confessions and lost convictions. To be sure, it is possible that a change might produce such a substantial drop in false confessions as to be desirable. But it also is possible that a change might produce such a substantial drop in truthful confessions as to pose a greater risk to the innocent.

This is an empirical or "numbers" issue that cannot be resolved by a theoretical reasoning. The only way to make an on-balance determination is through some sort of rough quantification of the relative dimensions of the various phenomena and the trade-offs among them.[39]

Legal scholars have devoted significant scholarly attention to explaining why prosecutors reject post conviction evidence of innocence. Indeed, some prosecutors have appealed post conviction defense motions exhaustively even in the face of forensic evidence of innocence rather than acknowledge a factual error.

In most states, after a brief window when defendants can file for a new trial, new evidence of innocence will not be considered until defendants have completed their direct appeal and entered the post conviction stage[40]. This process can take years, meaning that only those serving lengthy prison sentences can avail themselves of the remedy.[41] In addition, most states do not provide indigent defendants with an attorney in the post conviction stage.

Procedural flaws and loopholes can also lead to an unjust prosecution allowing the actual culprit fall out from the hands of law. The legislation while drafting a statute must be aware of all future flaw possibilities and should draft in a way that can prevent a culprit taking benefits out of them.

In spite of the fact that it is far fetched that enactment will be so wide as to envelop all improperly sentenced people, I agree that means ought to be taken to establish resolutions to repay those unjustly indicted for misfortune for freedom and partition from family; harm to notoriety; costs and expenses brought about in safeguarding himself; and different harms

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[39] Cassell, Paul G. "Protecting the Innocent from False Confessions and Lost Confessions: And from 'Miranda.'" *The Journal of Criminal Law and Criminology (1973-)*, vol. 88, no. 2, 1998, pp. 500. *JSTOR*, www.jstor.org/stable/1144289 Accessed 30 May 2020.

[40] See Daniel Medwed, Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts, 47 ARIZ. L. REV. 655, 676 (2005) ("First, many time limits governing motions for a new trial on the grounds of newly discovered evidence are remarkably brief. As a result, these remedies are of limited utility to the bulk of criminal defendants who, in the immediate aftermath of their convictions, might not have the resources or the good fortune to find new evidence.").

[41] See Nancy J. King, Judicial Review: Appeals and Postconviction Proceedings, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 217 (Allison D. Redlich et al. eds., 2014) at 220 (reporting that the mean custodial sentence for state felony offenders is three years, "barely long enough to complete the appellate process").

legitimately identified with detainment. Aside from the execution of these approach suggestions, increasingly point by point examinations ought to be embraced in cases like those that have been gathered for this information document.

Further investigations of this sort may assist with pin pointing highlights of the framework that produce mistakes and build up the methods for managing the issue unfair conviction, and to comprehend the manners by which our criminal justice framework can arrive at a point past which, as Sophocles reminds us in Electra, "even justice becomes unjust."

CONCLUSION

Each law, guideline, or change has unintended results. A case can be made that the exclusionary rule changed the way of life of the criminal equity framework and prompted the constrained request deal. By discharging crooks known to be blameworthy, the exclusionary rule transformed the criminal justice framework into a lottery for police, investigators and lawbreakers the same.

To make a scratch in unjust conviction, we should reexamine the methodology. Innocence ventures and law teachers who discover foul play a load on the inner voice work to restore the teaching of the ethic in graduate school, an ethic communicated by George Sutherland (Berger v. U.S. 1935) and Robert Jackson that the examiner's obligation is to see that equity is done, not to win feelings. Law schools can be conveyed, so can the bar affiliation and the news coverage. Tales about improper indictment should turn into a media need.

Law schools must plan also with the Benthamite impacts that have dissolved the "Privileges of People" and have made law a weapon in the hands of government. On the off chance that Benthamite cooperation, supported by deconstructionism and social Marxism, has subverted the lawful rules that shield people from government power, there is no hope about unfair conviction until the Blackstonian standards are reestablished. Progress against improper conviction likewise requires an arrival to constitutionalism. To numerous attorneys, "established protection" signifies the conceding of ensured minority status by a judge. The issue of unjust conviction is a lot bigger than a large number of its foes appreciate. We will waste our time consuming immense energies in liberating a couple of innocent individuals, and we should do what we can. In any case, we likewise should brace for the fight to come and lost law. Once the "Rights of People" are not, at this point even a memory, equity will be gone too. Thus, understanding the importance of reforms and implementation of the same is required to decline the cause of wrongful prosecution. Again, memorizing King Jr., "*Injustice anywhere is*

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a threat to Justice everywhere" can be dealt effectively with proper interpretation of law and the Justice will prevail above all the criticism and suffering reinstating trust in Justice.

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FAKE NEWS OF COVID-19

- ALISHA SINGH & ABHAY KUMAR

Introduction[42]

A new term, 'fake news' has evolved rapidly. Fake news is not a new phenomenon to deliberate presentation of the false or misleading claims as news. New technologies, come up from the telegraph in the 19th century to contemporary social media algorithms, have lead to fake news proliferation. The phrase 'by design' here refers to systemic features of the design of the sources and channels by which fake news propagates in too much in the 19th century. In the Arena journal, entitled "An important phase of gutter journalism: Faking", in order to outline the challenges of fake news in the 19th century. The aim of fake news is to only manipulate the people by exploiting their sentiments, whether news is constructed or dismissed (Gelfert 2018). Social media distribute fake news effectively at a quick speed by using the Facebook, WhatsApp, through News Channels etc... in the 21st century.

History[43]

In the history there are lots of examples of false news. Firstly it was used by the Nazi to create a new propaganda machines or technique to build anti-Semitic fervor. It played the most important role in catalyzing the Enlightenment, when the Catholic Church was introduced the false explanation of the 1755 Lisbon Earthquake only for the prompted Voltaire to speak out against religious dominance. In the 1800s in the US, US were racist sentiment led to the publication of false stories about African Americans' supposed deficiencies and crimes.

In the 1890s, Joseph Pulitzer and William Hearst newspaper publishers come up with competed audience through sensationalism reporting rumors as though they were introduced facts, a practice that became known at the time as "yellow journalism". Spanish-American War of 1898, the news was played a leading role to their incredulous news in the US. After that there was a backlash against the lack of journalistic integrity and the public demanded more objective and reliable news sources or authenticable date. Which created a niche that the The New York

[42] Cherilyn Ireton & Julie Posetti, 'Journalism, 'Fake News' & Disinformation', *United Nations Educational, Scientific and Cultural Organization,* 6 march 2018 https://en.unesco.org/sites/default/files/journalism_fake_news_disinformation_print_friendly_0.pdf [accessed on 15 April 2020]

[43] Mike Wendling, 'The (almost) complete history of 'fake news', *BBC Trending,* 22 January 2018 https://www.bbc.com/news/blogs-trending-42724320 [accessed on 15 April 2020]

Times was established to fill at the turn of the 20th century that Yellow journalism became less common.

the fake news has also been used as a term to try to discredit news stories that individuals (particularly President Trump) don't like, in order to suggest that they were introduced the true information or that they blow out of proportion something that should be trivial (even if other sources can verify their factual accuracy). In the conversation with Lou Dobbs of Fox Business in October, 2017, President Trump claimed that he had "really started this whole 'fake news' thing." Ironically, Hillary Clinton used the term in a speech she made two days before Trump's first use of the phrase. Although Donald Trump may have appropriated the term in a whole new way, the term itself has been in use for many years. The first documented uses of the term occurred in the 1890s, according to Merriam Webster.

IMPACTS OF FAKE NEWS

Major impacts [44]

You will be understood till now what is fake news? And the other type of false information can be taken on different faces that they can also have major impacts, because the right and wrong information to make shapes our worldview that we can make important decisions based on information. On the bases of information we form an idea about people or a situation by obtaining information. The information we saw on the Web is invented, false, exaggerated or distorted, even we won't make good decisions. For examples of impacts, let's return to some of the examples presented earlier.

False news always target specific individuals can have major consequences. It is now known as the false information played a major role in the last American presidential election. These individuals may be harassed on social media like facebook and whatsapp, and targeted by insults and threats that sometimes have real-life impacts, as we have seen with what happened in India and Mexico. This is only the reasons why the media has spoken so much about the fake news phenomenon; because this is an important democratic issue. You must understand on non-validated information circulating on social media to decide that a person is guilty. In a short period of time the impacts are very real and we must avoid sharing fake news.

[44] Sanjana Varghese, 'A huge study into the impact of fake news has surprising results' BBC News 22 January 2018
https://www.wired.co.uk/article/twitter-misinformation-social-media-election-fake-news [accessed on 16 April 2020]

The most powerful weapon in history is around the corner as "false-news or fake news". In the false and fake news the media industry has only a short time to get ahead of it. In the fake or false news technology plays the important role its current advance, we may soon face totally convincing videos showing events that never happened — so it was created effectively that even experts will have trouble proving they're fakes[45].

In fake news new term introduced as "Deep fake". It means that "Deep fake" video will be able to show people saying, with the authentic ring of their own voices, things they never said. It will show them doing things they never did, by melding their images with other video or creating new images of them from scratch. At a political scenario, deftly constructed video could show a political leader advocating or demanding for the reverse of what she stands for, or portray bloody events that never happened. It could trigger riots, swing elections, negativity in the society and created of the panic and despair situations among the society[46].

While fact-checks provide a reliable way to identify timely pieces of misinformation, fact-checkers cannot address every piece of misinformation and their professional work necessarily involves various selection biases as they focus scare resources (Graves 2016). Fact-checkers also have limited access to misinformation spreading in private channels, by email, in closed groups, and via messaging apps (and in offline conversations). Similarly, engagement data for social media posts analysed here is only indicative of wider engagement with and exposure to misinformation which can spread in many different ways, both online and offline. In many cases, it is likely that claims were repeated and spread by many accounts across platforms not included in these data. Thus, the analysis is neither comprehensive (we do not systematically examine misinformation in search, via photo-sharing platforms and messaging applications, or sites like Reddit, or for that matter via news media or government communications), nor is it exhaustive (we look only at a sample of English-language factchecks). We still believe it takes a step towards better understanding the scale and scope of the problems we face. Below, we present five findings that describe the makeup and circulation of misinformation about COVID-19 based on our content analysis, finalised by 31 March.

Some basic points

People are more inclined to believe and share information when the message is clear and simple, when they trust the source of the message and the channel through which it was

[45] Nicas, J, *Alex Jones Said Bans Would Strengthen Him. He Was Wrong*, The New York Times, (2018, September 4).
https://www.nytimes.com/2018/09/04/technology/alex-jones-infowars-banstraffic.html
[46] Feuer, A,m *The Ebola Conspiracy Theories*, The New York Times, 2014, October 18
https://www.nytimes.com/2014/10/19/sunday-review/the-ebola-conspiracy-theories.html

conveyed, when the message aligns to their pre-held beliefs, and when the message resonates with them emotionally (e.g., drawing on humour, fear or disgust); text heavy messages do not hold people's attention in the same way as emotional content. People have a greater level of assurance and trust in consistent information which they see featured on multiple sources, whatever those sources may be. The same is also true of mis- and disinformation which can gain traction and credibility as they circulate.

• If mis- and disinformation are not addressed as they arise, they can proliferate. Identifying and directly addressing false information and rapidly debunking 'rumours' can be very effective and create space for reliable and relevant information to circulate. Rumours often reflect underlying anxieties or pre-held social or political positions and beliefs; it is important to address their underlying causes. Communications that are solution-focused, promote a sense of self-efficacy, hope and agency, whilst building on existing resources and strengths can help mitigate fear and foster compliance with public health recommendations.

• In rapidly evolving situations such as health emergencies, it is acceptable for official sources to acknowledge that there are unknowns and to reassure the public that they will convey new information when it emerges. This transparent approach challenges people who circulate information that is not supported by evidence.

• Trust is also generated by when two-way dialogue is enabled. Accessible channels must allow people to ask questions, the answers to which are reflected in the information being shared. In this way, people are provided with pertinent information and see their realities and concerns acknowledged in broader communication.

• Trusted experts and 'social influencers' should be used to help communicate information in an engaging way and are often more trusted than official sources. Official bodies should collaborate with social influencers to amplify key messaging.

• Rather than censoring information which risks it moving to more private platforms such as WhatsApp, it may be more effective to flag information as inaccurate and flood the same channels with factual information.

• Further research is needed to better understand the sources and motivations behind health misinformation and to analyse the effectiveness of measures aimed at stemming its flow and mitigating its harmful effects.

The role of social media in public health emergencies

Social media are interactive forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content, and through which they can share, co-create, discuss, participate and modify usergenerated content

or self-curated content posted online. Social media have an increasingly visible and important role in communications during a public health emergency. Modelling suggests that information received through social networks and concerted public health campaigns can help to slow spread of disease and manage containment. It is important to conceptualise social media within the wider communications ecosystem that includes other online channels as well as traditional media such as television, radio, print media and face-to-face communication. Information flows between and across these channels. The rapid adoption of social media has created new and dynamic opportunities for information, mis- and disinformation to be shared more widely and at greater speed than ever before. Misinformation is incorrect information shared in the misguided belief that it is correct; disinformation is incorrect information shared intentionally. The distinction is nuanced. The same content that can be characterised as disinformation, due to the motives of the original poster, can also be characterised as misinformation when it is subsequently shared by others who believe it to be true. There is a broad spectrum of content related to COVID-19 circulating on social media and other online platforms.

That being said, fact-checking is a scarce resource. Our findings demonstrate the degree to which fact checking organisations have redeployed their limited resources to address misinformation surrounding COVID-19. It is important that fact-checkers continue to increase coordination to limit overlap in the claims they assess and validate. At the same time, the pressing imperative to validate coronavirus information does not also mean that misinformation about other topics has become less prominent or important. Given some initial indication that news about COVID-19 is supplementing rather than replacing existing news use, there is reason to suspect there remains a diverse landscape of misinformation circulating globally. It remains unclear what effect this rapid shifting of fact-checking resources and attention will have on the larger information environment. Given the importance of independent fact-checkers, we can only hope that more funders will be willing to support such work going forward. While describing the landscape of COVID-19 misinformation as an 'infodemic' captures the scale, our analysis suggests it risks mischaracterizing the nature of the problems we face. As we have shown, there is wide variety in the types of misinformation circulating, the claims made concerning the virus, and motivations behind its production. Unlike the pandemic itself, there is no single root cause behind the spread of misinformation about the coronavirus. Instead, COVID-19 has appears to be supplying the opportunity for very different actors with a range of different motivations and goals to produce a variety of types of misinformation about many different topics.

Understanding the behaviour and motives of social media users during an outbreak

Three distinct phases of a disease outbreak have been identified during which people require and seek different kinds of information, and do so in different ways. 'Far at risk' is the earliest phase, during which an individual is geographically distant from the outbreak with no real immediate danger of becoming infected. 'Near at risk' occurs when an individual is present in an area where cases have been recorded, but not in specific places the individual usually frequents. 'Real at risk' occurs when cases have been diagnosed within the individual's immediate social circle, and the individual has been in contact with someone who has contracted the disease[47]. During the far at risk stage, people focus on collecting or consuming information, and tend to initially become aware of the outbreak through Key consideration: online information, mis- and disinformation in the context of COVID-19 (March 2020)

Trust in the source and channel: Trust is an important determinant of whether a message will be believed. If information is delivered by a trusted friend or family member, or via a trusted news source or authority that aligns with the receiver's beliefs, it is more likely to be believed. The most trusted sources differ across regional and social contexts. In today's digital culture, 'influencers' with large numbers of followers on social media are often more trusted than recognised experts or official sources. Researchers have identified four aspects of information exchange that contribute to the credibility of a message.

Political, social and historical context and pre-held beliefs:

Misinformation needs to be understood within the context in which it circulates. Rumours have been found to gain the most traction when they align with already held beliefs, when conditions are difficult or distressing, and when motivation exists to believe the rumour. During the Ebola crisis in Sierra Leone, for example, rumours were found to be linked to long-term issues of structural violence[48]. Deeply held suspicions of the United States, the government and foreign health workers provided fertile ground for the proliferation of rumours and theories about the cause of the disease and the intentions of the response.

Psychological and emotional motivations:

Studies have found that content that elicits strong emotional reactions, such as disgust, fear, anger or surprise, are more likely to be believed as well as actively shared on social media.

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[47] Brinto, C, *President Trump uses term 'Chinese virus' to describe coronovirus prompting a backlash*. CBS News, (2020, March 19).
https://www.cbsnews.com/news/president-trump-coronaviruschinese-virus-backlash

[48] 4. Fidler, D. P, *Disinformation and Disease: Social Media and the Ebola Epidemic in the Democratic Republic of the Congo*, COUNCIL ON FOREIGN RELATIONS, (2019, August 20).
https://www.cfr.org/blog/disinformation-and-disease-social-media-and-ebola-epidemic-democratic-republic-congo

This is evident in the current pandemic of COVID-19. Social media analytics company, Brandwatch, reported that the dominant emotion associated with coronavirusrelated posts around the world was disgust and the second-most common emotion was fear[49].

Another analytics company, Sprinklr, found that the emoji most commonly associated with the coronavirus in February 2020 was the crying-laughing emoji, pointing to the fact that humour also tends to be widely shared.

Lack of or overabundance of information:

A lack of accurate information can provide space for misinformation to proliferate. Research conducted by the WHO during the H5N1 outbreak in 2004 found that the majority of rumours occurred during the first few weeks of the outbreak, when little was known about the disease. As more information became available and the questions behind the rumours were answered, the number of rumours circulating decreased[50]. This is in line with a study that showed that users tend to share unverified stories, but cease to share them once the story has been proven to be false. Conversely, an overabundance of information on any given topic, such as is occurring with the current COVID-19 outbreak, can make it difficult for social media users to select the correct information.

How Contemporary Fake News Is Different[51]

In the fake news no matter who started the "fake news thing," in the social media fake news in its modern form is different from the historical forms of journalistic nonsense in traditional media outlets. The speed of fake news which it is spread and the magnitude of its influence place it in a different category from its historical cousins. There are three unique parts to modern fake news that make it different from older varieties of intentionally exaggerated or false reporting: the who, the what, and the how.

[49] Bell, C., & Sternberg, *E, Emotional selection in memes: The case of urban legends. Journal of Personality and Social Psychology*, 81(6), 1028–1041, 2001
https://doi.org/10.1037//0022- 3514.81.6.1028

[50] CDAC Network, *Rumour has it: A practice guide to working with rumours*, CDAC Network, 2017
http://www.cdacnetwork.org/contentAsset/raw-data/f8d2ede4-d09e-4dbe-b234-6ba58e21e0dc/attachedFile2

[51] Tom standage, 'The true history of fake news', *1843 Magazine* ,June/July 2017
https://www.1843magazine.com/technology/rewind/the-true-history-of-fake-news [accessed on 17 April 2020]

In the 21 century in India, Fake WhatsApp Forwards on Coronavirus are Spreading Faster Than the Disease[52].

In the 21 century in India, WhatsApp is the most popular messaging platform now days. It has been on high alert after the number of coronavirus cases in the country rose to 30 % in India. The virus has spread to more than sixty countries since December, including India, and has claimed over 3000 victims in the past few months. The first case of Coronavirus in India was reported in Kerala, earlier this year and two more Indians were recently tested positive.

Indians were bombarded with messages on WhatsApp which claimed to contain "helpful" information related to the covid 19, along with home remedies which could keep the virus at bay. A quick dawn at the WhatsApp forwards that have come our way show that most of these messages try to explain what the deadly coronavirus epidemic is all about and are usually coupled with absurd and highly unscientific measures to counter it. The WhatsApp message in china claims that an "old Chinese doctor" had found a cure to coronavirus, and that's one bowl of garlic. But the WHO has clearly specified that there is no scientific evidence to study this. Bad news for those hoarding garlic cloves to fight off the virus. It just like vampires in all over the world, the humble garlic has no effect on a virus that has already claimed over 3,000 lives around the world.

Dr. William Schaffner was an infected by the some disease expert at Vanderbilt University, has debunked the claim that drinking water every fifteen minutes can prevent you from catching the virus.

That is really not how coronavirus works. For those who've been drinking copious amounts of water just to ward off the disease, all these things are doing is keeping you hydrated.

Another message speared on WhatsApp claims that consumption of Vitamin C will kill the virus even if you've contracted it. in a whatsApp messenger written a "Tell yourself and your children that they are all supposed to be HIV positive and don't touch anyone and don't regret it," the message reads in bold. Uh, no. While the scientists in China are trying to understand if Vitamin C has any effect on coronavirus, there's no study to prove the same yet.

While WhatsApp may prove to be an immensely useful method of communication in the 21st century, it has quite the record as far as fake news is concerned. The reason? All it takes is one

[52] Jashodhara Mukherjee, 'In India, Fake WhatsApp Forwards on Coronavirus are Spreading Faster Than the Disease', *News18*, APRIL 19, 2020
https://www.news18.com/news/buzz/in-india-fake-whatsapp-forwards-on-coronavirus-are-spreading-faster-than-the-disease-2526195.html [accessed on 19 April 2020]

ISSN: 2581-6349

click to forward a message. Anyone with access to the internet and a smartphone can start a trend on the Facebook-owned platform and if the topic is sensational enough, it doesn't take long for something to go viral on WhatsApp.

After that WhatsApp's parent company, Facebook, has introduced a ban on false information pertaining to coronavirus. But the same measures cannot be extended to WhatsApp owing to end-to-end encryption which means that the messages can be read-only by the recipients and the senders.

In India, the Delhi government has recently introduced new guidelines which are related to fake news and state that people spreading fake news on WhatsApp (which could directly or indirectly incite violence, or friction and may contain false information) could land in jail for three years.

Are these guidelines really enough to maintain the fake news in the society? The government clearly said that the users to report false information and those spreading it and even offer a reward in return. Yet, can that really enough to stop panic from spreading faster than the virus? We highly doubt it.

The many questions arise, why do people believe or forward these WhatsApp messages even though they're so obviously fake?

According to California's study, we analyzed that conducted revealed that people are more likely to hit the "forward" button if they feel that the message they received is genuine - this also means they wouldn't stop to verify it. As per the same study also showed that younger people, who've grown up with technology at their fingertips, will probably refrain from sharing a message without actually checking its authenticity. Others, on the contrary, are only too willing to pass on information.

Even as in India the number of confirmed cases of coronavirus rises rapidly in the country, what's more, worrying is the rate at which fakes news about the disease is being spread on WhatsApp.

Our analysis also found that prominent public figures continue to play an outsized role in spreading misinformation about COVID-19. While only a small percentage of the individual pieces of misinformation in our sample come from prominent politicians, celebrities, and other public figures, these claims often have very high levels of engagement on various social media platforms. The growing willingness of some news media to call out falsehoods and lies from prominent politicians can perhaps help counter this (though it risks alienating their strongest supporters.) Similarly, the decision by Twitter, Facebook, and YouTube in late March to remove posts shared by Brazilian President Jair Bolsonaro because they included coronavirus

misinformation was in our view an important moment in how platform companies handle the problem that a lot of misinformation comes from the top.

Several of the major social media platform companies have taken steps to try to limit the spread of misinformation about COVID-19. Some platforms, including Facebook, Twitter, and YouTube, say they have begun to remove fact-checked false and potentially harmful posts with reference to community standards that have in several cases been tightened in response to the pandemic. Facebook also now in some cases includes warning labels on content that has been rated false by independent factcheckers. Social media platforms have responded to a majority of the social media posts rated false in our sample. There is some significant of the variation from company to company. Even 59% of false posts remain active on Twitter with no direct warning label; the number is 27% for YouTube and 24% for Facebook. Please also note that each false claim may exist in many slightly different permutations on any given platform, and our analysis only captures if the platform in question has acted against the first or main piece identified as false by fact-checkers. There is no directly comparable data available, but background conversations with fact-checkers suggest COVID-19-related misinformation is more likely to be actioned by platforms than, for example, political misinformation. If this is so, it may reflect the combination of the clear and present danger of the pandemic, less partisan disagreement, and the fact that there is expertise and evidence clearly determine more clearly what is false and what is not than is the case in many political discussions (Vraga and Bode 2020).

Conclusion

As I had already mentioned earlier, the concept of deception detection in social media is particularly new and there is ongoing research in hopes that scholars can find more accurate ways to detect false information in this booming, fake-news-infested domain. For this reason, this research may be used to help other researchers discover which combination of methods should be used in order to accurately detect fake news in social media. The proposed method described in this paper is an idea for a more accurate fake news detection algorithm.

It is important that we have some mechanism for detecting fake news, or at the very least, an awareness that not everything we read on social media may be true, so we always need to be thinking critically. This way we can help people make more informed decisions and they will not be fooled into thinking what others want to manipulate them into believing.

ISSN: 2581-6349

A CRITICAL ANALYSIS OF SCHEDULED CASTES SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT 1989 AND THE SUPREME COURT JUDGMENTS

- **PALLABI PAUL**

INTRODUCTION

The term Caste refers breed, race complex of hereditary qualities, etc. and the term has been derived from the Spanish word "Casta". The caste system was prevailed in India from the ancient period and still its continuing in developing countries like India.

VIOLENCE AGAINST SC PEOPLE ARE ON THE RISE CONTINOUSLY

An executive director of Evidence, who is a member of NGO stated during the period of Covid-19 Pandemic lock down, that many incidents of violence took place against members of Scheduled Caste (SC) community across the State. However, many cases were related to land disputes or love affairs. One Sudakaran of Arani Taluk who was having a love affair with a girl who was actually from upper caste, and they were interested in marrying each other and to further life together. When's father of that girl with whom he was in love, came to know about that on 29th March, he along with his relative desperately murdered the youth.

Again on April 23, Adi Suresh, a journalist when video graphed a statue of B.R. Ambedkar, founder of Indian Constitution after it was allegedly defaced by unidentified people, he was brutally attacked and harassed by a group of people.

In another incident, a few men from Tiruvannamalai district coerced some people who belonged from Scheduled Caste to vacate an agricultural field and set fire to the crop of the person concerned. Once Tamil Selvan, a Dalit from Kottaipatti near Nilakottai in Dindigul district, married a girl from higher caste from his neighboring village and out of fear of being killed they resided their rest of their lives together in Periyakulam. But when the woman given birth to their babies on April 16, they expected that girl's relatives would have forgotten all and will accept and welcome them matter on, and they moved to the girls place to meet them but instead of that expectation on April 22, more than 15 huts in the village were burned due to outrage and anger. Though, the police had arrested the criminals involved in several case of violence against SCs and STs in all these cases, but there is requirement of State government direction regarding the enforcing agencies in order to detain the accused under Goondas Act

ISSN: 2581-6349

and to compensate the victims who have suffered loss or injury due to such violence and harassment. The Supreme Court of India has overruled its earlier judgments that were criticized for "diluting" protections for lower castes. In fact the earlier decision regarding the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, had led to mass protests. Moreover, the situation demands the federal government to ask the Apex court to review its original decision.

CASTE VIOLENCE CONTINUES TO BE THE MASSIVE PROBLEM IN THE COUNTRY

In 2016, as the Official statistics it would find that more than 40.000 crimes against the people belonging from lower castes were reported. Huge caste protests were made against the judgment where it was observed that numerous people killed after the demonstrations turned violent, the court ordered that instant arrests and the automatic registration of criminal cases under the provisions of the law should be regulated and controlled. In fact, Critics said at the time that the decision would pave the way for officials to turn a blind eye to caste atrocities. They also warned that this would lead to increased violence against lower castes. The SC Atrocities Act came into existence in order reduce criminal activities against people who were from lower castes and tribes in India. The Act came into force as the need was felt that the present legal framework did not provide enough protection to the people of lower castes. The law permits for immediate arrests, certain limitation regarding the opportunities for granting bail and the automatic registration of criminal cases against the person who is accused of committing an offense against a person of a lower tribe. Discrimination and exploitation against Dalits still prevail in spite of several laws for reducing discrimination. It also states that there are various other stringent measures which includes an attachment and forfeiture of the property of an accused. It was later on further amended in 2015 so that it could include newer forms of discrimination and crimes against lower caste communities.

Why do Dalits need protection?

Dalits are the country's most unprivileged citizens because of an unforgiving Hindu caste hierarchy, moreover, they were always degraded by the upper classes from the ancient times. Though there are various laws governing the and prohibiting discrimination against the SCs, STs and Dalits, they are still discriminated which still remains a daily reality for the Dalit population, thought to number around 200 million. From the earliest times, their rights were deprived by the upper castes as they were not permitted to enter the same temples and schools,

ISSN: 2581-6349

or even to drink same well or take a bath from the same place or to drink from the same cups as upper caste people. They were not avail of equal access to education or jobs, and used to become the victims of exploitation, abuse and violence. Indian men 'beaten up over mustaches' India woman fights family over 'low caste' husband's murder. Some activists stated that the ardent wish of the young Dalits have improved their situations day after day, but this has also increased violence and crime against them by people of upper caste community members who are unable to accept this. In 2018,there was increasing number of cases of Atrocities against scheduled castes and scheduled tribes ,and the SC/ST community were tortured brutally in every three days moreover in case of Karnataka even as Bengaluru Urban district tops the state when it comes to atrocities against the community, the Committee for Monitoring and Strengthening Members of Scheduled Caste and Scheduled Tribe Community in Karnataka (CMASK) released a report where it shows that murder and attempt to murder cases against members of the community is rapidly increasing and that rose by 67% in 2018 compared to the earlier year. Though the number of atrocity cases registered in the state declined from 2,010 to 1,751, state convener of the committee Yashodha P stared the large number of incidents of violence against people of lower caste are increasing rapidly which are, violating all human rights.

“Caste Hindus in Bagalkot district, violence took place against scheduled castes who whizzed past them on a bike. The scheduled castes of that village have no power or potential to protest against such atrocities based on the information collected for the report of the Right to Information (RTI) Act, it puts Bengaluru, with 163 cases or incidents of atrocities. The city is followed by 94 incidents in Bengaluru Rural ,88 in Mysure,84 in Kalaburagi and 77 incidents in Bealagavi .Based on survey it is found that increasing rates were more in urban areas due to the increased awareness among the members of the community. But the situation us not the same in rural areas, as the exhausting communities are often dependent on the people who inflict violence. Therefore, they are still continuously subdued and crushed and those who raised voice against such suppression were ostracised and boycotted in many instances.During the event held to release the report, a religious head created controversy during his speech by stating that he had resorted to “retribution of the same kind” when three women were raped in a village.

BIHAR HAS THE HIGHEST RATE IF CRIME AGAINST THE SC/ST s, BENGAL HAS THE LOWEST

But the convener of the committee stated that the lady excoriated the statement of the religious head. Offenses of various kinds are inflicting against people belonging to SC s have lead to a rise in 1% overall in 2018, but that was proceeded upward and rose up to 5.5% in 2016. Based on the 2016 statistics, 25.6 % of these crimes rates increased in Uttar Pradesh in 2016, followed by Bihar and Rajasthan. This shows that their respective capital cities involves almost total crimes of about 45 % against SC s, among all 19 metropolitan cities. Those states where there were lower rates of violence against SC s include the following - West Bengal consists of 0.3%, Jharkhand consists of 1.3% and Kerala consists of 2%. In Coimbatore and Chennai, the atrocities against people belonging to SC s decreased in comparison to rest of the metropolitan cities, with rate of about 0.2% and 0.6% respectively. Since 2014, decrease in the rates of crimes of about 3.8 % has been found against ST s, with a significant drop of 8 % in 2015. Moreover, in 2016, there rise of incidents of crime about 4.6 %. As per the 2016 statistics, in Madhya Pradesh, huge incidents or proportion of offenses of about 27.8% against SC/ST s were reported in 2016, followed by 18.2% incidents in Rajasthan and 10.4% incidents in Odisha with a high number of offenses against ST s like Madhya Pradesh, depicted a low number of offenses in metropolitan cities e.g, Indore, where about 0.3 % of total crimes against ST s was reported. However, in Jaipur about half the number ie 55.3% of crime in metropolitan cities was reported and then in Hyderabad, the incidents increased up to 13.2 percent.

The Role of Police

SC/ST violence, violence against dalits, dalit violence, Ambedkar Jayanti, Ambedkar Jayanti 2018, Ambedkar birth, Ambedkar death, violence against SC/ST, Gujarat, NCRB report, Indian found that all over the country the incidents were filed complaint in the police station and cases in which cases chargesheets are filed, and large number of cases still pending for investigation by the concerned police. That matter was further considered in the all-India charge-sheeting rate where the analysis shows that the number of cases where FIR is lodged as well as leading to filing of a chargesheet is much lesser as compared to other crimes. The Role of the police in protecting the SC/ST populations are vital as they are required to be protected under The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. They have the duty to ensure that a charge sheet is filed ,when the matter is reported, and that all cases are then investigated and forwarded to the hearing stage.39629 number of cases were filed by SC s, with the highest number of cases of 5479 being disposed of in the Court of Chhattisgarh in 2016 and in Madhya Pradesh about 6490 cases were filed by people belonging to STs were disposed of, with the highest disposal of 1805 .Of all incidents filed by SC/ST s

people as provided under the provision of the Act, about 30 % of cases are still pending and investigation has not completed. However on a state level, this proportion is highest for both SC and ST in Jharkhand that includes about 5.8% in cases of SC and 69.7% in case of ST.In comparison, some states, there are quite low numbers of cases which are pending for SC and ST such as Madhya Pradesh .The 78.3% of cases of SCs and 81.3% cases in STs the police files charge sheets for cases of violence and atrocities which is also lower than the national rate of charge sheeting which is about 87.5%.

High conviction rates, but huge backlog

The judiciary is considered as the system of Courts that interprets and apply laws in legal cases in the responsibility of enforcing the rights of SC/ST s as provided under the provisions of Act, by forming a fair trial and convicting those who are involved in the case of guilt. Now the rate of conviction for cases involving SC/ST atrocities are lower than the All-India rate which is about 21% and in case of ST s is about 20.8%, and are significantly higher in cases regarding SC s (25%). While the rates of Conviction are quite low in Karnataka, Odisha and Andhra Pradesh. Apart from that, pending cases of SC/ST atrocities are still in large number which shows that justice is being delayed. States likes Bihar show a very high pendency of cases as 95.9% in case of SC and 94% in case of ST. In many states it has pendency rate /percentage of more than 80%, representing an extreme backlog across the nation.

Note on Rajasthan

During the stage of police investigation total of 1063 cases were eliminated or rid of by the police officers due to certain mistake regarding the fact by the victim, or due to it being deemed a false case. Out of these cases, 691 of the cases used to take in Rajasthan. Moreover, based on the cases which are decided or disposed of by the courts, it is found that while plea bargaining in cases of violence against SC/ST s, 38 cases were disposed of using the procedure of plea bargaining, and all of them were witnessed in the state of Rajasthan in 2016.

SUPREME COURT SAYS SC/ST ACT IS MISUSED, SO WHAT EXPLAINS THE LOWEST CONVICTION RATES?

After a period of twenty-three years, the law regarding providing protection to the Scheduled castes and Scheduled tribes from atrocities enacted where the Apex Court of India has triggered

ISSN: 2581-6349

a controversy by diluting it to prevent its misuse. On March 20, in a judgment the Apex Court repealed a provision relating to the automatic arrests of the person suspected to or the accused as per Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and then made it compulsory for the police authority to conduct basic preliminary inquiries within seven days of a complaint lodged before filing the first information report. Moreover, judgment also stated that public servants can be arrested under the provisions of the law after getting the permission in written form of their public authority.

A bench of Justices UU Lalit and AK Goel reiterated that the SC ST Atrocities Act may be misused in order to blackmail or harass innocent citizens and public servants, and that it should not be used to "perpetuate caste ism". The court stated that as it observed that after the enactment of the legislation/ law had resulted in public servants being harassed and restricted from giving even basic criticism to their employees of Scheduled caste and Scheduled tribe. Similarly, the same bench had claimed cases were found where the wives were misusing anti-dowry law as provided under Section 498A of the Indian Penal Code 1860,by registering false cases in order to harass opposite party and had ordered a verification of charges before making arrests. That judgment was overturned three months later by the Bench headed by Former Chief Justice of India Dipak Misra. But the view of The Court regarding the provisions of the SC /ST Atrocities Act has been criticized by many people basically, Dalit and Adivasi group, and stated that large number of incidents of crime against the people belonging to SC and ST are rising every day where the conviction rates are still low and thus its leading to increasing number of cases. Moreover, as per the Annual statistics provided from the National Crime Records Bureau states that from 2009 to 2014, crimes against Scheduled castes increased by 40% while those against Scheduled tribes went up 118%.But conviction rates under the SC/ST Atrocities Act were continuously much lower than the other national conviction rate for all kinds of offenses in general. Based on the National Crime Record Bureau's data it is found that 10-year period from 2007 to 2016, depicts that an average conviction rate against Scheduled Castes is 28.8 in crimes and against Scheduled Tribes is 25.2 in crimes. Thus, the aggregate of the rate of conviction for all crimes under the Indian Penal Code is much higher at 42.5.

The data on conviction rates

On the other hand the Supreme Court of India commented and expressed fear that automatic arrests as per under the provisions of SC/ ST Atrocities Act may create a situation that the innocents being framed, in fact the crime data indicates that during the police investigations, it is found that the game reports lodged are of only 9% or 10% of the time. The vast majority of

ISSN: 2581-6349

atrocities cases investigated by the police and forms the charge sheets which are being filed. In 2016, based on the record of the National Crime Records Bureau found that 40.801 registered cases of atrocities against Scheduled castes and 6.568 cases of atrocities against Scheduled tribes was already made, while in addition to that, the police indulged into investigation of the cases filed but still many cases pending from previous years and filed charge sheets in 78% of cases of atrocities against Scheduled castes and 81% of cases relating to Scheduled tribes. The courts later on conducted trials in 1.44979 cases of atrocities against Scheduled castes under the SC/ST Atrocities Act, where the majority of cases were pending from past few years, but till date only 14.615 cases, trials took place and completed. Of these, in 2016 the courts gave conviction order of accused in 3.753 cases, resulting in 25.7% of conviction rate.

Similarly, almost 23.408 cases of violence and atrocities against the people from Scheduled tribes heard in courtrooms that year, and 2.895 trials were finished with 20.8% of the tm conviction rate. In several states, rates of conviction of the offenders for crimes against Scheduled castes and tribes are extremely lower than the national average. For example, in 2016 in West Bengal zero convictions rate was also found under the SC ST Atrocities Act cases, while Karnataka had a conviction rate only about 2.8 in Scheduled caste atrocities cases.

Anecdotal evidence

The Supreme Court had for the first time has considered that the SC ST Atrocities Act in an instance misused, and for that urges for its dilution are not new. But when members of the Maratha caste raised their voices regarding the requirements of caste-based reservations for their group, in

Maharashtra, one of their demands consists of the dilution of the provisions of the Act, as many instances found where there were too many false cases being reported policing against Marathas. In response, the Maharashtra Police submitted a report to the state government declaring that there was no actual strong evidence which can show that the Act was being misused. Mihir Desai, a human rights lawyer in the Bombay High Court stated that, there are possibilities of lodging of fake reports of crime under the Act and the same false cases are lodged under every law, but the thing is that no one can come to a conclusion without going through the cases. The Supreme Court of India should not be applying the method of anecdotal evidence.

Unlike popular perception, low conviction rates do not mean the rest of the cases that ended in acquittals were false cases. Desai said there are often procedural lacunae in the process of investigation and prosecution that delegitimize many of the cases heard in courts. "for example, investigation under this law has to be done by certain high-level officials as per the law," the lawyer said. "But the police often allow lower-ranking officials to investigate these crimes, and courts strike the whole case down."

In many other instances, it becomes hard and troublesome for the complainants to demonstrate or manifest themselves they belong to the Scheduled caste or Scheduled tribe category, or that the atrocity they faced was motivated by caste-based discrimination.

Another reason why cases may not lead to convictions is the inherent power play involved in filing atrocities cases.

In most of these cases, the accused are people in powerful positions, and there is so much pressure on SC or ST complainants, they end up agreeing to settle their case through a compromise.

The lawyer believes allegations of laws being misused are made only when it comes to laws protecting women and marginalized communities. "By that logic, laws like UAPA [Unlawful Activities Prevention Act] should also be diluted given the large number of acquittals

The act also allows public servants to be prosecuted for neglect of duties - a significant step given that many lower caste people allege that their complaints were often ignored by officials who belonged to the same communities as those they were accusing.

SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT 1989

Punishment for offenses of atrocities

1. Anyone who us not a member or person belongs to Scheduled Caste or a Scheduled Tribe. Coerces any person belonging to Scheduled Caste or a Scheduled Tribe to drink or eat any inedible or obnoxious and toxic material.

ii. any acts or omissions having intention to cause harm, insult or annoyance to any person belonging to Scheduled Caste, or a Scheduled Tribe by using the dumping excreta, waste matter, carcasses or by forcibly takes off the clothes from the person belonging to Scheduled Caste or a Scheduled Tribe or parades the person nude or with painted faces using cow dung or body or does any similar act which is derogatory to human dignity.

iv. Anyone unjustly possesses or cultivates any land which is owned by, or allotted to, or notified by any competent authority to be allotted to, any person from a Scheduled Caste or a Scheduled Tribe category or gets the land allotted to him transferred;

v. Unjustly removes a person belongs to Scheduled Caste or a Scheduled Tribe from his land or premises or indulge itself with the enjoyment of his rights over any land, premises or water

vi. compels or forces a person belongs to Scheduled Caste or a Scheduled Tribe to do 'beggar' or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government of India .

vii. Forces or compels a member of a Scheduled Caste or a Scheduled Tribe not to cast vote or to vote to a particular candidate or to vote in a manner other than as per the provisions of law.

viii. If nobody makes any fake, malicious or troublesome suit or other legal proceedings against a person from Scheduled Caste or a Scheduled Tribe categories.

ix. gives any false or inappropriate information to any public servant and due to the information causes such a public servant to use his lawful power to the injury or annoyance of a person belongs to Scheduled Caste or a Scheduled Tribe category.

x. intentionally insults, having intention to injure the dignity of an individual belongs to Scheduled

Caste or a Scheduled Tribe in any place within public view

xi. If, anyone hurts any woman or uses force against her who is from Scheduled Caste or a Scheduled Tribe so that to dishonor or outrage her modesty

xii. If, anyone who is having the power to dominate the will of a woman from Scheduled Caste or a Scheduled Tribe and uses that position to exploit and harass her sexually to which she would not have agreed or allowed.

xiii. If, anyone degenerates or fouls the water which is there in the spring, reservoir or any other source which are generally used by any person belonging to Scheduled Castes or a Scheduled Tribes so as to render it less fit for the purposes for which it is ordinarily used

xiv. If, a person belonging to Scheduled Caste or a Scheduled Tribe is deprived of any customary right of entering in places related to public resort or if anyone hinders a such person as to prevent him from using or having access to a place of public resort to which other members of public or any other places related to this have a right to use or access to.

xv. If, any person coerces or compels a person belonging to a Scheduled Caste or a Scheduled Tribe to leave his house, village or other place of residence shall be punishable with imprisonment up to six months however that punishment may extend up to five years and with fine.

Anyone who is not a member of a Scheduled Caste or a Scheduled Tribe -

i. Provides any fake /false evidence with the intention to cause, with proper knowledge that it would be lead to such a situation that it will cause any person belonging to Scheduled Caste or a Scheduled Tribe to be convicted with capital punishment of an offence as per the law he shall be punished with life imprisonment along with fine, and if an innocent person of a Scheduled Caste or a Scheduled Tribe is convicted and executed due to providing such false or forge evidence, those persons who gives or forges such false evidence, shall be punished with death penalty

ii.Anyone who provides any fabricates fake evidence with the purpose to cause, and with having knowledge that it to be likely that any person belonging to a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is not capital but punishable with imprisonment up to seven years or upwards, he shall be punishable with imprisonment up to six months minimum but the punishment may extend up to seven years or upwards and with fine.

iii. If any person commits any mischievous act by fire or any explosive substance with intention to cause or having proper knowledge to the fact that to be likely that he will thereby cause damage to any property of any person belonging to a Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for six months minimum but which may extend to seven years
and with fine.

iv. If anyone commits mischief by fire or any explosive substance with intention to cause or with knowledge of the fact that it would be likely that he will thereby cause destruction of any building which is usually used as a place of worship or as a place for human dwelling or as a place for custody of the property by a member of a Scheduled Caste or a Scheduled Tribe, shall be punishable with life imprisonment along with fine.

v. If anyone commits any offence under the provisions of Indian Penal Code 1860 ,he shall be punishable with imprisonment up to ten years or more than that against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with life imprisonment and with fine.

vi. If any person with proper knowledge or having reason to believe that an offence has occurred under this Chapter, tried to tamper any evidence to disappear any evidence relating to commission of that offence with the intention of harbouring and escaping the offender from legal punishment, or with that intention to provide any false information

ISSN: 2581-6349

respecting the offence which he himself aware that it is false, shall be punishable with the punishment provided for that offence, or

vii. If anyone who is a public servant, commits any offence as provided in this section, shall be punishable with imprisonment of one year but that may extend to the punishment provided for that offence.

4. Punishment for neglect of duties-Anyone who is , a public servant but not person belongs to the category of Scheduled Caste or a Scheduled Tribe, as well as wilfully ignores his obligations which is required to be executed by him as provided under the Act, shall be punishable with imprisonment of six months minimum but which may extend to one year.

5. Enhanced punishment for subsequent conviction-

If anyone, who is already been convicted of an offence under this Chapter and later on he is further convicted for another offence or any offence subsequent to the second offence, shall be punishable with imprisonment for a one year minimum but that may extend upto the punishment provided for that offence.

6. Application of certain provisions of the Indian Penal Code 1860-

Subject to the other provisions of this Act, the provisions as provided under section 34 and Chapter III, Chapter IV, Chapter V, Chapter VA, Section 149 and Chapter XXIII of the Indian Penal Code 1860,shall, also may be, applicable for the purposes of this Act as they are equally applicable for the purposes of the Indian Penal Code.

7. Forfeiture of property of certain persons

1.In any case ,any person who has been convicted of any offence which is punishable under this Chapter, the Special property, movable or immovable or both, belonging to the person, which has been used while committing that offence, shall be seized or forfeited by the Government of the nation.

2. In case any individual is accused of any crime under this Chapter, the Special Court shall be empowered to pass an order that all or any of the movable or immovable properties, or both, belonging to him, be attached, during the period of such trial, and in case the trial of the case comes to end in conviction, the property so attached shall be liable to forfeiture to the extent it is needed for paying any fine imposed under this Chapter.

8. Presumption as to offences

While in case of a prosecution for an offence under this Chapter, if it is proved that If it is found that an individual has provided financial assistance to a person who is accused of, or reasonably suspected of committing, any crime as provided under this Chapter, the Special

Court shall consider that , unless the contrary is proved, that such person had committed an offence of abetting of the offence.

b. Whenever any cluster of some people commits an offence under the provisions of this Chapter and if it is determined that the offence committed was a sequel to any ongoing dispute relating to the land or any other matter, it shall be presumed that the offence was committed in after the common intention of people involved and in prosecution of the common object.

9. A Conferment Powers

1. The State Government may, if it considers it necessary or expedient so to can do all the following acts like -

a. for the purpose of reducing such instances and for coping with any offence under this Act, or

b. for a case or class or group of cases as provided under SC /ST atrocities Act, in any district or any other parts of district confer, by providing the notification in the Official Gazette, on any officer of the under the control of State Government, the powers which are execrable by a police officer under the Code in such district or as the case may be, for such case or class or cluster of cases, and in particular, empowered to arrest, as well as investigation and prosecution of individuals before any Special Court.

2. Moreover, all the police officers and rest of other officers under the control of Government shall help the officer as provided under sub-section (1) in the execution of the provisions of this Act or any other rule, scheme or order passed.

3. The provisions of the Code shall, so far as may be, apply to the exercise of the powers by an officer under sub-section (1).

EXTERNMENT

Section 10. Removal of person likely to commit offence

a)Upon the satisfaction by the Special Court upon a complaint, or any report submitted by the Police that a person may commit an offence as per Chapter II of this Act in any area considered as 'Scheduled Areas' or 'tribal areas', as referred to in Art 244 of the Constitution, it may, by order in writing, direct such person to stay away beyond the limits of such area, by such route and within fixed time limit as may be provided in the order, and not to come back to the area from which he was directed to remove himself for certain period, not more than two years, as may be provided in the order.

b) Moreover, the Special Court is empowered to order under sub-section (1) and to communicate to the person concerned who is ordered as per under that sub-section the reasons behind such order passed.

c)The Special Court may cancel or change the order made under sub- section (1), but have to mention the causes behind that in written form on the representation made by the person against whom such directions has been made or by any other person on his behalf within fixed period that is thirty days from the date of the order.

11. Procedure on failure of person to remove himself from area and enter thereon after removal.

1. In case person don't obey the orders and remove himself from any areas mentioned against whom a direction has been issued under section 10 -

a. fails to go away himself as told ; or

b. In case the person moved away but again entered the place within the period specified in the order,

otherwise than taking written permission of the Special Court under sub-section (2), the Special Court may cause him to be arrested and taken away in police custody to such place outside such area as the Special Court may direct.

2.The Special Court may, by order in written form, allow any person to whom an order under section 10 passed, to return to the area from which he was asked to depart himself for a fixed period and based on such conditions as may be specified in such order and may ask the person to execute a bond with or without a surety for following certain conditions imposed or provided.

3. The Special Court is empowered to revoke any such permission.

4. If Any person who, after taking such permission, returns to the area from which he was asked to depart herself or himself shall observe the conditions imposed, and at the end the certain fixed period for which he was allowed to return, or on after the cancellation of such permission provided before the end if such permission, shall depart himself outside such places and shall not return thereto within the unexpired portion specified under section 10 without taking new permission.

5. If, a person doesn't follow any of the requisites imposed or to depart himself following the order or

even after removed himself enters again to such places without taking permission the Special Court may to be arrested and removed in police custody to such place outside such places as the Special Court may specify by order.

12. Taking measurements and photographs, etc of persons against whom order as provided under section 10 is made.(31)

1. All person against whom such order has been imposed as per section 10 shall, if so needed by

the Special Court, permit to taking his measurements and photographs by a police officer.

2. If any person referred to in sub-section (1), when required to allow his measurements or photographs to be taken by the Special Court refuses to take measurements or photographs, use of all lawful means may be taken in order to secure the taking thereof.

3. Refusing to permit for the taking of measurements or photographs under sub-section

(2) shall be considered as an offence as per section 186 of the Indian Penal Code.

4. In case an order as per under section 10 is canceled, all measurements and photographs which were taken under sub-section (2) shall be destroyed or made over to the person against whom such order is made.

13. Penalty for noncompliance of order under Section 10, if anyone does any act in contravention of an order given by the Special Court under section 10 shall be punishable.

THE MAHAJAN CASE

Subhash Kashinath Mahajan v. the State of Maharashtra.

After the refusal of Mr. Mahajan to grant coercive measures for prosecution, in 2011 the police filed a report on the case, where it refers that the case is neither true nor false.However, Gaikwad stated that he was not informed regarding the matter by the Police and the Court for more than four years, even though they were required to do as per the law is concerned.Later in 2016 when he found the C-summary report was filed, he filed another FIR, against Mr. Mahajan, on the allegations that he tried to shield individuals who were accused of a crime against a person belonging to SC category and us punishable under the SC/ST Act.In August 2016, the defendant Subhash Mahajan reached the Bombay High Court requesting to crush the FIR alleging so against him but the Court not only refused to quash the case but also ruled that there is existence of adequate safeguards in the Act itself which guarantee protection shall be granted against forged and false prosecution.

Later on he filed an appeal against this decision in the Apex Court. The apex court, avoided showing concern itself solely with the merits of defendents appeal, increased the scope of the case stating that, the matter which is to considered are which has arisen during consideration of this matter is whether any unilateral allegation which is ultimately false can be reason to prosecute officers who are dealing with such matters in officially and if such allegation is

falsely made what is protection available against such abuse.In order to give sufficient protection to various innocent non-SC persons so that not to be a victim of false complaints under the SC/ST Act, it laid down certain guidelines which nullify the key provisions of this law:

it removed the restrictions on providing of any anticipatory bail, even in the case of Mahajan it relates to the public servants, it ruled that in case of accused is a non-public servant, the police may arrest the person concerned only after taking permission from a senior superintendent of police and it held that before registering an FIR, the police is duty-bound to conduct a preliminary inquiry to ascertain the veracity of the complaint.

The three changes neatly reverse the original mandate of the SC/ST Atrocities Prevention Act is as follows - Before registering a complaint or an FIR, proper investigations by the Police of the accused is must and the police would now immediately doubt the Dalit and would investigate her complaint for veracity, and what's more, they are required to do so by law.The SC/ST Act and the SC/ST Amendment Act is considered important for the people belonging to Dalit community as it provides them many protection. If they are nurtured with affection despite their poor conviction rates and slow implementation, it is because their very existence is an instrument to Dalit agency where they are treated badly, and a powerful affirmation of the community's faith in the Indian Constitution.

The main issue is not the misapplication of the legislation in various cases and misusing it but the failure of India's criminal justice system to consider its own casteist biases.Moreover it is true the no institutions in the society can enjoy the privileges and immunities from castesit biases.

Dr. Subhash Kashinath Mahajan v. The State of Maharashtra & Anr.

certain direction were given be followed which includes -

(i)The Proceedings in the case are the abuse of process of court and should be defeated decisively.

(ii) There is no fixed or rigid obstruction against providing anticipatory bail in cases which falls under the SC ST Atrocities Act and in case no prima facie case is formed or where on judicial scrutiny the complaint is found to be prima facie false.

(iii) In regard to the abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can be only after taking permission from the appointing authority and of a non-public servant but that should be after taking permission by the S.S.P. which may be offered in suitable

cases if considered urgent after recording reasons behind that in written form and the reasons must be examined by the Magistrate for allowing any further detention.

(iv) In order to avoid false implication of an innocent, a basic inquiry may be conducted by the DSP concerned, so that it can find that whether the allegations are justified under the Atrocities Act and that the allegations are not forged or motivated.

(v) If anyone violates the direction provided under Section (iii) and (iv), disciplinary action shall be taken against the concerned person.

Prathvi Raj Chauhan Vs Union of India(35)

In this case the Court observed that it was necessary to emphasize that unless provisions as provided under the Act are implemented in their true actual spirit, with utmost earnestness and dispatch, the aim for which new legislation is made regarding that so that an ideal of a caste less society should exist will never fulfill and will remain as like a dream. The initialization of the people belonging to scheduled caste and scheduled tribe communities is an enduring exclusion and is based basically on the caste identities. It is required to discourse the issues related to segmented society, that as per provisions of the Indian Constitution which basically promotes the idea of fraternity and brotherhood as mentioned in the Preamble, and various statutes like the ST ST Atrocities Act and this gives emphasis to the social rather collective resolve of ensuring that all humans should be

be handled as humans, that their innate genius is allowed outlets through equal opportunities and each of them is fearless in the pursuit of her or his dreams.

CONCLUSION

Much more strict laws is required to be enacted in order to prevent atrocities against the people who are belong to the Scheduled Caste as well as Scheduled Tribes.

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THE EXIGENCY OF A NOTABLE DISTINCTION BETWEEN SECTION 354 & 376 OF THE INDIAN PENAL CODE – A CASE ANALYSIS

- SHREYALI YADAV

INTRODUCTION

A pivotal case in establishing the very definition of modesty as under S. 354 of the IPC and postulating the key differences between S. 354 and S. 375, *Ramkripal v. State of Madhya Pradesh* has created a massive avenue for clarity. Not only has it pronounced principles of law, but has upheld the very Rule of Law by preventing a gross injustice to happen to the victim. It is a well - known fact that justice delayed is justice denied. Concurrent appeals by the appellant have finally been dealt with in entirety, and justice was served to the victim under the rape laws (S.376) of the Indian Penal Code, 1860.

FACTS

The victim was on her way back home when the appellant approached her and proposed for them to engage in sexual intercourse. He tried to induce her to not utter anything by offering to provide ₹ 10 and upon denial, he pushed her to the ground, removed her undergarments, and penetrated her genital area. When she cried in pain, the appellant stuffed her mouth with a rough cloth. This case was heard by hon'ble High Court and the judgment rendered by the learned judge was concurrent with the judgment of the learned IIIrd Additional Sessions Judge that the appellant was guilty of offences punishable under section 376 of IPC and was punished with imprisonment for seven years. The appellant challenged the HC's judgment before the hon'ble Apex Court by seeking leniency and pleading that he was, at worst, guilty of outraging a woman's modesty under Section 354 of the IPC and not of rape under Section 376; this was the issue under consideration in the present case.

ANALYSIS

I. *Sine quo non* of rape under S. 375 & S. 376

ISSN: 2581-6349

Under S. 375 of the IPC, and to be punishable under S. 376 of the IPC, an act of violence needs to fulfill a few conditions *(sine quo non)* in order to fit in the category of the aforementioned, which are the following.

I.1. Element of penetration

Penetration is one of the *sine qua non* constituting rape. The main emphasis on sexual violence focuses around penetration, while other forms of sexual assault like molesting, leering, pinching and touching are packaged within the law against "outraging the modesty" of a woman. Thus, all forms of forcible penetration essentially characterize rape. The aforementioned principle is supported by the very explanation appended to S. 375 of the IPC, wherein, penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

In the present case, when the appellant forcefully felled the victim to the ground, removed her undergarments, and penetrated her, he is said to have committed the offence of rape.

I.2. Element of going against will

The word 'will' implies the reasoning power of the mind that determines whether to do an act or not. There is a fine distinction between an act done against the will and an act done without consent. The will of the person can be said to be an act done without consent, but the contrary is not true. Clause (1) of S. 375 of the IPC determines this 'will' in context of committing the offence of rape. Where the woman is in possession of her senses and therefore, capable of consenting, and despite her resistance and opposition, the offender penetrates the victim, it amounts to being against her will and hence, is punishable under S. 376.

In the present case, despite the cries of struggle from the victim and her screams of pain, the appellant proceeded with the act of penetration. Furthermore, he even shoved her mouth with a cloth to silence her. This sign of struggle clearly shows that the actions being performed by the appellant were against the will of the victim.

I.3. Element of absence of consent

The very essence of rape is the absence of consent. It is the most important factor in determining rape. Its absence is what distinguishes rape from ordinary consensual sexual intercourse. To absolve a person from criminal liability, consent must be given freely and not by fraud. It is

ISSN: 2581-6349

impenitent to note here that in the present case, consent was not given at all. When the appellant asked the victim for engaging in sexual intercourse, she denied. Thus, the very fact that the appellant continued with the proposed action, despite obtaining a dissent from the victim, fulfills the criteria under Clause (2) of S. 375 of the IPC, wherein the penetration concurred without the consent of the victim.

II. existence of intention to commit rape not withstanding resistance

In every crime, there is first, intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage of attempt is successful, then the crime is complete. Thus, an attempt consists in it the intent to commit a crime.

In the judgment of *Prabhuram Satnami V. State of Madhya Pradesh,* the intention of the appellant appeared to be of committing rape, and in furtherance, he did the aforementioned. Outraging the modesty of a woman may occur when there is indecent assault. In this case, the appellant not only effectuated indecent assault, but also appeared to be determined gratify himself sexually by performing sexual acts. Thus, the intention and preparation to commit an attempt to rape existed and the appellant was rightly convicted for committing an offence under Section 376 and 511 of IPC.

In applying the aforementioned to the present case, the appellant penetrated her with the intention of sexually gratifying himself. He not only outraged her modesty, but also performed the indecent sexual act of penetration with full knowledge of the consequences. Thus, he will be punishable under S. 376 and 511 of the IPC.

III. Extent of non-applicability of S. 354 as regards S. 375 & 376

III.1. Applicable to crimes stopping short of penetration

Outraging a woman's modesty, as mentioned in S. 354 of the IPC, will apply to crimes against women that stop short of penetration, in which event it becomes rape. As per the definition of rape under S. 375 of the IPC, all sorts of penetration amount to rape. It is only when the action of committing a sexual offence does not effectuate penetration, that the offence becomes punishable under S. 354 of the IPC. The aforementioned can be further explained by basing the principle on the grounds of distinction between suggestive and actual sexual intercourse.

ISSN: 2581-6349

In the landmark judgment of *Pandurang Mahale v. State of Maharashtra*, it was established by the SC that the request for engaging in sexual intercourse would amount to the modesty of the woman being outraged. This is an example of suggestive sexual intercourse, wherein no actual penetration has taken place. Thus, S. 354 is fit to be applicable to this case as S. 376 would be too rigorous a punishment for the aforementioned offence. However, if, in the same case, the man had not only suggested, but also penetrated the woman's genitalia, it would amount to actual sexual intercourse and subsequently, rape under S. 375 and punishment under S. 376.

In the present case as well, although the appellant had initially only outraged the modesty of the victim by suggesting sexual intercourse with her despite repeated denial, he took the further steps to initiate the act of penetration and thus, committed the offence of rape**.**

III.2 Narrow scope of definition of rape

The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused, which would indicate that he was going to have sexual connection with her. A crime like in the present case, if included with Section 354, would result in a gross denial of justice as it prescribes a paltry sentence of two years for as serious an offence such as rape. This becomes a direct violation of the right to life with dignity and personal liberty available under Article 21 of the Constitution.

CONCLUSION

The judges found no merit in the appeal filed by the appellant, Ramkripal, and dismissed it. Hence, he was still charged under S. 376 of the Indian Penal Code, 1860. The decision is righteous as there is a reason as to why two separate sections exist under a statute for two offences that draw a very thin line between them. Merely ignoring the severity of the crime in light of the fact that an offence under another section gives lesser rigorous punishment than is deserved exists, is a gross injustice on behalf of the woman. A woman has the right to exercise her rights, which is, protected by the legal maxim *ubi jus ibi remedium.* This principle has been the *ratio decidendi* in adjudicating upon this case.

As important as this case has been for establishing principles with regard to outraging a woman's modesty, it has been equally, if not more, pivotal, in establishing major and principle differences and the causes for such differences, between merely outraging a woman's modesty,

and going so far ahead as sexually assaulting her. The latter has been a controversial issue for decades; our polity is amongst the list of most notoriously known for the projectile rates of number of rapes that occur. It is only befitting that judicial pronouncements work towards our most challenging social issue – women empowerment. This case has been one step towards it.

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STRENGTHENED FAMILY BONDS VS. DOMESTIC CONFLICT AND VIOLENCEE DURING COVID-19

- **PRAPTI BHATTACHARYA**

The Corona virus crisis is placing all sorts of relationships to an extreme test. But many people are trying as hard as they can and are maneuvering the "new normal" with people they have not spent much time together or lived together for a long time or have only just met. This trend is named as "corona cuffing" and the couples are termed as "coronnials".

Working professionals seldom get sufficient time to spend with their family members. But the current 70 days lockdown due to the Corona virus pandemic, supplemented with work from home, has effectively strengthened families. This constant close connection may become stressful at time because it started abruptly it provides a huge chance for spending quality time together with the family.

Work from home is strenuous as same as the 9 to 5 job in a cubicle, especially with an infant but the silver lining in this is that there is no need for video calls to see the toddler, one can observe his child playing all around during the day and the connection with kids can go stronger by helping with the homework and read some bedside stories to them to put them into sleep every night. The face to face long conversation with your partner, not through only voice calls or chats are making the conversation more effective. There is no such delay in communication over dropped calls, missed calls or voice messages. While so many couples have figured out their responsibilities to complete the household chores by dividing responsibilities, a vast majority has picked up common hobbies like cooking together or binge-watching their favourite shows, gardening together, watching football matches or playing video games and arguing over that even boiling up the mundane conversations. The partners are able to discuss financial constraint and any serious issue at workplace which they have not talked about before to get positive input from each other. And not only partners, this remains same between the working parents and their children. So we can say the nationwide lockdown to reduce down the infection of Corona virus has strengthened relationships. [53]

[53] *Urban working professionals hit hard by India Covid-19 lockd .. Read more at: http://timesofindia.indiatimes.com/articleshow/74826837.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst* (2020)

Previously the chitchats were mostly limited to WhatsApp chats but due to the lockdown now, those who live in another state for job or studies, they are at home and have adequate time to talk with their parents or siblings mere than WhatsApp chat.

Maybe we feel we are so played up because we never worked before our parents or siblings around us because it is like giving up tiny bits of freedom, but it is also peaceful knowing that the parents mostly don't have to go to work during the pandemic outbreak and they are safe. The universe will definitely change after this pandemic is over but the boredom and anxiety, reluctance we face in self-isolation can only be shove off by the virtual and real accompaniment of our loved ones.

The 'At Home Together' survey was conducted amongst singles, newlyweds and married couples as well as those currently in a relationship, through the last two weeks of April 2020. It was found that 90 percent of the couples gave vote that they have been spending a considerable amount of time with each other, with almost 40 percent of them said that they are spending nearly 18 hours per day with their spouse. Since the announcement of the lockdown, it was reported that almost 46 percent have grew healthier habits by communicating more openly which improved their bond and lifestyle substantially and they have discovered new things about their spouses leading to shared joy.

Despite the negative vibe escalated by the pandemic, only less than 10 percent of the couples talked about their stained relationship. Since March 15, many couples are lining up to deepen their emotional connection which is 68% more than the 55% stage at pre-COVID period. However, 35% are less likely to discuss conflicting issues in healthy ways[1] and only 18% of couples report that they are satisfied with the way they communicate with each other[2].

Despite bizarre circumstances, the report imparts engaged couples are eager than ever to prioritize their love and affection in this challenging time. Meanwhile the 71% of the couple who are going to be wedded soon are feeling anxious, 62% of them are looking stressed and 50% of them are feeling overwhelmed. Most commonly, the positive impact on engaged couples' relationships has resulted from finding new ways to spend time together (64%), reminding them what they care for each other (64%) and discussing mindboggling topics (54%), from finances and unemployment to preparedness for illness and death. Their relationship health priorities include managing finances together (49%), navigating disagreements in a healthy way (31%), and focusing on sexual intimacy (34%) and almost every third of the matched couples are having more sexual intercourse than they used to have before the COVID-19 pandemic started in the US.

While prioritizing the relationship, it is also reported that people are paying back to their local communities: 34% of people have helped the elderly, infirm or those with higher health risks in recent weeks; 19% people have generously contributed to charities related to COVID-19 affairs; and nearly 1 in 10 engaged couples have also donated food or household essential, money to the needy.[54]

Domestic conflict and the real look of domestic violence notwithstanding any family bond-

But now comes the dreadful and negative part. We are very well acquainted with the term **domestic violence**, which is used in many countries to refer to violence by intimate partner, but it also consolidates child and elder abuse, and abuse by any other member of a household. It includes-

- Physical aggression – Punching, kicking, slapping, choking or using weapons against the victim.
- Sexual assault – Indecent assault or any unwanted sexual touch, rape (with or without threats of other violence and without consent or forcefully making the partner to watch pornography.
- Coercive methods- By threatening the partner by telling that his/her children, pets or shelter over the head will be taken away.
- Intimidating way- Scaring a person using looks, actions or gestures.
- Psychological/Mental abuse - Using words and other strategies to insult, threaten, degrade, abuse or denigrate the victim.[55]
- Economic abuse - Controlling and stopping access to most important resources such as money and property.

Although women alone do not face domestic violence but the rates of abuse and violence targeting women are highest, mostly from perpetrators well known to them. As per the **World Health Organization**, one in every three women out in the world experience physical and/or sexual violence in their lifetime; and 30 percent of all women have gone through one or the other kind of physical and/or sexual violence by their partners in any kind of relationship.

Condition and cases of domestic violence in India-

[54] 18News, *Coronavirus' Impact on Indian Couples and How They're Spending Time During Lockdown - News18* (2020), https://www.news18.com/news/lifestyle/coronavirus-impact-on-indian-couples-and-how-theyre-spending-time-during-lockdown-2621121.html.
[55] *What is the Definition of Domestic Violence?* (2018), https://family.findlaw.com/domestic-violence/what-is-domestic-violence.html.

From the **Crime in India Report 2018**, published by the National *Crime Research Bureau* (NCRB), a woman faces domestic violence every 4.4 minutes and crime is recorded against women in India every 1.7 minutes. It is extremely sad to say that India is at 4th worst position to maintain the gender equality to women. According to the data, 89,097 cases related to crimes against women were registered across India in 2018, higher than the 86,001 cases registered in 2017 and such cases are rising during lockdown. Where everyone is working from home now, the home is now treated as "workplace" from legal perspective and women are filing cases of online harassment at "workplace".

After few days of lockdown in India, the National Commission of Women (NCW) noted a hike in the number of domestic violence complaints they are receiving via email. The NCW chairperson believes that this does not represent the real figure, since a high volume of complaints from women generally come by post, and might not be able to use neither the internet, nor the space and time to call for help because of constant vigilance of their partners around them, Between the beginning of March and April 5th, the NCW received 310 grievances of domestic violence and 885 complaints for other forms of violence against women, which came in the shape of bigamy, polygamy, dowry deaths, and harassment for dowry.

To stop such instances we need an aggressive nationwide agenda to promote consciousness about domestic violence, and make people aware of the several methods through which complaints can be filed. National news channels, radio channels, and social media platforms must be strategically used for advocating such awareness and campaigns.

Condition and cases of domestic violence in foreign countries-

To spread the alertness in France and Spain, pharmacies are trained to identify people from customers facing abuse through code-words: like 'mask 19' for those who cannot speak openly, to indicate that they are getting abused and are seeking help. Spain police says 18 percent more calls came in the emergency number assigned for domestic violence just in the first two weeks of lockdown than in any of the earlier months.

The French police report says that they faced about 30 percent hike across the country in cases of domestic violence. It is now compared that intimidating techniques used in the domestic violence to dominate and repress the spouses and children carry an eerie alikeness to the way kidnappers regulate their hostages and to the repressive regimes governments use to interrogate political prisoners. The common tools of such coercive restrain include isolation from friends,

peers, family and colleagues; strict and constant surveillance; thorough routine behavior and restrictions on access to basic necessities such as food, clothing and sanitary facilities.

Which classes/groups of women are at higher risk during this lockdown?

Besides women of some groups are at a higher risk to face domestic violence. Various researches prove that race and age play a commendable role in likeliness of a person to experience abuse from an intimate partner. Women with certain incompetence are more vulnerable to rape and sexual assault and other kinds of sexual coercion too. It is very pathetic that minorities and older women are at particularly higher risk. And a pretensive study found that the violent crime rate by the intimate partner is highest in the poorest neighborhoods.

Those who belong to gender and sexual minority communities, and if this minority is about color, then they are unjustifiably more likely to be homeless or have wobbly shelter, have the tendency to be unemployed or underemployed. These stressors are increasing profusely during the lockdown. While bars, restaurants and drive-ins are being circumscribed to take-out service only in many neighborhood or communities, alcohol abusers who are also family violence perpetrators are creating a whole abusive platform at their home 24x7 and this is definitely increasing risk factor for the entire household.

Not only alcohol abusers but surprisingly the sales rate of gun and ammunition is going leaps and bounds in the U.S. during the crisis, which is notably depicting the clear link between firearm access and fatal incidents of domestic violence.[56]

We generally consider the adult victims of family violence, but children and pets too reside in 60 % or more of households where domestic violence is a common scene and are also at high risk of suffering momentous physical and/or emotional trauma. Researchers have drawn an estimate that children residing in a home where domestic violence occurs time and again are facing 60 times more risk of child abuse or neglect in comparison to what general U.S. child population suffer. The domestic violence is not delimited to women and children but additionally it is also extending to harming animals in the home. It is calculated that 80 % of victims residing in a home which is a hub of both domestic violence and pet abuse, report their daily fear of the chance getting slaughtered by the husband or the father as the case maybe.[57]

[56] Liem Marieke, *Patterns of multiple family homicide.* (18 ed. 2014), Homicide Studies .

[57] Andrew Campbell, Ralph Hicks & Shannon thompson, *Characteristics of Intimate Partner Violence incidents and the environments in which they occur: victim reports to responding law enforcement officers* (2017), Journal of Interpersonal Violence

China, **United States**, **United Kingdom**, **Brazil**, **Tunisia**, **France**, **Australia**, and other nations too have reported cases of increased domestic violence .

The comparison of reports of domestic violence in the aftermath of natural disasters to the ones reported in current crisis-

The reports of domestic violence, alcohol abuse, stress among family members and their aggressive behavior have sped up by 46 % in Othello, Washington after the eruption of Mount St. Helens volcano.[58] Reports of psychological torture among women by their significant others increased by 35% after Hurricane Katrina, and reports on physical torture on women approximately doubled in the Mississippi counties.[59] The 2009 "Black Saturday" bushfires in Australia and 7.0 magnitude earthquake in Haiti brought such analogous scenario. The instances have been similar aftermath of earthquakes, tsunamis, hurricanes, and several other catastrophic natural calamities around the globe.

Due to the Corona virus crisis, the prime organizations, institutions and offices are closed completely which was previously observed in the aftermath of such natural disasters. Meanwhile community togetherness is often appreciated to come out of shock of natural disasters, but the physical separation from our concomitant members of the locality, controlling behaviors, unemployment and limited access to social support systems are stimulating the current crisis. All of these are resulting in abundance of family violence reports during the lockdown and it is expected that such reports after the Covid-19 pandemic will cross the record of the reports submitted during natural disasters and other catastrophic events.

Condition and cases of domestic violence at the heart of the outbreak: CHINA

In Hubei province, the core of the initial outbreak, reported cases of domestic violence increased threefold since the initiation of the pandemic. Evidently there is spike in divorce rates too. The country from where this virus spreaded first i.e. China is facing most of such cases. In the city of Xi'an in northwest province Shaanxi in China, the marriage registration offices saw an extraordinary number of divorce requests from March onwards. In this era where everything is valued on the social media outrage, it is used for letting out the women's

[58] Adams P & Adams G, *Mount Saint Helens's ashfall: Evidence for a disaster stress reaction* (1984), American Psychologist.
[59] Julie Schumacher, Scott Coffey & Fran Norris, *Intimate Partner Violence and Hurricane Katrina: Predictors and Associated Mental Health Outcomes* (2020), Violence Vict.

grievances too. The hashtag "#Xi'an divorce appointment explosion" has reached 32 million reads on the social media platform Weibo.

In Beijing, the women's rights NGO 'Equality' reported an efflux in calls to the organizational helpline number on issues of domestic violence, since February from where the lockdown measures were implemented throughout the country by the government. In Hong Kong, a domestic violence prevention centre and shelter called 'Harmony House', the number of admissions to the centre rose from 10 to 40, from January to April.

These are not the only stressors but women who are mothers too are having another burden of imparting more care for their kids to follow the quarantine measures and home-schooling situations. This is typically causing unequal divisions in household labour and the statistics say that women spend 2.5 times more time on unpaid care work than men in China, and this will affect women's ability to participate in the workforce in future for long-term because women have to stay at home and take care of their families.[60]

Duties and responsibilities of the health sector to stop the violence?

Violence against women can result in injuries and genuine mental, physical, sexual and reproductive problems, sexually transmitted diseases, unplanned pregnancies and HIV. The helplines such as hotlines, crisis centers, shelters, legal aid, and protection services, access to vital sexual and reproductive health services may are also halted back which increase the abovementioned issues more.

COVID-19 is exaggerating risks of violence for women in the ways mentioned below-

And beyond all this we should not forget about the women health workers, who may be at risk for violence in their homes or in the workplace. Front-line providers who are directly involved with COVID-19 might experience arraignment, isolation, and they may get socially snubbed. Health managers or local administrators need to look for the safety of their health workers too..6

Governments and policy makers – they must set adequate measures and elementary services and response plans to respond to violence against women and response plans for COVID-19,

Health facilities should pinpoint and administer information about helping services available locally (e.g. hotlines, shelters, rape crisis centers, counselling) for survivors.

[60] *Lockdowns around the world bring rise in domestic violence* (2020), https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence.

Health providers need to be well aware of the emanations and contingencies of this partner abuse. First-line support consists of: asking about the current needs and conditions, listening empathetically and without any judgment, giving validation to the feelings and emotions of survivors, heightening safety standards.

Humanitarian response organizations need to create information database to get the data reported cases of violence against women and services for women who are subjected to violence and their children in their COVID-19 response plans.

Community members should need to keep in touch with one another and support women in their surroundings subjected to violence, and they need to disseminate any information about any such domestic assault which can help a lot of people.

The harsh truth is we were at no better position to handle such problems but this pandemic situation is enhancing every problem to a great extent. Many organizations around the globe were already passing through the strain of ever-increasing cases and they did not have enough resources to fight with that. Now, the resources have depleted more and many are facing even greater barriers as they are struggling to find ways to reach these families who are completely separated from the remaining of their peers and are putting their life at stake. To improve relations between human welfare and animal welfare agencies, family violence victim-serving agencies must explore new and expanded community partnerships. Many workers from post office, courier service, food delivery staff or from the repairing service of home appliances are all working out there incessantly and traveling through several communities during the global crisis. So they have the chance to detect any problem or abuse happening to women in the neighborhood and can report about the incidents to the proper authorities.

Though everyone across the borders are not physically connected due to the threat of catching hold the virus, but nobody cannot control our opportunities to stay in touch mentally or psychologically.[61]

[61] Violence against women What health workers can do, (2020), https://www.who.int/gender/violence/v9.pdf.

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CASDAGLI V. CASDAGLI

- **SHARMEEN SHAIKH**

FACTS

In 1916, Jean Casdagli presented the petition for divorce and dissolution of marriage with Demetrius Emmanuel Casdagli, on the grounds of alleged cruelty and adultery, before the Court Of Appeal in England.

According to Demetrius Emmanuel Casdagli, he was born in England on October 10, 1872, his father was a naturalised British citizen born to Russian parents. Subsequently, he was educated in France and England. According to Mr. Casdagli, he came to Egypt in 1879 and remained in the territory till 1882, after which he went back to England. He came back to Egypt in 1895 as he found the climate suitable to him and ultimately chose it as his choice of domicile from 1900 by residing in Alexandria initially. Simultaneously, he was engaged in his father's business. In 1900, he went to Cairo to manage the business and was residing till the petition was presented. He was also a member of the Greek Orthodox Church and Jean Casdagli who was born in Egypt, was a member of the same Church. They were married according to the rites of the Church in Alexandria on 1st July, 1905 and on the 5th of the same month, solemnised their marriage in a civil ceremony before the British Consulate at Alexandria. Mr. Casdagli was taken into partnership with his father, together with his four brothers in 1910. His father died in 1911 and after his death, Mr. Casdagli carried on the Egyptian branch of business along with the two of his brothers. He was registered as a British subject at the British Consulate in Cairo. He also stated that neither he nor his wife ever established a matrimonial home in England. Hence, Mr. Casdagli pleaded that the English court did not have the jurisdiction to try this suit. According to Jean Casdagli, even though his choice of domicile was Egypt, Mr. Casdagli never abandoned his domicile of origin

The case was first present before the Court of Appeal and then the House of Lords in England.

JUDGEMENT

The court of appeal held that Demetrius Emmanuel Casdagli was governed by the extra territoriality of the British laws in the British Protectorate of Egypt. He was, as a result, under the jurisdiction of the English Court and had not acquired the domicile of Egypt.

In the appeal presented before the House of Lords, the judgement of the court of appeal as reversed and it was held that though it may seem through various cited judgements that it is

ISSN: 2581-6349

improbable for Mr. Casdagli to acquire a domicile in Egypt, since he was deemed to be governed by the privileges extended to the European community, like it was the case in several other protectorates, it had no effect on the legal right to do so. Mr. Casdagli was deemed as a person domiciled in Egypt and thus the English courts were deemed as incompetent to try the petition of dissolution of marriage in the instant case.

ROADMAP

This analysis will recognise the importance of the domicile and how the law of domicile should be interpreted in the international forum. The English courts have made a balanced judgement on the tricky ground of domicile under private international law.

ISSUES

The main issue that arose under this case was the want of jurisdiction of the English courts to try the petition of divorce for a marriage solemnized in Egypt. It revolved around the following sub-issues:

1. Mr. Casdagli was a resident and was carrying on trade in Egypt, which was later declared as a protectorate of England.
2. He was a member of the Greek Orthodox Church and after the performance of the rituals of marriage with Jean Casdagli, chose to hold a civil ceremony before the British Consulate so as to register his marriage officially.
3. He was registered with the British Consulate as a British subject, and thus was subjected to the extra territoriality of the British laws.
4. He had been living in Egypt since several years.
5. Even though he was a part of his family business based in England, his actions did not reflect the intent to go back to his domicile of origin as he chose to handle the Egyptian branch of the business. He claimed to have adopted Egypt as his domicile of choice and intended to stay there indefinitely.

Keeping the above facts in mind, the question of his domicile and the jurisdiction of the English courts to try the matter in the first place, was inevitable.

ANALYSIS

Domicile is an important concept under private international law. The domicile of an individual not only helps in the ascertaining the interests of parties involved, but also furthers the cause

of justice in a unified manner. The intent behind using the law of domicile is to help in the classification the acts with a legal relationship in an easy way.

Domicile, to put it in a rudimentary form, is the home or a place which a person considers as permanent. The purpose is to reside at this particular place for eternity and indefinitely. Any cap on the duration automatically negates the idea of domicile. It is a connecting factor that links a person with a legal system. For a place to be acceptable as one's domicile there has to be visible evidence that the mentioned place is a permanent abode of a person. Thus, domicile is nothing but a place or a geographical location, where one intends to reside permanently and with free volition.

This case not only broadened the interpretation of residence and law of domicile under private international law, but also accepted the intention to reside and the various facts that depict the intention to reside, as a vital factor in determining the domicile of a person.

In this case, Demetrius Casdagli, although a British-born citizen, claimed that he had adopted the domicile of choice in Egypt, which was initially under the Ottoman dominion and was governed by the Sultan of Turkey. In 1914, the suzerainty of the Sultan was terminated and it became a protectorate under the British Empire, owing their allegiance to His Majesty. After the proclamation, new rules came into picture, one of which, according to the Treaty of Dardanelles which was capitulated with Turkey, stated that disputes among the English themselves should be decided by their own magistrate or consul according to their customs. Accordingly, Consular Courts were established for disputes involving personal status of British subjects, excluding the matter involving land and were subject to regulation by Egypt Order Council in Egypt. There were also 'Mixed Courts' in operation in Egypt since 1875, adjudicating upon matters of foreigners or disputes that arose between foreigners and natives.

Keeping the geo-political scenario in mind, one cannot deny the fact that the foreigners in Egypt, at least before 1914, were governed by the Egyptian laws. It was only after the Treaty of Dardanelles that it conferred special rights and extra territorial jurisdiction upon the British subjects residing in Egypt, which was then officially declared as a protectorate of England.

Mr. Casdagli, initially as a dependent, acquired the domicile of his father. Later, when he voluntarily moved to a Turkey-governed Egypt and subsequently married and decided to manage the Egyptian side of the family business, his actions indicate the abandonment of his domicile of origin and the assumption of Egypt as his domicile of choice.

The civil ceremony post the religious rites, before the Consulate do not attribute the continuation of his domicile of origin as it may be perceived in the light of providing the

relationship a legitimate and legal colour and may be governed by the intention to register the marriage as per the rules prescribed for the British subjects residing in Egypt post the assumption of suzerainty of His Majesty the King of England.

Another argument which was stated in the court of appeal was that he was registered as a British citizen with the consulate situated in Egypt. This is not conclusive of his continuation of his domicile of origin either. The registration is part of a protocol, so as to keep track of the British subjects in the foreign territory, albeit governed by the home government, at that point of time. His registration is also attributed to his father's domicile, which would automatically become his domicile.

An important aspect that governs the aspect of domicile is the intention to reside. The English courts have taken the view that law of domicile governs the personal affairs of an individual. It is a connection of the person with the legal system, whether or not he/she is a citizen or is in the process of acquiring citizenship. The fact that he kept coming back to Egypt, speaks volumes about his intention to reside. He chose to handle the Egyptian side of his family business is also indicative of his change of domicile as a person prefers to stay in close proximity to where he/she works and vice versa. Another fact that substantiates the claim is that he solemnised his marriage and chose to stay in the same place, thereby establishing their matrimonial residence in Egypt. Also, one should not forget that when Mr. Casdagli chose to reside in Egypt indefinitely, it was governed by its own laws. The difference in time period, even if it is a year, is enough to suggest that he had given his allegiance to a foreign country and gave his acquiesce to be governed by foreign laws and customs indefinitely.

There can be no single fact but a series of events that establish a person's claim to change of domicile. The fact that he was given the privilege to be governed by the British laws even outside the territory does not negate the fact that Mr. Casdagli had abandoned his domicile of origin long before he was given this privilege.

In the case of Michael Anthony Rodrigues v. State of Bombay[62], one Michael, born in 1918 in Goa of parents possessing a Goan nationality, came to Bombay in 1927 where his father had established a tailoring business for the last forty years. After that, Michael never went back to Goa. He was then educated in Bombay and joined his father's business in 1936. In 1946, he joined the Royal Indian Armed Forces. After his discharge, he gave Bombay as his permanent address. Thereafter he lived in Bombay and reverted to his father's business. His name was also entered in the municipal rolls as a voter. Based on these series of facts, the Bombay High

[62] 1956 Bom. 729

Court ascertained the intention of the person to reside indefinitely and held that he had acquired the domicile of Bombay as domicile of choice and had abandoned his Goan domicile of origin. The duration of stay are easy indications of intention to reside but it is not necessary as even if the stay is short, if there is intention to reside indefinitely, the domicile origin maybe accomplished.

This case helped evolve the concept of residence and domicile. In the case of Kumud v. Jotindranath[63], the Calcutta High Court, in 1911, held that residence means the place where a person eats, drinks, and sleeps, or where his family or servants eat, drink and sleep. Also, the judgements rendered in this case successfully depict both sides of the coin. But, the liberal interpretation adopted by the House of Lords opened doors for the reconsideration of the factors that determine the domicile and the residence of an individual.

CONCLUSION

The judgement given by the House of Lords helped establish the rule that domicile of choice is achieved when a person intends to reside in a place indefinitely and gives the assent to the local laws and customs to govern his/her daily and personal matters. Such broad interpretation of the concept of residence and domicile helped in the shunning of traditional interpretations of facts and laws. This case successfully helped develop the rules for law of domicile under the arena of private international law.

[63] (1911) 38 Cal. 394

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A PROPOSAL: TO BALANCE THE FACTORS OF GENDER JUSTICE AND RELIGIOUS FREEDOM

- **AYUSHI VERMA**

INTRODUCTION

Article 44 provides Directive Principle for the citizen of India under Indian Constitution and "Uniform civil code" ("UCC") it is a goal which needed to be achieve. By Uniform Civil Code ("UCC") it is meant Uniformity in every civil matters and uniform religion i.e., matters of Civil, Divorce etc. It is western, liberal and intellectual Principle. It has purpose to replace various Personal Laws Like Hindu Law, Christian Law, Persian law and Muslim Law (shariat) etc and to make one uniformed set of guidelines law under ("UCC") in marriage, Divorce and inheritance of Rights, if it is get implemented. It will eradicate Gender Discrimination and there will be no interpretation by different religious Gurus it will also reduce the women exploitation, False politics on the name of caste, creed, race and religion.

("UCC") doesn't mean that one should impose majority of Hindu Laws there is fear among minority that is ("UCC') follows or hold Hindu Agenda and majority will follow Hindu Law because in India the minority Population is 14% and Majority Population is around 86% which is Hindu. Thus, it has been concern of minority like Mohemmadan, Christian and Parsi that if "UCC" gets implemented then it will only favor Hindu Law and they may be ruled and crushed by majority. That's why it is opposed by many religious Gurus.

In the case of *Smt.Sarla Mudgal, president vs. Union of India & Ors On 10 May 1995*, AIR 1995 SC (3)[64] 1531 the court handled matter to resolve the inter-personal conflict of law, which is a byproduct of lack of a Uniform Civil Code ("UCC") "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India."

FACTS

On May 10, 1995 the court heard four (4) petitions filed under Article 32 of the Indian Constitution. The petitioners field the case against the practice of solemnizing a second marriage by conversion to Islam, without dissolving the first marriage.

[64] See Sarla Mudgal case.
I have used Uniform Civil code and UCC interchangeably.

- The first one was by Kalyani, which is an organization that works for the needy families and women in distress, which was headed by Sarla Mudgal.
- The next petitioner was Meena Thakur, married to Jitendar Mathur, in 1988
- Third Petitioner was Geeta Rani, married to Pradeep Kumar.
- Fourth Petitioner was Sushmita Ghosh married to G.C Ghosh.

A. Legislative Solution

One of the most controversial and high voltage Judgment which was handed down by supreme court which raised the question of implementing Uniform Civil Code ("UCC")[65] The Judgment in (Sarla Mudgal case) was based on that there is no interlinking between Religion and personal laws (on the matter of marriage) in a civilized society which needs a down scrutiny.

In *sarla mudgal case as per Supreme Court* Under the Hindu personal Law as it existed prior to its codification in 1995. A Hindu Marriage converted to Islam there was no automatic dissolution of the marriage. No authority could be found to support the view that a marriage solemnized according to one personal law simply because one of the two parties has changed his or her religion. If there were to be an automatic dissolution due to conversion it would amount to destruction of the existing rights of the other spouse who continues to be Hindu.

In pursuance of Secularism a state should restrict or stop administering religion based personal laws into account of Directive principle state Policy (DPSP). Every nation should achieve peace and harmony and it is a duty of state to achieve harmony by implementing valid policies stated in Part IV of constitution.

There can be solution in ("UCC"), if it is enacted as a 'Grundnorm' instead of replacing all the customary laws. A set of guideline can be made to abolish or made those laws or customary practices which "lower down the status of women and creates inequality in society comparatively to male. This type of laws might be accepted by all because it will not replace customary laws or party of it and it also protect miscellany of Indian culture and religion[66]

Another step for preventing bigamous marriage is can be passing Anti-Bigamy Bill which can be great solution of it and it should be pre debated and discussed by authority before approval so that necessary mandate points can be taken into account for avoiding disagreement towards bill.[67]

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[66] See law article by kinshuk ritu khullar < http://www.legalserviceindia.com/legal/article-226-should-uniform-civil-code-be-implemented-in-india.html>

[67] See Jstore article by Geetanjali Gangoli Vol 31, no 29 on July 1996, named Anti-biagamy bill in Maharashtra.

B. Balancing Religious Freedom with Gender Justice

The tension between the Religious Freedom and Gender Justice is becoming increasingly acute. UCC affirms the importance of Religious freedom and equality. The intersection between religious freedom and gender justice gave rise to concern about injustice on the base of caste, creed, religion or sexual orientation and maintaining minority culture within the dominance of majority culture. Article 25 to article 30 Under Indian Constitution of India which provides protection on religious freedom and education or cultural Rights of Minorities "the right freely to profess practice and propagate religion"

This provision of religious freedom creates hurdles of the freedom and equality extended to women by the Constitution. Because family law and personal laws are rooted in this code it is required that women should have equal rights in Family and Property. Women in politics, Judiciary can make big difference in Gender Justice as law should be seen by eye of women can change perspective and bring development. Thus, there is requirement of concrete action in various critical areas which can address the challenge of gender equality and religious freedom.

CONCLUSION

Gender justice in a multicultural society would be difficult to achieve until the struggles for inter-group and intra-group equality are seen as related. The complex between right of individual and rights in constitution has adverse effect or impact on female and might be male as well. It is important to view justice within groups as important as justice among groups. The absence of ("UCC") give rise to unwanted, unnecessary ugly Piquant situations. However, when citizens have already brought under ambit of Hindu Marriage Act, Succession Act and Maintenance Act. Then why "Uniform Civil Code" is not being enforceable which is need of an hour in diverse culture.

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THE 4 WAY SPLIT OF 44 LAWS

- **ARJUN. A, PONMANI CHAKKARAVARTHY& ANULEKHA SRINIVASAN**

ABSTRACT

India has the second largest number of workers after China with a population of 487 million. Of the overall workers' population, 94% are unincorporated and unorganised. All the labourers are governed by a lot of Acts and laws. These Acts cover the occupational safety, health, wages, etc. of the labourers. Though these Acts help the working class to function properly and peacefully, the amount of these laws and Acts are excessive. 44 labour laws and thousands of sections are difficult for the labourers to follow and more difficult for the employers to function. So, the Government of India, on 2018, subsumed these 44 labour laws into 4 codes, i.e. The Code of Wages, The Occupational Safety, Health and Working Conditions Code, The Code on Social Security and The Code of Industrial Relations, making it easier for the employees and the employers.

The Code on Wages subsumes 4 labour laws and deals with the importance of wages for both organized and unorganized sector and it is employee-friendly. The Occupational Safety, Health and Working Conditions Code emphasizes subsumes 13 labour laws relating to safety and health standards, health and working conditions, welfare provisions of the employees and leave and hours of work. The Code on Social Security subsumes 9 labour laws and provides welfare benefits such as pension, medical cover and death and disablement benefits to all workers. The Code on Industrial Relations subsumes 3 labour laws and aims to streamline industrial relations and help India improve on the ease of doing business.

This article helps the readers to understand the importance of these codes and why these codes are pending to be passed by the Parliament (except The Code on Wages), why the trade unions are against these codes, the trade-offs of the codes and how these codes are different and useful to the employers and the employees than the 44 labour laws that were subsumed.

INTRODUCTION

As several as forty-four central labour laws square measure presumptively to be subsumed underneath four labour codes in 2020, creating it a year of reforms as a result of the govt. works to bolster investments and tackle holdup blues.

Entering 2020, the govt. hopes that India would be able to implement all four codes on wages, industrial relations, social insurance and activity safety, health and dealing conditions. These square measure expected to reinforce easy doing business and safeguard the interest of staff.

"We hope that 2020 would be the associate year of labour reforms. The four codes would be a reality in 2020. The codes would safeguard the interest of staff and employers. We've tried to strike a balance between workers' besides employees' rights," Labour Minister Santosh Gangwar told the PTI.

[68]THE CODE ON WAGES:

The consolidation, rationalisation and simplification of labour-related regulations are on track with the Code on Wages, 2019 receiving Presidential assent on August 08, 2019, after the nod from both Houses of Parliament.

This Code is the first of the four labour codes which have now become an Act, and has replaced four labour regulations viz. the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976.

It is important for the industry at large to understand the key aspects that the Code will impact. Having brought together various previous legislation under a single umbrella, the Code has expanded the definition of "employer" as well as "employee", resulting in broad-based applicability of the regulations and is now applicable to employees in both the sectors (organised and unorganised). Further, the provisions of the Minimum Wages Act and the Payment of Wages Act used to apply only to workers drawing wages below a particular ceiling and working in scheduled employments only. However, under this Code, the minimum and the payment of wages provisions cover all establishments, employees and employers as defined unless specifically exempt (the member of the Armed Forces of the Union and apprentice engaged under the Apprentices Act, 1961 are specifically excluded from the definition of employee).

With intent to have a uniform definition of wages across all legislations as well as to minimise litigation, the definition of "wages" has been unified. The definition of wages now has three parts to it- an inclusion part, specified exclusions and conditions which limit the quantum of

[68] www.economictimes.indiatimes.com The Code on Wages, 2019: Understanding the key changes to wages, remuneration and bonus

exclusions. The definition includes basic pay, dearness allowance and retaining allowance. It specifically excludes components such as statutory bonus, the value of house accommodation and utilities (light, water, medical etc.), employer contribution to provident fund/ pension, conveyance allowance/ travelling concession, the sum paid to defray special work expenses, house rent allowance, remuneration payable under the settlement, overtime allowance, commission, gratuity, retrenchment compensation.

The specified exclusions, however, may not exceed 50 per cent of all remuneration, and in the event of exceeding, such excess amount shall be deemed as remuneration and will be considered as "wages". This is aimed at ensuring that companies do not adopt compensation structures which result in wages being reduced below 50 per cent of the total remuneration.

[69]The occupational safety, health and working conditions code, 2019:

"In November 2018, the international labour organization said that 31% of Indian workers were working in unhealthy conditions while around 41% of them said they were poorly paid, giving India a bottom-end rank of #19 among 22 countries of the Asia-pacific region."

India's history in promoting occupational and industrial safety is weak even with years of tremendous economic growth. Making work environment safer is always been a low priority, even the productivity benefits of such investments have always been clear. The consequences are often seen in the form of a large number of fatalities and injuries which is being ignored on a daily basis by policymakers and also due to more supply of labours every day. Safety, health, welfare and improved working conditions are the prerequisite for the wellbeing of the workers and also for the economic growth of the country as a healthy workforce of the country would be more productive and occurrence of fewer accidents and unforeseen incidents would be eco beneficial to the employers also. The central government should abandon its reductionist approach to the challenge and engage in serious reforms. The occupational safety, health and working conditions code, 2019, introduced in Lok Sabha in July to combine 13 existing laws relating to Mines act 1952, factories act 1948, dock workers act 1986, buildings and constructions, transport workers, interstate migrants labours act 1979 and so on. Lok Sabha has referred the labour code on occupational safety, health and working conditions to the standing committee on labour for consideration, a move that may delay the process of approval for the bill. This code is still pending in Rajya Sabha due to many shortcomings which have to be addressed and given more attention for it to be enacted.

[69] www.prsindia.org The Occupational safety, health and working conditions code, 2019.

ISSN: 2581-6349

This code has all-round disapproval wherein the trade unions across the spectrum are opposed to a ham-handed work the central government has done without sufficient attention to worker's safety. The RSS-affiliated Bhartiya Mazdoor Sangh (BMS) has various objections. Its president CK Sajinarayanan denounces the code as a ''cut-and-paste job'' with no universal application, unlike the other three labour codes being contemplated. Other central trade unions, including the CITU, INTUC, AITUC and others have also indicated their disapproval, accusing the government of discriminatively picking up provisions (from the 13 central labour laws) advantageous to employers and grossly diluting and tampering all provisions pertaining to the rights and protecting of workers.

The occupational safety, health and working conditions code,2019 is applicable only to establishments with 10 or more workers, it is keeping 90% of the workforce from the unorganized sector, outsourced on contract and home-based, out of its purview which is been noticed as a major drawback of the code. This code has been branded as ''anti-worker and pro-employer exercise''.

Labour economist Prof. KR Shyam Sundar of the XLRI'S Xavier School of Management, Jamshedpur, holds similar views. He says instead of providing secure and robust conditions of work, the code actually exposes them to greater risks.

Some of the provisions in the code endanger health and safety of worker's which has to be noticed:

1. Clause 22 of this code gives the government discretionary power in setting up a safety committee, while under factories act of 1948 this is a statutory requirement for every hazardous unit.
2. Clause 83 deals with giving power to the state government to ''prescribe'' maximum permissible limits of workers exposed to chemical and toxic substances, while the Factories Act 1948 specifies this in its second schedule.
3. Clause 125 and 126 gives the government extensive powers to make rules for implementing the code, including those relating to safety and health matters. There is an absence of safeguard for dealing with e-waste and all other toxic and hazardous substances.
4. Clause 47(2) is another provision being disapproved for the reason, it empowers the government to give ''work-specific-license'', which could be renewed within such period as may be prescribed, ''where the contractor does not fulfil the requisite criteria

or qualification'' for supplying or engaging contract labour which makes us wonder how this could be justified

5. This code shall not apply to the officers of the central government, officers of state government and any ship of war of any nationality.

Our Indian industry appreciates the attempt at simplifying the labour laws and ease in filling documents relating to safety and health measures at the same time it is unhappy about not increasing the threshold for the applicability of the code. ''CII'S MS Unnikrishnan says the industry has been demanding the threshold to be increased from 10 workers at present to 20 workers, which is been ignored'' which also serves as the best shortcoming of this code. And 90% of workforce which is from unorganized sector/informal economy sector, outsourced on contract and home-based sector would be out of the purview of the code.

Another main reason for not favouring this code is there are different work situations, with varied needs of safety equipment's, work environment, various sector-specific aliments needing health needs in accordance to that etc., the same shoe cannot be fitted to everyone. This code in detail view would in one stroke exclude millions of workers from safety protection instead of inclusion.

It is essential that this code go back to the drawing board for careful scrutiny by experienced parliamentarians, aided by fresh inputs from employees, employers and experts. Industries that use hazardous processes and chemical deserve particular attention, and the code must have a clear definition, specifying limits of exposure for workers. Compromising on safety can lead to extreme consequences that go beyond factories, and leave something this is etched in the nation's memory as in the case of fire at the oil and natural gas corporation gas facility in Navi Mumbai, or the tragedy that killed nearly two dozen people at the firecracker factory in Batala, Bhopal gas tragedy and so on.

"An incident is just the tip of the iceberg, a sign of a much larger problem below the surface'', so the government should go through all the provisions carefully and make required changes where necessary and should enact the bill as soon as possible before larger problems hit our nation.

[70]THE CODE ON SOCIAL SECURITY 2019:

Background:

[70] www.economictimes.indiatimes.com Social Security Bill introduced in Lok Sabha.

ISSN: 2581-6349

The Indian labour ministry is working towards consolidating its 44 labour laws into 4 codes- on wages, industrial relations, social security and safety, and health and working conditions in order to improve ease of business whilst safeguarding the interest of co-workers. The social security bill will replace 8 social security laws in India.

The Indian government may set-up various social security schemes, including the PF, insurance scheme, for the benefit of the works. The government may also provide:

1. Sickness and maternity benefits.
2. Gratuity to workers on completing 5 years of employment.
3. Maternity benefits for women employees.
4. Payment of tax to the employer for the purposes of social security.
5. Compensation to employees and their dependents in the case of occasional injury or disease.

Introduced by the labour minister Santosh Kumar Gangwar, the bill proposes setting up a social security fund using corpus available under social responsibility. This fund will provide welfare benefits such as a pension, medical cover and death and disablement benefits to all workers, including gig workers. As for the bill, millions of organized sector employees may soon have the option of reducing their PF contribution- currently at 12 per cent of basic salary, and therefore increase their take-home pay. The social security code subsumes 8 central labour laws:

1. Employees' Compensation Act, 1923.
2. Employees' State Insurance Act, 1948.
3. Employees' Provident fund and miscellaneous provisions Act, 1952.
4. Maternity Benefit Act, 1961.
5. Payment of gratuity Act, 1972.
6. Cine workers welfare Act, 1981.
7. Building and other construction workers cess Act, 1996.
8. Unorganized sector workers' social security Act, 2008.

ISSN: 2581-6349

[71]Except for Bhartiya Mazdoor Sangh (BMS), a major trade union affiliated with the ruling party BJP, 12 trade unions protested that workers' rights are curtailed. They protested across the country demanding the centre to withdraw the proposed labour code. Central labour minister has brushed aside the Indian labour conference formula on a calculation of wages and the Supreme Court's decision to add 25 per cent to it. He announced the minimum wages at ₹4,628 per month or ₹178 per day, even when the 7th pay commission had recommended minimum wages of ₹18,000 per month in January 2016. Central trade unions went on a Nation-wide strike on January 8 and have warned of an intensified agitation at the state level and in industrial belts. The BMS stayed out of the strike but had written on 28 November to the labour minister accusing it of taking a "casual approach" to labour reforms. The BMS rejected the draft on social security code and termed it "totally disappointing", for the workers in the country. It submitted its comments to the labour ministry on the draft that said the draft is a weak cut-and-paste of the existing 8 social security laws with different threshold limits for different benefits. Unlike the code on wages, it is not universal, i.e. it did not aim all the workers to be benefitted by all the benefits. It creates a class division of privileged 'employees', 'workers' and unfortunate 'wage workers' with a different set of benefits. The government share of 1.16 per cent in EPS (Earning per Share) has been withdrawn. Flaws and mistakes in the existing social security laws raised by trade unions are not attended in the code. The new code will give the option for the reduction of Provident Fund contribution by employees in some sectors from 12 per cent to 10 per cent. The reduction will not apply to employers and has been solely to increase the take-home pay of employees. The bill proposes to set-up a social security fund by utilizing the funds available under corporate social responsibility, to provide welfare perks such as pensions and death and disability benefits. The bill also has a clause to make fixed-term contract workers eligible for gratuity on a pro-rata basis.

The vision to make social security universal is undoubtedly the right one. It has traditionally encompassed, apart from a lot of benefits. However, the Bill fails to encourage that provision of meaningful social security on such an enormous scale is beyond the capacity of any single ministry at any single level of government, and that social security has to be fundamentally rethought, instead of creating a patchwork drawn from different extant laws.

[71] www.thehindu.com Workers protest against new draft code on social security

ISSN: 2581-6349

Housing and education are key necessities of such security if not vital parts of it. All these cannot be delivered by any single venture or scheme by any single ministry or department, to a population as large as India's.

Nor can these be delivered from the funds contributed by workers and their employers whether into the provident fund or into any corporate social responsibility fund. The present government seeks to provide healthcare to all, and housing for all. These are to be funded by the exchequer. It points to the overlap between the welfare policies of the government and social security narrowly conceived.

Therefore, it is essential to rethink social security from the top. It should be delegated equally, its different components given to different arms and agencies of the government at all levels. In the era of advanced and rapid technological obsolescence, quality education must play its part. The Government, instead of passing the Bill through the Parliament, can subject it to detailed reconsideration.

[72]Code of Industrial Relations, 2019:

The industrial relation means the relationship between the management and workmen and the role of a regulatory body to resolve any disputes. In India, it is a Regulatory body to solve the disputes. It is subsumed three labour laws they are: Trade union act 1926, Industrial employment act 1947 Industrial dispute act 1946. This bill was proposed in Lok Sabah by Santosh Gangwar in 2019. The industrial relation code is the third of the labour code that has got approval from the cabinet; the industrial relation bill comes to develop the industrial index. The primary objective of industrial relation to maintaining and develop a good and healthy relationship between employees and employers or management. The important things in this bill are 1) fixed-term contract the expiry of contract due to the expiry of fixed-term does not constitute retrenchment 2) To form a negotiating union in this they recognize the employment union 3) Re skilling fund the retrenching employer is required to contribute 15 days last drawn wages of the retrenched employee for a fund it will be used for the welfare of employers 4) amendment in detention of strike an employee cannot go on strike unless he gives notice for a strike within 60 days before striking and also within 14 days of giving such notice. Similar notice provisions exit for lockout of workers .lockout refers to the following actions by an employer temporary closure of an establishment, suspension of work or refusal to continue employing workers. 5) The code provides for the recognition of trade unions notice 6) The

[72] www.lexology.com Industrial Relations Code, 2019- Will it increase 'ease of doing businesses in India?

trade unions that have a membership of at least 10% of workers or 100 workers will be registering the union with75% of workers in the establishment will be the sole negotiating union .7) The code provides for the Constitution of the industrial tribunal for the settlement of industrial disputes. Each industrial tribunal will consist of judicial members and an administrative member .8) the factories mines or plantations in which 100 or more workers are employed are required to take prior permission of the Central or state government before lying off or retrenching their workers.

[73]ISSUES AND ANALYSIS:

1) The code permits the government to reject or modify awards passed by industrial tribunals and the national industrial tribunals. A similar provision in the industrial disputes act, 1947 was struck down by Madras high court in 2011 as it violated the principle of separation of power by allowing the government to change the decision of a tribunal through executive action.

2) The code requires the employers of establishment with at least 100 workers to obtain permission from the appropriate government prior to the retrenchment of a worker. The government may increase or decrease this threshold through a notification. The question is whether the power to determine such a threshold should be specified by parliament or whether it should be delegated to the government

3) The code prohibits strikes or lockout in any establishment unless prior notice of 14 days is provided. Similar provisions existed in the industrial disputes act 1947 for public utility services such as railway and airlines. The code expands these provisions to apply to all industrial establishments. This may impact the ability of workers to strike and employers to lockout.

IN THE EYES OF INDUSTRIAL BODIES AND UNIONS:

The industrial relation code mostly industry bodies welcomed the proposed legislation while unions opposed it. CK Sajinarayanan president of RSS Affiliated Bhartiya Mazdoor Sangh says "He strongly opposes the attempt to suppress strike and dismisses it as IMPRACTICAL. And also he says such provisions were made for public utility service earlier and did not work as most strikes happened to violate it. The 14 days of notice become meaningless given the restrictions and will create a fresh battleground badly affecting industrial peace".

[73] www.labour.gov.in THE INDUSTRIAL RELATIONS CODE, 2019.

While the government says the code will simplify old and complex labour regulations improve the business environment and spur employment unions to call the related bill anti-workers for allowing employers to hire and fire workers more easily, arguing that it has no safeguard for workers make it harder for workers to negotiate better terms and wages with employers and makes strike actions more difficult

"This industrial relation code is pushing us back to the British era, "said Amrajeet Kaur, general secretary of the All India Trade Union Congress. It attacks collective bargaining by making trade union leader vulnerable to punishment and attacks existing labour legislation we have for workers protection"

The industrial relation code has proposed that workers not be allowed to go on a strike after initiation of the process of conciliation. Irrespective of the time taken to arrive at a decision, it restricts the ability of unions to go on a strike. The code has also proscribed subscription charge for trade unions as well as proposed changes to norms for registration of unions making it difficulties for Unions to go for collective bargaining

Rituparna Chakraborty co-founder and executive vice president of Teamlease services said the move is "encouraging to see". "It showcases the government intension to create an Ecosystem for job creation. The reaffirmation of e entitlement to wages as well as statutory and social security benefits for fixed terms employee at par with regular employees is just moving. Similarly, the amendment to the current rule wherein employers who intend to let go more than 100 employees requiring prior approval from the concerned authority is also a good move ".

CONCLUSION:

[74]The migrant worker is the link between industry and agriculture. His mobility is the measure of the interconnections between the urban and the rural in India. The number of migrants is proportionately smaller than the far larger numbers of men, women and children engaged in agriculture, as street vendors, as members of the workforce keeping production running in the organised and unorganised sectors, irrespective of whether these are registered or remain unregistered. Though the idea of subsuming the labour laws into a code for various welfare measures and seeking to provide employment for more than 50 crore workers is a noble goal undoubtedly, the question to be asked is, will subsuming the labour laws and suspension of labour rights, aimed at reducing labour cost, enhance private investment and ensure recovery? Past experience does not inspire confidence. The Reserve Bank of India, for some time now,

[74] www.hindu.com Labour rights are in free fall

ISSN: 2581-6349

has single-mindedly designed policies that reduce the cost of borrowing capital, but this has clearly failed to unleash animal spirits. Further, cutbacks in corporate tax in September 2019 made no impact in uplifting private capital and reviving growth in subsequent quarters. So, instead of rushing it through the Parliament, these codes must be given a detailed consideration.

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A FOUCAULDIAN ANALYSIS OF THE NATURE OF AMERICAN PENAL ENFORCEMENT

- ABHIJIT VADAVALLI

INTRODUCTION

Michel Foucault was a French philosopher who wrote extensively about power. His analysis of the ways in which power is used in society rests on a comparison of social structures to a Panopticon. The Panopticon was a creation of the English philosopher, Jeremy Bentham, who used it to model prisons.[75] In brief, it was a circular structure with prison cells embedded into the walls of the circle, at the center was a tower, the windows of which were shielded from observation of the cells. This meant that anyone in the central tower could observe all of the cells, and the people in the cells could only observe the tower. The prisoners would not be able to tell if they were under constant surveillance or not, but they would still be apprehensive to believe that they were free. This creates a method of control that is not a direct and visible exercise of power, but a more subversive one. Bentham argued that this would ensure that in the event that constant surveillance is not possible, it could be guaranteed that the criminals would adhere to the rules of the prison.

In this paper, the author will analyze the arguments that Foucault makes about the exercise of power in modern society, and will attempt to apply it to the American penal system. Through this analysis, the methods of control, the potential benefits derived from these methods, and the possible benefactors of this control will become clear.

ANALYSIS

The Panopticon and Power

Foucault, in *Discipline and Power*,[76] analyzes how punishment has changed through history with the change in power relations. In the past, punishment was gruesome, violent, and public. It served as a reminder of the supremacy of the king to the people, and that transgression of the king's word would be met with extreme measures. Due to the enlightened reform of human values, there were calls for punishment to be made more humane. While recognizing the

[75] Sprigge, Timothy L. S.; Burns, J. H., eds. (2017), *Correspondence of Jeremy Bentham*, Volume 1: 1752 to 1776. UCL PRESS.
[76] Foucault, *Discipline and Power*, 1975.

genuinely enlightened reform, Foucault argues that this reform was not done out of goodwill for the prisoners, but was done to make punishment more efficient. Enter, the Panopticon. In the interest of efficiency, the meaning of discipline changed. From meaning a top-down means of ensuring compliance with a system of rules, it became a method of ensuring self-regulation in behavior. From this conception of discipline, prisons evolved. Fashioned after a Panopticon for efficiency, prisons succeeded in ensuring that prisoners self-regulate their behaviour, as they are under a threat of constant surveillance. This new form of power is what Foucault refers to as disciplinary control.

Disciplinary control is exercised through three primary techniques: hierarchical observations, normalizing judgement, and the examination. For most systems of control, mere observation is enough. For example, in a university lecture hall, the seats for the students are tiered so as to allow all of them to see the lecturer, who is at the centre. This also ensures that the lecturer has a clear line of observation of each student in the class, ensuring a degree of control over the lecture. Since the clearly efficient model of a singular observer is not tenable in most circumstances, observation is hierarchised. With lower level observers relaying information to the higher level of observation. For instance, in most prisons, there are prison guards that patrol the cells and gather information on the state of the prison, this information, along with the information from CCTV surveillance, is passed onto the prison warden. If we were to understand this as a Panopticon, the warden would represent the tower at the centre, and the prison guards and CCTV cameras would simply be means of hierarchical observation.

Much of disciplinary control is concerned with the things that people have not done, that is, non-observance. Essentially, this form of control is concerned with a person's failure to behave according to a certain standard. The punishment system, therefore, becomes concerned with ensuring reformation, rather than a means of revenge, as it was in the past. This is the second limb of disciplinary control, normalizing judgement. It is through a system of judgement based on a person's adherence to an established set of norms that a degree of reformation is decided. Through this reformation that the system deems necessary, disciplinary control is exercised. This form of normalized judgement is pervasive in almost any system where evaluation is necessary. For instance, in most education systems, a student failing a subject is seen as the student failing to satisfy the norm of studying. The remedy to this that the system provides is to ensure that the failing student satisfies this norm by sending them through remedial classes or ensuring after class tuitions. Through these means, it is ensured that the student behaves according to the norms. The third and final limb is that of the examination. This combines the first two limbs of hierarchical control and normalizing judgement to both gauge the knowledge

ISSN: 2581-6349

of the subject, and ensure their compliance. The examination of the subject compares the subject to the normative system through hierarchical observation. Attempts are then made to ensure compliance to the norms wherever there is a deviation. For instance, examinations of the mental health of people who are schizophrenic compares their experiences to the normative understanding of a "healthy" person's experiences. After this examination, they are most of the time committed to a mental health institution that will observe them and ensure that they start behaving like "healthy" people, through the administering of medicine and exercises that are intended to model their behaviour.

Foucault finds that these mechanisms of the Panopticon embody four principles that are ensured in any system of disciplinary control. The first is pervasive power. The tower at the centre sees into every cell. The second is obscure power. While the prisoners know that there is some power in their vicinity that is controlling them, they do not know how to attach an image or a face to it. The third is the replacement of direct violence by structural violence. Direct harm does not have to be caused to those who disobey the law to ensure compliance, however, they are still coerced through the structural violence of the Panopticon. The fourth is the profitability of the structural violence. The modern prison system in the U.S. allows prisoners to work and sell their labour for essentially no compensation, providing a profit to the prison. This profit can only be achieved if the only alternative to labouring was sitting in a cell. Through these four principles, Foucault argues that disciplinary control systems not only ensure compliance, but also profit from it.

The American Penal System

The U.S. has the highest number of people incarcerated in the world. A staggering 2.2 million people populate the country's prisons and jails.[77] A big reason for this high a number is due to the number of people serving sentences on drug related offences. The number of people serving a prison sentence for drug related offences is higher than the number of people in prison in 1980.[78]

Sentencing has also gotten longer and harsher over time. Studies show that a decreasing crime rate since the 1990s might not be a result of mass incarceration, but due to those who were sentenced simply aging out of crime. Since these sentences are normally given out for youth

[77] Data taken from https://www.sentencingproject.org/criminal-justice-facts/. (Last accessed on 8th June, 2020)
[78] *Id*.

crimes or drug crimes, they continue to happen as the people who commit the crime are easily replaced.

Mass incarceration has also had a disproportionate impact on the racial front. People of colour in the U.S. are at a much higher risk of being incarcerated than white people. While a third of the American population is comprised of people of colour, two-thirds of the prison population happens to be comprised of by people of colour.[79] The racial bias of the American penal system goes even deeper. The history of policing in the U.S. is marked with instances of police brutality against black people. Several studies have shown that there are psychological, functional and legal mechanisms that enforce racial biases and disparities in the policing system.[80]

Prison, however, is a fairly profitable business. It has an estimated yearly turnover of around $74 billion.[81] Prisons are privatised and corporations are allowed to foot a profit for managing prisons and inmates. Further, the 13th amendment of the U.S. Constitution prohibits slavery except as a punishment for crime, essentially legalising the slavery of the prison population.[82] Prison labour allows these private prisons to profit off of the virtually free labour of the prisoners. These private prisons are under no obligation to provide workable conditions for the prisoners, such as healthcare, reasonable compensation, or even clean clothing.[83] In extreme situations like in Texas and Florida, prisoners are made to work in vast fields with no pay at all.[84]

Using Foucault to Understand this Problem

Through his genealogy, Foucault argues that the purpose of disciplinary action has been to produce docile bodies. Prisoners, students, workers, and soldiers are subjected to disciplinary control to mold their behaviour such that they are beneficial to the powerful and easy to control. It is clear in the ways in which modern disciplinary control addresses the human body that it views the body as a machine, aspects of which can be optimized for functionality. For instance,

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[79] *Id*.
[80] David Weisburd and Malay K. Majmundar, *Proactive Policing: Effects on Crime and Communities*, THE NATIONAL ACADEMIES PRESS, 2018.
[81] Brian Kincade, *The Economics of the American Prison System*, SMART ASSET, 21st May, 2018, https://smartasset.com/mortgage/the-economics-of-the-american-prison-system. (Last accessed on 8th June, 2020)
[82] 13th Amendment, UNITED STATES CONSTITUTION.
[83] Kevin Rashid Johnson, *Prison labour is modern slavery. I've been to solitary for speaking out*, THE GUARDIAN, 23rd August, 2018, https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike. (Last accessed on 9th June, 2020)
[84] *Id*.

the education system is meant to provide a skillset to students that is seen as optimal for performance in the current economy, rather than as a means to impart the knowledge that one might want to acquire. This becomes clearer in the context of the American prison system. The use of their labour and harsh sentencing implies a nature of the system to want to optimize. They view these prisoners as objects that they can optimize to their advantage. They give them farm implements and make them work, and they put them through reformation exercises, and often solitary confinement, to make them obedient to commands.

To depict the American prison system as a strong example of Panoptic power we must analyse the system through the three mechanisms of the exercise of power that Foucault provides. The first is hierarchical observation. Other than the previously used example of a warden, prison guards and CCTV cameras, the policing system and domestic surveillance system form a part of the hierarchical system of observation. The NSA had played an integral part in the efforts for domestic surveillance and was a part of this role. There have been instances of police surveillance on journalists for the simple reason of them possessing left-wing political views.[85] All of this information is relayed into federal crime databases that are used as background checks when people apply for jobs, gun licenses, adoption forms, etc. This shows that there are various levels of observations in the system, all relaying the information to points of reference.

The second mechanism is normalizing judgement. The schedules of inmates are very strictly regulated.[86] They are made to wake up early, walk in lines, exercise, shower, and eat on time and in a systematic way. Any digressions from this schedule are met with violence, or solitary confinement. Strict compliance is ensured to the rules of prisons through force. Even in the world outside prisons, police officers enforce the law by comparing the behaviour of observed people to the "ideal" subject. Enforcement is based on subjects not following the law, and to what degree a transgression of the law was made. The law is fundamentally a normative system of rules. It indicates what it is good and bad, what can be done and what cannot be done. The enforcement of a system of rules like this would therefore fall squarely under the workings of the second mechanism.

[85] Sarah Betancourt, *Massachusetts police tweet lets slip scale of leftwing surveillance*, THE GUARDIAN, 15th September, 2018, https://www.theguardian.com/us-news/2018/sep/15/massachusetts-police-tweet-leftwing-surveillance-boston. (Last accessed on 9th June, 2020)

[86] Jerry Metcalf, *A Day in the Life of a Prisoner*, THE MARSHALL PROJECT, 12th July, 2018, https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner. (Last accessed on 9th June, 2020)

The third mechanism is the examination. The inmates in prisons are under constant surveillance. The way they interact with their fellow inmates and prison guards, the things they do in their free time, and their obedience are constantly gauged. This is to ensure that they are let out once it is determined that their behaviour is in line with what is wanted. This is why certain prison sentences are cut short on the basis of "good behaviour".[87] Outside prisons, police officers constantly examine the behaviour of civilians. This is done through CCTV cameras for surveilling traffic, stop and searches, and in extreme circumstances, warrants for searching houses. There is very little evidence to show that the increase in policing and investment in policing has led to a reduction in crime.[88] Yet, this examination continues, satisfying the requirements of the third mechanism.

The last aspect that must be analysed to establish the similarity between the American prison system and Panoptic disciplinary control is the satisfaction of the four principles of control that Foucault argues. The first is pervasive power. The power of the penal system is everywhere. From traffic cameras at every lane, to a patrol car in every alley, investments into the force have gone up significantly.[89] The power of the penal system is expectedly everywhere, forcing the civilians to abide by the law, and leaving them with the expectation of constant surveillance. Inside prisons, there is surveillance everywhere. Inmates are constantly being watched by guards or cameras. Even when they are in fields, recreational areas, or even their cells, there is some form of surveillance that is expected.

The second principle is obscure power. Although the police force still engages in overt acts of violence, for the most part, it is unnecessary for them to do. In most circumstances, the people abide by the law because even if they are not physically being watched, they expect that they are. This is due to the threat of surveillance being everywhere, but also the threat of fellow civilians being agents of surveillance. Through the valuation of the law, the system has managed to convince the people that everyone can be an agent of surveillance meant to ensure compliance. In prisons, the power is obscure since there is no one face of power. Every prison guard exercises similar amounts of power. Due to this, the prisoners do not know the true face of the power and are forced to assume that all of the guards represent power, and therefore comply.

[87] Title 18, United States Code, § 3624.
[88] Alan Neuhauser, *Cities Spend More and More on Police. Is It Working?*, U.S. NEWS, 7th July, 2017, https://www.usnews.com/news/national-news/articles/2017-07-07/cities-spend-more-and-more-on-police-is-it-working. (Last accessed on 9th June, 2020)
[89] *Id*.

The third principle is direct violence that is made structural. This is clear in the way that the policing system is set up. Along racial lines, the violence of slavery and overt racial abuse is made more structural by subjecting people of colour to a racially biased penal system. The direct violence of punishment for all of those who transgress the law is replaced with prison sentences. Once in prison, the violent acts that were used in ancient times to ensure compliance are replaced with measures such as solitary confinement and sentence prolongation.

The fourth principle is profitability of the structural violence. Prisons profit off of free labour. This would imply that their profit is likely to grow if they are able to obtain more prisoners, as they are now capable of harvesting more benefits of free labour for little to no increase in investment. It would make sense then for a policing system that is structurally beneficial to the prison system to have a higher rate of convictions, allowing for more labour in prisons. There has been a stark increase in the intensity of sentences and race-related convictions as per a few reports.[90] The racism in the policing system is structuralised and is profitable due to the free labour that it provides to prisons. This shows us that all four principles are very clearly embodies in this system, and the system can be very fairly categorized as one of disciplinary control.

CONCLUSION

While it may be claimed that rates of crime have gone down, the penal system is still one that satisfies the mechanistic and principled requirements of Foucault's disciplinary control systems. Merits and demerits aside, this would imply that the penal system is one that is not only obscured to continue to inflict violence, but also profit from said violence. A fundamental requirement of any penal system is that it be just and fair. Foucault reasons that a system founded on a necessity to control cannot be just and fair at all. The problem of crime cannot be dismissed, however, analysis like this helps in developing more humane ways of treating transgressions to the law, preventing us from alienating those who engage in crime and forcing them into lives at the fringes of society, creating cycles of crime and destitution. The American penal system is far from just, several calls for reform have been made in light of the recent instances of police brutality. In these times, Foucault's analysis of power and the way that it is exercised in our society shines and provides a benchmark for us to understand how societies should be modelled, and how they should not.

[90] *Supra* n.3.

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PREDATORY PRICING: LEGAL SCENARIO IN INDIA

- LAHAMA MAZUMDAR

INTRODUCTION

Predation may be defined as a temporary conduct of the part of a business entity who intends to completely exclude or wipe out its business rivals or competitors from the market using strategies other than efficiency in order to acquire or protect market power. This exclusion happens with the help of low pricing of competing goods for a short time period. The goods are placed at a price so low which results in the exiting of all other competing products or which deters entry of new competing goods. This can also happen with a non-price conduct which has the ability to put the business competitors at a disadvantage by raising their costs.
The competition commission of India laid a definition of predatory pricing in In Re: Johnson And Johnson Ltd. that it is "*pricing below one's cost with a view to eliminating a rival*".[91]In this practice the goods or services a priced at such a low level the completing forms cannot survive in the market and therefore a force to leave it. earlier this practice was majorly utilised by government agency to put a check on the unlawful activities and to control monopoly however it majorly acted as a redressal mechanism instead of right to equality and freedom as guaranteed under law.

The Competition Act, 2002, was introduced in replacement of the Monopolies and Restrictive Trade Practices Act, 1969. The act insured healthy competition in any relevant market thereby ensuring welfare of the consumers. The Competition Act, 2002 makes predatory pricing illegal which is an abuse of dominant position of any entity functioning in the market. Predatory Pricing in India is governed by the Competition Act, 2002, and has been taken from the "*English Competition Act, 1998*" and the "*Clayton Anti-Trust Act, 1914*." [92]

PREDATORY PRICING LAWS IN INDIA

Predatory pricing in the long run has an effect on the economy and consumer interest as increase in Monopoly power through predatory pricing leads to higher prices and that affects

[91] In Re: Johnson And Johnson Ltd., (1988) 64 Comp Cas 394 NULL
[92] Mr. Kumar Harshvardhan, 'An Analysis Of The Law Relating To Predatory Pricing In India' <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=3e7817b5-23f9-4313-9ac0-fd94a329de45&txtsearch=Subject:%20Competition%20;/%20Antitrust> accessed 3 March 2020.

public interest. However, sometimes it has been confused with a highly competitive market. There are times when due to predatory pricing the prices fall and firms to stay in business also lower their prices which indirectly benefits the consumers.[93] The Competition Act, 2002 was introduced to ensure that a healthy competition among the market players makes the market thrive and it replaced Monopolies and Restrictive Trade Practices Act, 1969, seeking welfare of the consumers.

Section 4 of the Competition Act, 2002 talks about abuse of dominant position. It prohibits an enterprise or a corporate to abuse its dominant position and also defines what will be considered as abuse under this legislation. Section 4 (2)(a) defines abuse of dominant position. It lays down that:

"There shall be an abuse of dominant position if an enterprise or a group -

(a) directly or indirectly, imposes unfair or discriminatory-

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service." [94]

The Act has prohibited a dominant player from abusing his market position by imposing unfair terms and conditions on a consumer and by restricting competition. An entity is regarded to hold a dominant position in a relevant market if it enjoys a position of strength in that market. It is basically a situation where an entity can function in the market irrespective of the market forces i.e., ascertainment of price of the product. It has the market power to conduct its activity independent of his competitors, consumers and the market forces of demand and supply. Enjoying a dominant position in a market is not illegal but abuse of that position is as a different sort of responsibility id imposed on the entity enjoying a dominant position in a market that it has to comply with several rules to protect its competitors, consumers to help the market structure function properly. It has a social responsibility to discourage any abusive behaviour for the market to thrive. There are various factors to determine whether an entity is indeed holding a dominant position or not. The factors could be market size, market share, resources and structure of the market. If large market shares are maintained for a very long time in the relevant market then the entity can be considered to be having a dominant position. The position of dominant position also depends on determination of the relevant market. A relevant market could be a relevant geographic market or relevant product market.

[93] Tejvan Pettinger, 'Predatory Pricing' (2017) <https://www.economicshelp.org/blog/glossary/predatory-pricing/> accessed 3 March 2020.
[94] Section 4(2) (a) of the Competition Act, 2002.

In relevant geographic market the geographic locality can be separated from all other localities due to the fact that such locality forms the relevant market for a product where the competition conditions are same for all the competitors and participants in that market. Relevant factors effecting this market are regulations relating to trade barrier, transport expenses, language, national policies of procurement, local specification requirement.

A relevant product market is a market for substitutable or interchange goods or services for a consumer. The interchangeability can be on the basis of price, intended usage, and characteristics of the product. For example, Maggi and Ching's schezwan noodles, yippie all of them form a part of relevant product market. They are substitutable for their price, intended use etc.

Predatory Pricing has been defined in Explanation to the Section 4. It says that:

"*Predatory price means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors*."

It is a form of exploitative practise on account of a dominant firm. Section 4 (2) (c) of the Competition Act,2002 provides about how it is abuse of dominant position by an entity in case it indulges itself in any activity as a result of which market access is denied to other market participants. In a Standing committee report on the Competition Bill, 2001 there were various claims made regarding Section 4 of the now Competition Act,2002. The opinion that is reflecting here is:

"*The Bill does not consider dominance as Restrictive trade Practise but its abuse. But there lies a thin difference between the dominance and its abuse because dominance has the tendency to be abused. Abuse of dominance occurs when an enterprise directly or indirectly imposes unfair purchase or selling prices including predatory prices; Limits production, markets or technical development to the prejudice of the consumers; Indulges in action resulting in denial of market access; Makes contracts with obligations which have no connection with the subject of such contracts; and uses dominance in one market to move into or protect other markets."*[95]

Lord Denning, M.R. in *Registrar of Restrictive Trading Agreements v. W.H Smith & Son Ltd.*[96], made the most valuable observation on predatory pricing and with regard to abuse of

[95] DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HOME AFFAIRS NINETY-THIRD REPORT ON THE COMPETITION BILL, 2001 <https://www.prsindia.org/uploads/media/1167471748/bill73_2007050873_Standing_Committee_Report_on_Competition_Bill__2001.pdf> Accessed 18th March, 2020

[96] Registrar of Restrictive Trading Agreements v. W.H Smith & Son Ltd., (1969) 3 All ER 1065

dominant position while interpreting the English Law in Restrictive Trade Practices Act, 1965. that there was a time when traders used to join hands, and combine, so as to keep the trade all for themselves, so that prices can be decided according to them, because of the monopoly. This also lead to the shutting down of all new entrants who might cut prices or even produce and sell better quality goods. Therefore, the Parliament had to step in, both for the benefit of the new entrants and the consumers, and had to hold these trade practices void unless they were done in the interest of public interests. Therefore, the law made any such agreement void and also asked the traders to get all their trade practices registered. However, Lord Denning observes that the traders who combined did not tell the law about it, and it was done in dark; without the law or the consumers knowing about it. Neither putting such agreement in writing, nor words were required, "a wink or a nod was enough" for them to combine and turn the whole market into a monopoly and control everything in it. Therefore, the Parliament came up with another law to get rid of these practices, and so, it included not only agreements but also arrangements to keep the predatory pricing in control. This observation by Lord Denning was aptly discussed when Parliament of India amended Section 4 of the Competition Act, 2002 by the Competition (Amendment) Act, 2007 and is also reflected in the amendment.[97]

In the order of *M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd.*[98] the Commission held that to decide whether the dominant firm is engaged in the practice of predatory pricing, the following three condition have to be satisfied:

- The prices of the goods or services of the dominant firm is below the cost of production of such goods or acquisition of such service.
- Such decline in the prices of the dominant firm was brought with the *intention of driving the competitors out of the market.*
- There is a significant planning in order to recover or recoup the losses that are incurred by increasing the prices again after the competitors are forced out of the market.[99]

ROLE OF COMPETITORS IN PREDATORY PRICING

[97] Mr. Kumar Harshvardhan, 'An Analysis Of The Law Relating To Predatory Pricing In India' <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=3e7817b5-23f9-4313-9ac0-fd94a329de45&txtsearch=Subject:%20Competition%20/%20Antitrust> accessed 3 March 2020.
[98] *M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd.* Competition Commission of India, Case No. 09 of 2013, (2013).
[99] Atyotma Gupta, 'LEGAL POSITION OF PREDATORY PRICING: AN ANALYSIS IN INDIA' (2016) <https://competitionlawobserver.wordpress.com/2016/08/11/legal-position-of-predatory-pricing-an-analysis-in-india/> accessed 4 March 2020.

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When a single entity in the market rises almost instantaneously, it is mostly because of the abuse of dominant position and predatory pricing which follows. These two principles are seen to intertwine to form a bridge between legal and economic boundaries, and overlap over the existing players in the market. Such activities are basically found to be illegal, however it is just one of the many most frequently used ways in which that enterprise or group may abuse its position of dominance.

Predatory Pricing is mostly dependent upon the use/misuse of dominant position. As per the Section 4(2) of the Competition Act, 2002 dominant position has been described as:

"*DOMINANT POSITION*" means a position of strength, enjoyed by an enterprise, in the relevant market, in India which enables it to-

i) Operate independently of competitive forces prevailing in the relevant market; or

ii) Affect its consumers or competitors or the relevant market in its favour;

For an entity to attain a dominant position , it is important that the entity has control and has the influence to affect the relevant sector of market to the tune of 50 per cent or more, provided that the other rival players hold a much less share in the active market. Though the economic strength of the entity does play a vital role, however conditions like the presence of other players in the relevant section of the industry/market plays an important role in ascertaining whether the entity is capable of exercising a dominant position.

Michael E. Porter of the Harvard Business School developed an analysis of the same. Porter's 5 forces, which shows that the five conditions mentioned below are prerequisite to show abuse of dominance:

i. The bargaining power of customers (buyers)
ii. The threat of the entry of new competitors
iii. The bargaining power of suppliers
iv. The threat of substitute products or services
v. The intensity of competitive rivalry

In *Hoffmann-La Roche & Co. AG v Commission of the European Communities* the concept of 'abuse of dominant position' has been defined as:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect

ISSN: 2581-6349

of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

Being in a dominant is not illegal per-se. Further, "Abuse" is an objective term and it comprises every conduct which might adversely affect the structure of a market in which competition is weakened. Hence, the being on a entity in a business in a dominant position is not illegal but the misuse of such dominant position is illegal. Predatory pricing by such an enterprise which spans enough business to be classified as a dominant player, can be one such abuse.[100]

TESTS OF PREDATORY PRICING

Over the years, many tests have been devised to aid antitrust/competition agencies in sorting out predatory behaviour from tough competition. Some of the more important tests are as follows:

- Price-Cost Tests (PCT) – The key question which PCT seeks to answer is whether a company is incurring losses that are rational only if they are part of a predatory pricing strategy. PCT involves comparing objective cost and price data to provide information about whether an enterprise is actually engaging in Predatory pricing tactics. Nevertheless, there is a divergence of approach with different jurisdictions adopting different measures of cost to detect Predatory Pricing.
- The Recoupment Test – This test assumes that Predatory Pricing is happening and questions whether it is likely to succeed in light of the characteristics of the relevant market, the predator firm and its target(s). Specifically this test aims to determine whether a firm's Predatory Pricing campaign would be likely to eliminate and deter competition, and whether it is likely that the predator firm will then be able to amass at least enough supra-competitive profits to recover the losses it sustained during the attack.
- The Predatory Intent Test – This test aims to address the more subjective question of whether a firm intended to engage in Predatory Pricing . The European Union has expressly incorporated 'intent' in its predation analysis (along with PCT), whereas,

[100]Himanshu Sharma and Martand Nemana, 'Predatory Pricing: A Synopsis On The Indian Telecom Sector' (2017) <http://www.mondaq.com/india/x/576894/Antitrust+Competition/Predatory+Pricing+A+Synopsis+on+the+Indian+Telecom+Sector> accessed 6 March 2020.

others, such as the United States, are more sceptical towards 'intent' as an indicator that predatory conduct is occurring or is likely to harm competition.[101]

RECENT DEVELOPMENT ALONG THE LINES OF JUDICIAL INTERPRETATION

The Competition Act, 2002 is the governing statute for the CCI and Competition Appellate Tribunal ('COMPAT') to prevent anti- competitive practices. The preliminary issue to be decided by CCI is whether selling the product at a price lower that the average variable cost is illegal per se as per the Indian legal position.

In the order of *M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd.*[102] the Commission held that to decide whether the dominant firm is engaged in the practice of predatory pricing, the following three conditions have to be satisfied:

1. The prices of the goods or services of the dominant firm is below the cost of production of such goods or acquisition of such service.
2. Such decline in the prices of the dominant firm was brought with the intention of driving the competitors out of the market.
3. There is a significant planning in order to recover or recoup the losses that are incurred by increasing the prices again after the competitors are forced out of the market.

Well from the understanding of the criteria's laid above , the enterprise being charged of predatory pricing should be dominant in the first place . The Reliance JIO case is in this line of interpretation where it was laid down that :

"Providing free services cannot by itself raise competition concerns unless same is offered by dominant enterprise and shown to be tainted with anti competitive objective of excluding competition/ competitors..... In competitive market scenario, where there are already big players operating in market, it would not be anti competitive for entrant to incentivize customers towards its own services by giving attractive offers and schemes. Such short term business strategy of entrant to penetrate market and establish its identity cannot be considered to be anti competitive in nature....."[103]

Bharti Airtel Limited v Reliance Industries Limited and another - (2017 Indlaw CCI 37)

[101] Ravisekhar Nair and Abdullah Hussain, 'Predatory Pricing Under The Indian Competition Act, 2002' <http://www.luthra.com/admin/article_images/Predatory-Pricing-under-CA.pdf> accessed 7 March 2020.
[102] M/s. Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd Case No. 09 of 2013, (2013)
[103] Bharti Airtel Limited v Reliance Industries Limited and another , 2017 Indlaw CCI 37

This case was decided on 9th June , 2017 by the Competition Commission of India. The case has been filed by Bharti Airtel Limited against Reliance Jio and Reliance Industries for contravening Section 3 and Section 4 of the Competition Act.

FACTS : Airtel is a global telecommunications company with operations in 18 countries across Asia and Africa. It provides 4G services in 21 telecommunication circles across India. The Informant is stated to be amongst the top three mobile service providers globally in terms of the number of subscribers. It offers 2nd Generation (2G), 3rd Generation (3G) and 4th Generation (4G) wireless telecommunication services, amongst other services. The Informant is also the first operator to roll out 4G Long Term Evolution (LTE) wireless telecommunication services in India. Reliance Industries limited is also one of the largest corporations. Infotel Broadband Services Private Limited had won the spectrum aution of 2300Mhz which was later taken over by Reliance JIO. It initially held only Internet Service Provider License and later with the permission of Department of Telecommunication got a unified license with voice calling services

The concern over here was in relation to free services offered by Reliance Jio since its inception i.e., September, 2016 under one offer or the other. This according to the Informant amounts to predatory pricing, in contravention of the provisions of Section 4(2)(a)(ii) of the Competition Act. Further, Reliance Industries is alleged to be in contravention of Section 4(2)(e) of the Competition Act as it has allegedly used its financial strength in other markets to enter into the telecom market through Reliance Jio. It has entered into the market offering the most efficient bands of LTE . Reliance Jio had a subscriber base of 72 million as of 31st December, 2016 and it had surpassed all other telecommunication services thereby enjoying dominant position as claimed by the Informant. Reliance JIO entered the market offering an welcome Offer with free services of data, voice calls, video calls since 5th September 2016 ending on 31st December, 2016. TRAI said it can be only up to 3rd December but Jio extended it to 31st December disregarding TRAI. Next it launched a New Year Offer and continued with its free services till 31st March 2017. It was providing telecom services at below average cost intending to eliminate competitors from market, as none of the other operators are offering free services under TRAI's direction of prohibition of predatory Pricing.

ISSUE : Whether it was Predatory Pricing under Section 4 (2) (a)(ii) and Section 4 (2)(e) of the Competition Act.

Section 4 (2) (a)(ii) : Abuse of dominant position : (2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—- (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service

Section 4(2) (e): uses its dominant position in one relevant market to enter into, or protect, other relevant market.[104]

ANALYSING THE DECISION : To assess the dominant position the commission took the matter of Reliance JIO being supported by Reliance Industries and opined that financial strength is relevant but not the sole factor to determine dominant position of an enterprise. Considering comparable investments and financial strengths of competitors, the success of Reliance Jio in managing large scale investments does not suggest dominant position being enjoyed by Reliance JIO . The Commission does not find it appropriate to hold Reliance JIO dominant in a scenario where its customers constitute less than 7 per cent of the total subscriber base at pan-India level, various functions of telecom service providers are regulated and entrenched players have been in existence for more than a decade with sound business presence, comparable financial position, technical capabilities and reputation. Even if one were to consider 4G LTE services as the relevant product market, Reliance JIO is not likely to hold dominant position in such market on account of the presence of the Informant, Vodafone, Idea, etc., who derive commercial and technical advantages due to their sustained and sound business presence in other telecom services. It needs to be appreciated that Reliance JIO is a new entrant, who had commenced its business recently . So the commission held that as Reliance Jio was not dominant it definitely could not abuse any position as such. Another allegation regarding the pricing to be below cost and causing predatory pricing is dealt under . The Commission notes that providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/ competitors, which does not seem to be the case in the instant matter as the relevant market is characterised by the presence of entrenched players with sustained business presence and financial strength. In a competitive market scenario, where there are already big players operating in the market, it would not be anti- competitive for an entrant to incentivise customers towards its own services by giving attractive offers and

[104] 'The Competition Act, 2002', <http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf>accessed 7 March 2020.

schemes. Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature. Therefore no prima facie case of contravention was established. Predatory pricing was not involved. [105]

However one concern that is raised is the fact the behaviour of the customer in the market has been neglected. The effect of the strategy to give incentives of this sort also needs to be seen with reference to the effect of the same on the existing competitors .

Another case *C. Shanmugam and another v Reliance JIO Infocomm Limited and others (2017 Indlaw CCI 45)* was filed just after this decision where this proposition was reiterated by CCI thereby affirming its stance as put in the Earlier Judgement.

SOME RECENT DEVELOPMENTS

However with recent developments Bharti Airtel and Idea Cellular have challenged the TRAI's order of 16th February in the Telecom Tribunal . They have alleged that the TRAI's regulations are favouring Reliance Jio thereby bringing the old communication services and TRAI at loggerheads. In its petition to the Telecom Dispute Settlement and Appellate Tribunal (TDSAT), Bharti Airtel said that the tariff order "virtually permits a telecom service provider who is an effective significant market player (SMPs) to indulge in predatory pricing to the severe detriment of the appellants and the other operators".

"Thus, if the impugned tariff order is not stayed then it will cause severe detriment to the appellants as it will have no means to meet the predatory pricing and consequent loss of subscribers and business by another TSP (telecom service provider)," Airtel said seeking a stay on TRAI's latest order. Airtel further argued that not staying the order would also "hamper consumer interest as they will be deprived of discounts and offers"[106].

TRAI by its order dated 16th February , 2018 TRAI has thought of putting up floor pricing for retail tariff basically capping price so that no one can go below that. However after a meeting with Telecom Service providers it decided not to. However it has launched new rules and regulation thereby to bring in transparency, non-discrimination and non-predatory pricing. Amendments deal with reporting requirements, guiding principles for checking transparency in tariff offers, definition of non-discrimination, adherence to the principle of non-predatory

[105]'Bharti Airtel Limited V Reliance Industries Limited And Another' (2017) <https://login.westlawindia.com/maf/wlin/app/document?srguid=i0ad6ada60000016209aedf0685f8889b&docguid=I9D7DCDF054DE11E781D5F7EB3184FAD6&hitguid=I9D7DCDF054DE11E781D5F7EB3184FAD6&rank=6&spos=6&epos=6&td=83&crumb-action=append&context=89&resolvein=true> accessed 8 March 2020.

[106] Gulveen Aulakh, 'Airtel, Idea Move Telecom Tribunal Against Predatory Pricing Order' (2018) <https://economictimes.indiatimes.com/news/economy/policy/airtel-idea-move-telecom-tribunal-against-predatory-pricing-order/articleshow/63164394.cms> accessed 9 March 2020.

pricing, definition of predatory pricing, relevant market, assessment of significant market power (SMP)and other related provisions. The definition of Non-discrimination provides a clear benchmark to telecom service providers to bring tariff offers to consumers on non-discriminatory basis. [107]It's going to be the 63rd Amendment relating to regulatory principles of tariff assessment which is challenged by Bharti Airtel and Idea. They have said in case the order is not stayed it will lead to Airtel and all others losing a lot of subscribers also consumers interest would be hampered as they will be deprived of discounts and offers. TRAI said that it will impose a financial disadvantage of up to 50 lakhs if their service rates are predatory and service rates would be predatory if market share of the operator is above 30% and is offering services below variable cost. The regulator has also said that telecom operators will have to provide services to all subscribers availing the same tariff plan in a non-discriminatory manner. The rules drew flak from the established operators. Industry body COAI has flagged the revised definition of Significant Market Power (SMP) that now excludes parameters like traffic volume and switching capacity, and said such changes will place older operators at a disadvantage and stop them from responding to "what may be actual predatory tariff plans". It has also contended that the recent regulation has also taken away flexibility from the operators to offer benefits to customers.[108]

CONCLUSION

Predatory pricing laws helps all the enterprises to stay harmoniously in the market however to some extent is adverse to promotion of trade and commerce. However the present statutory regime and the interpretative approaches towards it needs to be changed. To establish predatory pricing dominance is a very important factor to be proven , however that should be in the same market. It may be possible that a dominant name in one market may acquire advantages out of goodwill that it has in another market. It may be a dominant player in another market and that will definitely help it in the other one. It may reduce its prices and then with it already existing goodwill it might be able to enter the other market though its initial market share would be minimal. For example, if *Amazon* uses its already established goodwill to enter in *textile* business and reduces its kprices below the average variable cost, it will not classify

[107] 'Information Note To The Press (Press Release No.24-/2018) Telecom Regulatory Authority Of India' (2018) <http://www.trai.gov.in/sites/default/files/PR_No24_TTO_16022018.pdf> accessed 9 March 2020.
[108] 'Airtel, Idea Approach TDSAT Against TRAI'S Predatory Pricing Norms' (2018) <http://indianexpress.com/article/technology/tech-news-technology/airtel-idea-approach-tdsat-against-trais-predatory-pricing-norms-5087896/> accessed 9 March 2020.

as a case of predatory pricing in India as *Amazon* is not a dominant firm in textile industry. The same happened in the JIO case . In case we considered its dominant position in the other market probably Airtel might have won.

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UNCONSTITUTIONALITY OF THE CITIZENSHIP AMENDMENT ACT

- **ESHA RATHI**

ABSTRACT

The Citizenship Amendment Act stands unconstitutional by violating the Fundamental Rights under Articles 14, 15(1), 21 and 25(1) of the Constitution. Further, this Act being unconstitutional by violating the above-mentioned fundamental rights, should stand void as per Article 13(2). The following article will provide a rationale for the said claim in five parts: (1) That the arbitrary classification of the three countries without any rationale or standard principle amounts to violation Article 14. (2) That the religion- based discrimination in granting citizenship which is against the secular outlook and fabric of our country amounts to violation of Article (15)(1). (3) That the fundamental rights being denied arbitrarily without any valid reason amounts to violation of Article 21. (4) That leaving out a religious community under the Act violates the spirit of Article 25(1). (5) Under Article 13(1), the Act being inconsistent with and in derogation of the mentioned fundamental rights, is void.

Under Article 14 of the Constitution, *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*[109]*"*. In the case of *State of West Bengal v. Anwar Ali Sarkar*[110], Justice SR Das held that, *"Article 14 does not take away from the State the power to classify for the purposes of legislation, but the classification must be rational, and in order to satisfy this test, the classification must be founded on an intelligible differentia and that must have a rational relation to the object sought to be achieved by the Act"*. If there is no reasonable basis for a classification, the legislation making such a classification violates the law of equality before law. A law can also be struck down as violating Article 14 if it is manifestly arbitrary. In the case of Shayara Bano v. Union of India[111], the Supreme Court held, *"Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be*

[109] The Constitution of India, Article 14.
[110] AIR 1952 SC 75.
[111] MANU/SCOR/34974/2017.

manifestly arbitrary". While it is true that the Act is not mandated to recognize every form of persecution, once it has recognized a particular form of persecution i.e. religious, it cannot discriminate between different communities who have faced religious persecution. There is no rationale in not extending the rights to a class of minorities which attacks the principles of secularism and equality before the law, thus violating Article 14.

Under Article 15(1) of the Constitution, *"The State shall not discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them*[112]*"*. In the case of *S. R. Bommai v. Union of India,* Justice PB Sawant upheld, *"Whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited"*. If the idea is to protect one against 'religious persecution of minorities', there is no reason as to why the protective umbrella of the law leaves Muslims out, thus *prima facie*, discriminating on the grounds of religion. Not only does the Act select certain illegal immigrants based on religion, but it also does so for reasons that have no basis in the law itself. Further, Article 3 under 'The 1951 Refugee Convention' states, *"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin"*[113]. The Citizenship Amendment Act stands in clear violation of the Constitution as it legitimatizes discrimination on the grounds of religion. The religion-based discrimination in granting citizenship which is against the secular outlook and fabric of our country amounts to violation of Article 15(1).

Under Article 21 of the Constitution, *"No person shall be deprived of his life or personal liberty except according to procedure established by law"*[114]. In the case of *Maneka Gandhi v. Union of India*[115]*,* Bhagwati, J. observed, *"The expression of personal liberty in Article 21 is of widest amplitude and it covers a variety of rights which would constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights"*. This case while adding a new dimension to the concept of personal liberty, extended the protection of Article 14 to the personal liberty of every citizen. In the case of *Kharak Singh v. The State of UP and Ors.*[116]*,* it was held that *"personal liberty was not only limited to bodily restraint but was used as compendious term including within itself all the varieties of rights which go to make up the personal liberty of man"*. In the case of *National Human Rights Commission v. State of*

[112] The Constitution of India, Article 15(1).
[113] The 1951 Refugee Convention, Article 3.
[114] The Constitution of India, Article 21.
[115] AIR 1978 SC 597.
[116] AIR 1963 SC 1295.

Arunanchal Pradesh[117], the Supreme Court observed, *"the fundamental right of life and liberty guaranteed by Article 21 of the Indian Constitution is also available to the illegal immigrants even though they are not Indian citizens".* In the case of *Isaac Isanga Musumba and Ors. v. State of Maharashtra and Ors.*[118], a vacation bench of justice A.K. Patnaik and Ranjan Gogoi upheld, *"Article 21 of the constitution applies to all citizens, whether Indian or foreign nationals.* Under Article 6 of the UDHR, *"Everyone has the right to recognition everywhere as a person before the law*[119]*",* and under Article 14 of the UDHR, *"Everyone has the right to seek and to enjoy in other countries asylum from persecution.* It is also the constitutional obligation of the State under Article 51 of the Constitution, that it would strive to *"foster respect for international law and treaty obligations in the dealings of organized people with one another*[120]*".* Right to life includes anything which is essential to live life with dignity. In the case of *Justice K.S. Puttaswamy and Ors. v. Union of India and Ors.*[121], Justice Sikri laid out three core principles of dignity that are; intrinsic value of every person, autonomy and community. The CAA specifically violates the first and third principles. The second one is violated automatically when human rights of individuals are denied. To discriminate based on one's faith, belief and national origin is not only arbitrary but injures fraternity, which denies, not assures, dignity of individuals. The Muslim immigrants are not being recognized equally before the law by violation of their right to seek asylum in the country on discriminatory grounds. Their fundamental rights being denied arbitrarily without any valid reason amounts to violation of Article 21.

Under Article 25(1) of the Constitution, *"Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion*[122]*".* While Article 25 gives Muslims the right to practice their religion, denying them benefits as against others on the grounds of religion stands in violation of their right by implying otherwise. It is paradoxical to encourage freedom of religion while denying rights based on it at the same time. Article 25 provides for religion- based protection of minority rights. These minority- protections are to ensure that that there is no imposition of majority predilections on minorities. Using such classifications to deny equal rights is unconstitutional and stands in violation of Article 25(1). Leaving out a

[117] AIR 1996 SC 1234.
[118] MANU/SC/0725/2013.
[119] Universal Declaration of Human Rights 1948, Article 6.
[13] Universal Declaration of Human Rights 1948, Article 14.
[120] The Constitution of India, Article 51.
[121] MANU/SC/1604/2017.
[122] The Constitution of India, Article 25(1).

religious community under the Act violates the spirit of Article 25(1). Religious classification without valid bases is an assault on the secularism of our constitution without which Article 25(1) has no ground to stand on.

Under Article 13(2) of the Constitution, *"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention be void*[123]*".* In the case of *Gokalnath v. State of Punjab,* the Court ruled that Parliament could not curtail any of the Fundamental Rights in the Constitution. Due to lack of reasonable classification and criteria for selecting only a set of refugees to confer this benefit which appears to be on discriminatory grounds, it violates the fundamental rights. Consequentially, it stands in violation of Article 13(2).

Taking Article 13(2) into account, it can be established that the Act being inconsistent with and in derogation of the fundamental rights under Articles 14, 15(1), 21 and 25(1), stands void.

[123] The Constitution of India, Article 13(2).

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LEGAL STATUS OF PROSTITUTION AND THE RIGHTS OF WOMEN: A CRITICAL ANALYSIS

- SHUBHAM KUMAR THAKUR

HISTORY OF PROSTITUTION IN INDIA

Female prostitution is perhaps the oldest profession all over the world. Alas, it is perhaps the most hated profession. Hated in the sense that people who visit them actually enjoy it, but in society, they pretend otherwise. As a concept, prostitution has been defined by social scientist in different ways depending on the extent of its prevalence. The most widely accepted definition; however, is the one given in the encyclopaedia of social science which defines prostitution "as the practice in which a female offers her body for promiscuous sexual intercourse for hire etc. However, a new definition has been coined for the word 'Prostitution' in the Government of India's "Prevention of Immoral Traffic Act-1987, which now means "Sexual exploitation or abuse of persons for commercial purposes." Prostitution is one of the oldest professions of the world practiced since the birth of the organized society. Prostitution is practiced in almost all the countries and every type of society. In India, the Vedas, the earliest of the known Indian literature, abound in references to prostitution as an organized and established institution. In Indian mythology there are many references of high class prostitution in the form of celestial demigods acting as prostitutes. They are referred to as Menaka, Rambha, Urvashi, and Thilothamma. They are described as perfect embodiments and unsurpassed beauty and feminine charms. They are highly accomplished in music and dance. They entertained divinities and their guests in the court of Lord Indira, the Lord of Hindu Gods. They were also sent to test the real depth of 'tapasya' (penance) and devotion of great saints.

An apsara named Menaka caused the downfall of the great sage Vishwamithra, and became the mother of Shakuntala, the immortal heroine of the greatest drama of the world, Abhiguan Shakuntalam written by the great poet Kalidas of India. Aryan rulers of India followed the system of celestial court and developed the system of guest prostitution. They presented well-accomplished maidens in token of friendship of kings. They were also offered as ransom to the victor to part with his most beloved prostitute. Empires fell and came up for her sake. Another class of girls from infancy were carefully selected and fed on poisonous herbs and venomous foods. They were called Vishkanyas (Poisonous virgins). They kings to destroy their enemies utilized these prostitutes.

Prostitutes were common during the reign of the Pandavas and Kauravas (Historical Indian rulers). They were an important part of the court and both dynasties possessed harems of aristocracy in Brahmanic India. Having concubines is common among the aristocracy. Kautilya's famous 'Arthasasthra' contains rules for prostitutes and their activities and gives an account of how prostitutes should behave and how their lives are ordered. A code of conduct was prescribed, for people seeking their favor and for them. They had certain definite prerogatives, rights and duties. Vatsyayan, the noted Indian sage of the Third century B.C. devoted a number of pages on prostitutes and their amorous ways of life in his monumental treatise Kamasutra. Rules of conduct for popular and successful practice of their trade have been prescribed. His classification of the prostitues indicates that the common, private, private and the clandestine prostitutes of today had their prototypes in those olden days.

The sanctified prostitution in the third century A. D. in the Sanskrit works of Mahakavi Kalidas. Religious prostitutes were attached to the famous temples of Mahakala of Ujjain and the system of holy prostitutes became common. This class consisted of girls who had been offered by the parents of the service of the God and their religion. In the south Indian, They are known as Devadasi and in North India as Mukhies. These dancing girls were considered essential at the time of offering of prayers and were given a place of honor. Gradually due to the laxity of morals among the priests, they misused the systems for immoral purposes. Under the garb of religious dedication of girls to temples, clandestine prostitution developed. The medieval period gave great importance to women and wine. The Muslim rulers with the exception of Aurangazeb recognized prostitution and the profession flourished under royal patronage. The word 'Tawaif' and 'Mujra' became common during this era. During the Mugal era in the sub-continent, prostitution had a strong nexus with the performing arts. Mugals patronized prostitution which raised the status of dancers and singer to the higher levels of Prostitution. King Jahangir,s harem had 6,000 mistreses which denoted authority, wealth and power. After the downfall of the Mughal Empire, hoards of concubines, dancing and singing girls women came out of the royal palaces. They were not trained for any profession and society had no jobs to offer them. When faced with economic problem they had no choice but to take recourse to the laziest of all the trades, the trade of sex. The place of women in India did not improve during the British regime. Conditions continued to deteriorate and in the absence of state control and regulation prostitution thrived on a large commercial scale

PROSTITUTION IN INDIAN SOCIETY

ISSN: 2581-6349

India is home today to Asia's largest red-light district--Mumbai's infamous Kamathipura, which originated as a massive brothel for British occupiers and shifted to a local clientele following Indian independence. The Mughal Empire (1526 -1857) also witnessed prostitution the word tawaif and mujra became common during this era. During the Mughal era in the subcontinent (1526 to 1857) prostitution had a strong nexus with performing arts. Mughals patronized prostitution which raised the status of dancers and singers to higher levels of prostitution. King Jahangir's harem had 6,000 mistresses which denoted authority, wealth and power. Even during the British era prostitution flourished the famous kamathipura a red light area in Bombay was built during this era for the refreshment of British troops and which was later taken over by Indian sex workers.

The prostitution continued from ancient and medieval india and has taken a more gigantic outlook in modern india, the devdasi system still continues ,according to a report of National Human Rights Commission of the Government of India, after initiation as devadasis, women migrate either to nearby towns or other far-off cities to practise prostitution.

The practice of dedicating devadasis was declared illegal by the Government of Karnataka in 1982 and the Government of Andhra Pradesh in 1988. However the practice is still prevalent in around 10 districts of north Karnataka and 14 districts in Andhra Pradesh. Districts bordering Maharashtra and Karnataka, known as the "devadasi belt," have trafficking structures operating at various levels. The women here are in prostitution either because their husbands deserted them, or they are trafficked through coercion and deception. Many are devadasi dedicated into prostitution for the goddess Yellamma.

PROSTITUTION IN MODERN ERA

Today India hosts some of the largest red-light areas of the world like, **Sonagachi in Kolkata, G.B Road in New Delhi and Kamathipura in Mumbai.** Sonagachi in Kolkata is the second largest red-light area of Asia. In India, prostitution (exchangeof money for sexual services) is legalised, but a number of other activities including soliciting in public, kerb crawling, owning or managing a brothel, pimping and pandering are considered as crimes. The first law regarding prostitution in independent India was **"The Immoral Traffic Supression Act 1956 (Sita)",** according to which prostitutes can trade privately but cannot legally solicit or seduce customers in public and cannot practice any sex trade within 200 yards of a public area. Managing of brothels or pimping was also considered as a crime. This law was then replaced by the **"The Immoral Traffic Prevention Act 1986 (Pita),** the law was intended to limit and eventually

ISSN: 2581-6349

abolish prostitution in India by gradually criminalising various aspects of sex work. But even today prostitution is prevalent in the Indian society and now there is a heated debated going on regarding legalizing it as a profession.

Thus this chapter clears the concept that prostitution has been subsisting in Indian society from time immemorial and still continuing. Now the next chapter will be dealing with the legal framework regarding the prostitution in India.

TYPES OF PROSTITUTES

Generally prostitutes can be classified on the basis of their 'modus operandi' which is as follows:

- **Brothel Prostitutes:** Their operations are carried out in the brothel which is owned by an ex– prostitutes. The prostitutes work for a commission based on her sexual service.
- **Call Girl Prostitutes:** They generally operate independently from her place. She may be available directly or solicit customers through middlemen.
- **Street Prostitutes:** This type solicits customers on the streets and takes the customer to a place of assignation.
- **Other Types:** Clandestine forms of prostitution are also found in bare, massage parlours, amusement centers, dance clubs etc.

FACTORS CONDUCIVE TO PROSTITUTION:

It is rather difficult to enumerate as identify all factor conducive to prostitution because it has often been argued that prostitution has its roots deep in the fabric of society. The social and economic subordination of women by men has often been cited amongst the important causes leading to prostitution.

SOME RESEARCH STUDIES SUGGESTED THE FOLLOWING FACTORS TO BE CONDUCIVE TO PROSTITUTION:

- **Abduction:** This is the most common cause. Young girl are abducted from their villages / negative places on some or other pretext, exploiting their innocence. Some of these are going to movies, cities, temples / pilgrims, making them film-stars offering job

opportunities and marriage. Contrary to common beliefs, most kidnappers are females or couples. Incidence of prostitution through abduction is estimated to be 35 percent.

- **Devadasi System:** The inhuman system of prostitution with religious sanction "Devadasin System" still continues to florish in the so called progressive and democratic country. Every year thousands of girls are dedicated to goddess 'Yellamma; 'Renuka' (mostly in the State of Karnataka and Maharashtra) and after a brief period of concubinage, they become accessible to urban-prostitution. Within these mechanics we find, that three socialized instruments perpetuate the fates of these women, namely economic organization, brute force and the religious rituals. Devadasi System contributes to about 10 per cent of total prostitution in India. The percentage of Devadasi is amongst the Bombay prostitution is 15-20 per cent; in Nagpur, Delhi and Hyderabad 10 per cent in Pune it is 50 per cent and in the urban centres bordering Belgaum Dist. (Kolhapur, Sangli, Satara, Miraj, etc.) it is upto 80 per cent of total prostitution. Devadasi System contributes to 20 per cent of the child prostitution and moreover it legitimizes the practice of putting them to prostitution.

- **Rape:** About 6 per cent of the girls entered prostitution after the incidence of rape. Rape on the girls is a great social stigma and in some circumstances, the victims of rape are not even accepted at home. Apart from the delay or even absence of justice, the victims have to face similar incidents every now and then. When they don't find any safe place in society and don't foresee any better future perspective, they find their ways in the brothels. About 8 per cent of the girls came to prostitution following the incidents of incest. The most common incest is between father and daughter, followed by uncle-niece. When the young victim of incest in exploited at home, she doesn't foresee safety anywhere in the society and slowly ends up in prostitution. In certain circumstances, we have come across the cases where the girls were sold by their own fathers, uncles or the brothers-in-law after subjecting them to incest.

- **Marriage:** Though the problem of prostitution directly through marriage is not very common, a few cases have been noticed. In Pune nearly 15 per cent of the women in prostitution came through marriage.

- **Children of women in prostitution:** Female children of the women in prostitution invariably end up in prostitution (98 per cent), as there is no safe place for the children and there is no programme for them till date, to get them out of these areas and to provide them alternation livelihood. This contributes to about 10 per cent of prostitution.

- **Social Factors in Prostitution:** The view of women as a commodity is pervasive in popular manifestations of Hindustan culture in India. Women who have had sexual experiences are considered to be 'used goods' and are unlikely to ever marry. Without a husband, a woman has no source of income; she also cannot wear the marriage bindi. She is an impoverished cultural outcast. The prevailing line of reasoning is that she at least has a useful place as a prostitute. Women who have been widowed or divorced are also confronted with this social stigma. If a woman's husband dies, she has essentially outlived her purpose. Since she is no a virgin, she obviously cannot marry again. In rural areas, "birde burnings," in which a woman burns herself to death on her husband's funeral pyre, Sill occur. The social stigma, which leads a woman to believe that her life is worthless after her husband's death, is also attached to a woman whose husband chooses a different woman as his wife.

When strong cultural notions are combined with the potency of religion or poverty, even more people are pressured into prostitution. For example, a girl may become a street child because her mother died and her father's new spouse will not accept her. As a street child, she may be periodically arrested along with her fellow vagabonds for crimes, which they may or may not have committed. While in police custody, instead of simply being beaten as her male cohorts are, she may be sexually abused by the police officers. She may decide to become a prostitute to support herself and to find her place in the broken world in which she is fated to reside. Her children will likely be prostitutes as well.

POVERTY'S ROLE IN INDIAN PROSTITUTION

One of India's most striking characteristics is its material poverty. An estimated 40% of India's population lives in poverty. This means that almost 400 million people cannot meet basic survival needs like food, clothing, and shelter. This is an overwhelming, almost unimaginable statistic. Poverty does not create imbalances in gender and sex. It only aggravates already

existing imbalances in power and therefore increases the vulnerability of those who are at the receiving end of gender prejudice. In a patriarchal set up, the section in families in societies that is affected is women and girl children. Caste wars, political strife, domestic conflicts through their manifestations and repercussions reflect strong gender prejudice against women. Violence against women, assault and rape on women are not individual sexual or physical crimes. It has become a tool of a political statement for aggression and gender persecution, which amply reflects on the degree of human degradation and commoditization of women in the eyes of the state, community, and society.

Indeed, such poverty belongs to an almost surreal world in which only the "wealthy" are certain to meet basic needs. Desperation seems to characterize the lives of India's poor. This desperate poverty is often cited as the root of India's growing prostitution problem.. . It is however argued that in many countries with prosperous economy, high standard of living, universal education, full equality between men and women, the problem of prostitution remains unsolved. This indicates that trade in human fleash goes on unabated not simply because of ignorance, illiteracy, poverty or a like but also because human beings consciously choose this occupation and are willing to be manipulated by others.

MISERIES AND SUFFERING OF PROSTITUTES:

Most of these workers are treated very inhumanly at the early stage of their stay at the brothel (a unit of prostitution). They are beaten frequently in order to create fear in their mind. Once they reach the age of entertaining the customers they are physically forced to do so. Having achieved what the brothel owner wants, these workers virtually remain under house arrest to prevent their possible escape. Whatever they can only a small part of the earning is given to them.

The government estimates that there are three million sex workers in India. Most of them are not only HIV affected but are suffering from various other diseases. They don't have a proper access to medical facilities. Referral to specialist care "Probably unthinkable for them.

Exploitation through the males designated as clients or customers. Pimps are the most obvious fate of these girls and women. Police and other law enforcing agencies always take advantage of these people. They not only extract money from them but also abuse them physically.

Throughout this research paper, the term 'sex worker' will be used wherever possible. The term 'prostitution or prostitute' may be referred to, however, when discussing case law or legislative text that has adopted this term. This research paper aims at exploring aspects of legalization of commercial sex work in India and whether it is a possibility in light of the various social and legal constraints that are existent in our country. The paper will start with a broad overview of the international legal framework with regard to prostitution, sexual exploitation and trafficking and the safeguards entailed within them. This international legal framework would include various conventions and treaties that India has ratified and the steps in respect of legalization that have been adopted by countries such as Netherlands, Sweden and Australia. This paper will consider such steps of legalization that could be implemented in India. After looking at the international legal framework, the picture in India with regard to the legal framework and ground realities will be considered including issues of inadequacy of the legal framework and misuse thereof. The decisions of the Supreme Court and various High Courts will be looked at where the problems of sex work have been contemplated and addressed. The directions of the National Human Rights Commission and National Commission for Women with regard to trafficking and the ITPA will also be looked into.

CONCLUSION

Prostitution is always going to be a pressing issue, and the society will always have different views about it. It is the society that decides where a country stands on this issue. Prostitution is something that is rejected by the society but is very much prevalent in it. But as the society progresses so does itsviews on such critical issues. What is right and what is wrong is something that you have to decide based on your own moral opinion. In the end I would quote BARBARA MEIL HOBSON, "Prostitution will always lead into a moral quagmire in democratic societies with capitalist economies; it invades the terrain of intimate sexual relations yet beckons for regulation. A society's response to prostitution goes to the core of how it chooses between the rights of some persons and the protection of others."

In India, with diverse societal ingredients, prostitution is usually looked down due to the nature of the profession. Sex workers live in a community formed by their own. Through the course of research, it can be observed that legalizing prostitution would benefit the people, prostitutes as well as the state. Though prostitution has been taking place in our country since many years it is still looked down in our society. It would benefit the prostitutes in many ways like, better

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health facilities, impose rights and duties on them, the working conditions would be improved etc., it would benefit the state by means of earning income through which the state would have better control over such activities. It also imposes a right on the state to have control over such activities and also by giving them the power to regulate these activities. With legalization, the sex workers‟ problems will be reduced. One of the main crime that is, trafficking would be reduced to a great extent. There must also be a distinction made between sex workers who have taken up this profession on their own will and sex workers who have been forced to do this job. Both the sectors must be looked after and a body of laws must be made governing the same. Sex workers must also be given life insurance and rights and for such rights, prostitution must be legalized. Instead of punishing the prostitutes the brothel owners must be punished as in most of the cases they are responsible for the acts of the prostitutes. It is suggested that sex workers must be rehabilitated with the help of state and it must be seen that such deprived women have to be provided with sufficient income and be reallocated to another sector with proper training and development.

SUGGESTIONS

Apart from the benefits of the prostitute's rights, there are several other reasons why prostitution must be legalized. Firstly, they are treated unequally before law. Legalizing prostitution does not only confer rights on the prostitutes but also benefits the country in one or the other way. Prostitution in our country has been taking place since hundreds of years. In a country like India, people mostly believe in moralistic prejudices, whether based on religion or an idealistic form of feminism remains silent regarding such issues. Basically, where a woman's responsibility is to take care of the household and her family, sex forms the most important part of her life and her husband's. That's why female prostitution is huge in number. Nevertheless, times are now changing. There are laws which concentrate on the illegal trafficking of women (Immoral tracking (protection) Act, 1956) but not on legalizing prostitution. The countries which criminalize such activities should also take into account the impact on people indulging in such activities. It is also important to know that legalizing prostitution would help many of them to get out of the trap and the converse would keep them trapped. While prostitution is not legalized, trafficking takes place. That's when people try to run such industries illegally and hundreds of people become the victim of trafficking. We also need to understand why prostitutes get killed or why they get assaulted? It is because the criminal has a better chance of escaping justice. On the other hand such people tend to clear

the off police by means of paying them huge amount. One economic aspect of legalizing prostitution is that it would benefit the state. In countries like Germany, people are taxed for prostitution. Taxing of prostitution would increase the wealth of the state. When the price increases, demand for the activity decreases. The costlier the activity, the lesser the demand. When people are charged for such activities, it becomes costlier for them to afford in their day to day activities and hence the demand falls. Some of the other reasons are explained in brief below:

Income: one of the main reasons why people indulge in prostitution is because of poverty. Due to poverty they lack education. Lack of education, leads to unemployment and for their living they indulge themselves in prostitution. Such people are deprived and have no other way to earn money. Some do it out of choice (for their living) and some of them do it out of responsibility (to earn for their family and earn income. Like, children). The second category people are those who indulge themselves for their families and mainly those who do not have a financial support, as in, husband or parents. And sometimes, they are not paid adequate amount for the service provided. Legalizing prostitution would help prostitutes earn adequate income and satisfy their basic needs. These prices would be fixed and the same would help these prostitutes live a better life.

Rights and duties: Rights are those which have a corresponding duty. They are social, ethical principles of freedom or entitlement. When a freedom is recognized by law it becomes a right. Rights can be moral or legal. When we say that a person has a right to do something, it means that no other person has a right to interrupt or stop that person from enjoying that particular right. Here, the former has a right and the latter has a corresponding duty not to interfere. Legalizing prostitution would confer rights to the prostitutes. With prostitution sanctioned their calling would get away from the shadows of illicitness and enable its laborers to call the police. If still illegal, they would be excessively apprehensive, making it impossible to call any expert and the assault and murder tally would keep on rising.

Health benefits: Legalizing prostitution would make sex workers life better and healthier. According to a research held by The BBC, It was found that when the sex workers request the clients to use condoms, they refuse to do so and get harsh on the workers. This leads to unsafe sex due to which there is high level of diseases transmitted like HIV/ AIDS and other diseases. Legalizing this would make the clients use condoms compulsorily and the sex

workers can also get a regular check done for the same. Sex specialists in Nevada need to get a month to month tests for HIV/AIDS and week by week tests for Gonorrhea and Chlamydia. It likewise requires condoms for all sex in whorehouses . A research conducted in Australia, the prevalence of sexually transmitted sexual infections was 80 times greater in illegal street prostitution than in legally owned brothels. This is because brothels encourage brothel usage.

Taxes: legalizing would not only benefit the people and the sex workers but also the state. Imposing taxes on brothels would decrease the demand and by this the state would also incur income. It is estimated that prostitution incurs 21 lakh crore on yearly basis. When the prices are high, the customers also decrease and when the demand reduces, there would be fall in such activities. According to Richard Posner, when taxes are imposed on such activities, the demand for the same decreases. The higher the prices lower the demand. According to him, tax evasion or price fixing is the best solution to criminal offenses. With this, violence would also decrease i.e., trafficking, rape etc.

Reducing human trafficking: Legalizing prostitution reduces human trafficking and It also reduces violence against them Such as, rape, murder, forced sex etc. This can be understood with the help of economics. Criminalization of prostitution will lessen intentional prostitution because of danger of conviction. This hazard is additionally for the trafficker however less harsher, as if there should arise an occurrence of an arraignment the casualty bears the criminal punishment yet the trafficker bears just a wage misfortune. Criminalization of prostitution will diminish intentional prostitution which will thusly put an upward weight on value in this manner boosting the trafficker. Subsequently, rather than decreasing human trafficking, criminalization will tend to expand it. further as prostitution is criminalized , the prostitutes and johns won't tend to report human trafficking dreading prostitution.

Improving working conditions: legalizing prostitution would improve the working conditions of sex workers primarily by way of medical facilities, reduction in violence against woman.

Protection by the police: Legalizing prostitution would provide police protection in cases of emergencies. Illegal prostitution face a lot of problems. The woman are into trouble. And these deprived women no resource of help. Providing protection would avoid violence and also protect prostitutes from violent customers. Pimps have illegal prostitutes in their power

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because these woman are deprived and have no resource of help. Also, they do not have easy access to health care. On the other side, legal prostitutes enjoy health benefits and they also have better access to other facilities.

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COMPETITION LAW WITH REFERENCE TO PATENTING AND TRADE SECRETS IN PHARMACEUTICAL PRODUCTS

- SHIVAM GUPTA

1. INTRODUCTION

When a law is enacted by legislative authority it seeks to achieve Public interest simultaneously it also takes care of the individual interest. The Competition Law Policies and Intellectual Property Policies broadly seek to achieve the consumer welfare and enhancing the economic growth as well but on the other side the very two regimes are observed to be contrary in their approach. A competition law policy strives to encourage innovation by restricting monopolies and unfair trade practices in the market while Intellectual Properties Policies encourage innovation by granting monopolies over the inventions.

Competition Act 2002 primarily focuses on prevention of anti-competitive agreements that has appreciable adverse effect on the competition. It focuses through CCI that there is no abuse of market power that affects the consumer welfare. Indian Patents Act 1970 primarily focuses on providing protection to the inventors in form of patent that gives exclusive power to the holder for a certain period. This regime seeks to provide market power to the patentee which is sought to be prevented by the other regime.

This paper seeks to analyze the relation between the two regimes in special context of Pharmaceutical products and impact of Trade Secret agreements on Competition law and determine how the two regime work harmoniously in ensuring fair trade practices and ensuring the public welfare without impeding the provision of the other. It also focuses on recent practices adopted by Patent holders that has an appreciable adverse effect on competition such as

Reverse payment settlements, Ever-Greening, Refusal to License, and Vertical Restrain in supply chain.

The paper also focuses on various aspects of trade secret and issues related to trade secrets in special context to pharmaceutical products.

According to World Intellectual Property Organization there exists a harmonious relation between these two regimes wherein Patent Law primarily works to prohibit the copying of the

patented products and with the help of Competition Law it tends to establish fair market.[124] Whereas the competition law works to prevent any anti-competitive agreements therefore the ultimate aim must be to establish balance between these regimes in a manner that patents are not misused or patents should not annul the reward granted by the other regime also it must be such relation that the other regime shall not lose its purpose when comes in contact with other regime.

2. PROXIMITY OF COMPETITION LAW AND PATENTING IN ESTABLISHING FAIR MARKET IN TRADING OF PHARMACEUTICAL PRODUCT.

Living in the world of commerce where directly or indirectly people enter into many agreements that forms the part of a trade, it is the duty of the traders to ensures that he should adopt fair trade practices and keep the spirit of competition alive. Spirit of competition is the tool that not only ensures fair market but it also keeps the traders active to adapt the dynamic business environment to in order to survive in the competitive market which eventually brings the best in the consumer market.

2.1Patenting in Pharmaceutical Products

Health is an essential socio-economic asset which contributes to economic development. The Pharma industry plays a vital role in saving human life which is often prone to many diseases. These pharmaceutical industries strive to invent medicines that fight with diseases. As per the data the Indian pharmaceutical industry stands 3rd largest industry in terms of volume and 13th in terms of ranking in world market. The Indian Pharma sector is expected to grow at CAGR which is 15% to 20% that would make up to somewhere around USD 50billion to USD 74billion. The sector is expected to grow USD 100billion by 2025[125].

Considering the increased growth of the pharmaceutical industry and the importance to further motivate traders to actively participate in the industrial growth the only tool available is to provide special grants to the players in Pharma industry. India became signatory to TRIPs agreements in the year 1995 which is an international agreement administered by WTO that

[124] United Nations conference on Trade and Development 15th session Geneva 19-21 0ct 2016 " Examining the Interface Between Objectives of Competition law and Intellectual Property Law https://unctad.org/meetings/en/SessionalDocuments/ciclpd36_en.pdf(visited on 10 May)

[125] SK Publisher" Growth of Indian Pharmaceutical Industry" SK International Journal of Multidisciplinary Research Hub volume 4, Issue 12, Dec 2017 https://www.researchgate.net/publication/327474331_GROWTH_OF_INDIAN_PHARMACEUTICAL_INDUSTRYAn_overview (visited on 10 May, 2020)

lays down minimum standards for various forms of IP that must be incorporated by the members to the agreement in their indigenous country.

Patenting in the Pharma industry was at most important. Earlier there was no product patenting in India it was brought in the year 2005 when India complied with TRIPs agreement. Protecting the interest of the Pharma player was considered important because the players in this field invest sizable amount in conducting the Research and Development work. Somewhere it appears convincing in granting monopolies or such exclusivity to the patentee as they spend high capital to bring out an innovation or invention which is quite intensive procedure. The exclusivity is granted as an incentive to encourage the players for further advanced innovation by helping them through the grants to restore their investment.

3. ROLE OF COMPETITION LAW AND PATENTING IN MAINTAINING FAIR MARKET AND PREVENTING TRADE DISTORTION.

Competition Act 2002 governs the competition in the market that not only ensures the competitive market but also benefits the consumer by providing them the wide variety of choices at affordable prices and ensures fair dealings in the market. The major issues arise when the competition law policy gets violated due to exercise of the patents rights. Patents confer monopoly rights over the invention to the patentee as an incentive to motivate the inventor. It assures him with such exclusive rights or monopoly to manufacture and sell the patented product to the exclusion of others. These rights somewhere give an opportunity to the patentee to indulge in anti-competitive agreements. It also gives the market power to the inventor that can amount to abuse of dominant position which on the other hand is aimed to be eliminated by the competition law.

For instance a patentee for some reasons if unable to work on his invention may grant license to others. If it mentions the exclusionary terms in a contract that restricts the licensee or bounds him to trade on exclusive dealings, tie- arrangement or anything of such nature then such agreements violates the competition law policies as it is deemed to defeat the sole purpose of the competition law.

3.1 Provisions of Patent Law in Consonance with Competition Law.

Research and Developments of drugs is highly capital intensive and a very uncertain activity as it is based on trial and error with very low success rates so it is very uncertain to say when the inventor would get the success in his invention. On an average it takes 12-15 yrs for a new drug to be developed and commercialized and both these steps have to pass through stringent test clinical trial where it has to be scrutinized on the parameters of its workability for the

human consumption. Only 5 out of 5000 drugs go up to the human consumption testing level and mere 1 out of five is approved for human unsafe[126]. Exorbitant Research and Development these Pharma companies want to gain as much revenue as they can make for which they use patenting strategies to maximize their profits. These Pharmaceutical industries strive to obtain patent on their products primarily to make money and to get an exclusive rights so that they can exclude others from unauthorized manufacturing, selling, exploiting their invention.

Section 3 of the Indian Patent Act marks all the inventions that are not patentable or does not fall under the definition of invention which includes any invention which is contrary to law, any invention which is done primarily or could be used against public order or morality.

3.1.1Section 3(d) has great reference to fulfilling certain aspects of Competition Law.

A. Ever-Greening of Patents

This provision of the Patent Act endeavors to put a check on the frivolous attempt of the applicant for obtaining a patent on a new form of the known substance or on a new form of the already existing drug innovation which implies a new form of an old substance can't be given a patent protection.

In the case of Novartis AG v. Union of India ….*Imanitib was a patented drug by Novartis which further sought to get patent on its beta crystalline form which is Imanitib Mesylate, the one which is under an issue. The question before SC of India was to see that the requirements of "enhanced efficacy" in section 3(d) are fulfilled It was held that the new form of the already existing patented product did not show any kind of enhanced efficacy it further explained that this efficacy had to be therapeutic i.e. it shall be determined by the body of the diseased person. Hence the increased capability in curing the ailment is the prime objective to be considered while granting patent and therefore the plea was rejected*[127].

Proximity of this case with the completion law is as follows-:

The new form of the Imanitib which is Imanitib Mesylate if manufactured by Novartis it would cost 120000 per month to a consumer whereas the Generic version of it would cost 8K-10k per month to the consumer. The action of Novartis in making a derivative of the product was just to extend their patent and earn profits by preventing the entry of the Generics in to the market. This very act if would be granted by Patent Act would made up to Anti-competitive act and would have defeated the objective of Competition law.

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[126] Tomorrow's Pharmacist "Drug Development the; journey of a medicine from lab to shelf" 12May 2015 https://www.pharmaceutical-journal.com/publications/tomorrows-pharmacist/drug-development-the-journey-of-a-medicine-from-lab-to-shelf/20068196.article (visited on 10 may)

[127] Novartis AG v. UNION of India and Others SLP(Civil) Nos. 20539-20549 of 2009 https://www.mondaq.com/india/patent/826478/a-study-on-novartis-ag-v-union-of-india (visited on 10 May)

B. Voluntary Licensing - Compulsory Licensing-:

Voluntary licensing can be granted by the patentee to multiple generic companies where they make generics companies an authorized person who could manufacture and sell the patented product and in return this licensee has to pay the royalties to the licensor. Through these licensing the patentee aims at manufacturing affordable medicines but due to certain reasons like incompetency or lack of resources can be the reason for granting such license.

India is signatory to TRIPs and as per article 27.2 it gives a leverage to the members to remove from the gambit of patent certain invention which are the concern of human health. With regard to Doha Declaration on the TRIPs and public health which is pro form of TRIPs agreements, the fourth WTO Ministerial Conference in Doha adopted that the protection of public health also promoting medicines access to people[128]. Considering these compliances it is the duty of the nation to protect the public health and make medicines access to public infringing the individual interest of the patentee.

Their lies a provision in Indian Patent Act for Voluntary Licensing and that voluntary licensing if provided then their doesn't arise the need of compulsory licensing, it arises only when the patentee refuses the license thereby obstructing the public access to medicine. As per section 84 of Patent Act the patentee owes the duty to make the patent workable and to provide the benefits to the public but if the patentee fails to do so then after the cessation of 3 years the person interested can file an application to the controller for grant of compulsory license.

In the case of Nacto Pharma Ltd.vs. Bayer Corporation this was the first and the only compulsory license granted by the controller with regard to the drug Soraafenib Tosylate which was used for the treatment of kidney and liver cancer. It was held in this case that drug patented to Bayer Corp. Was highly priced, which was not available to the public at a reasonable affordable price, it did not work in India as not manufacturing was done and the reasonable requirement for the public was not made. Hence Controller while making the final order considered section 84(6) that marks certain grounds for granting compulsory license

a) The nature of invention

b) The time that has elapsed since sealing of the patent

c) The measure taken by the patentee or any licensee to make full use of invention.

d) The ability of the applicant to work the invention to the public advantage.

[128] WTO OMC " The TRIPS Agreement and the Conventions referred to in it" https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/1_tripsandconventions_e.pdf pg15 (visited on 11 May)

Considering the above criteria the compulsory License was granted to Nacto Pharma[129].
This case and the provision of compulsory licensing showed that the Indian Patent Act itself strive to fulfill the purpose of consumer welfare and tends to keeps the check on traders to ensure fair market.

C. No Abuse of Dominant Position-:

The dominant position of a person or a company is determined by three step process where the 1st step is to determine the relevant market which is of two types relevant product market and relevant geographical market. 2nd step would be to determine dominance of that person or company in the market.3rd step is required only in case if the enterprise is found to abuse its position and doing anti-competitive acts.
Mergers of Ranbaxy Laboratories by Sun Pharmaceutical Ltd. in the pharmaceutical industry when a company is at the dominant position merges or tends to acquire other companies then this may arise competition related issues as was observed by CCI in the Mergers of Ranbaxy by Sun Pharmaceutical Ltd. for $ 3.2 billion in stock along with debts. The merger would result in total portfolio of 46 drugs formulations which constitute 8.5% of India's Pharma market share that amounts to Rs. 76000 crore annually.
The assessment was made by CCI that-
This transaction would make Sun Pharmaceuticals Ltd. India's largest Pharma company which is 5th largest in global generic Pharma industry. There were 49 molecules that were shortlisted on the basis HHI.CCI further studied the case under the parameters of combined market share , incremental market share, pre & post merger value and the concentration in the market, market share of the next competitor, no. of other competitors having market share more than 5% in the market.
CCI 1st Structural Remedy- on the basis of the assessment the commission concluded that the proposed combination is likely to cause appreciable adverse effect on competition and accordingly it says that it could allow the conditional approval and as per that the Sun and Ranbaxy have to divest 7 products.[130]

4. RECENT TRENDS OF PATENT RELATED COMPETITION LAW ISSUES.

[129] "NATCO PHARMA LTD.VS. BAYER CORPORATION AND THE COMPULSORY LICENSING REGIME IN INDIA" By Mansi Sood http://docs.manupatra.in/newsline/articles/Upload/93092AEC-D7C8-4C1E-9219-3B4CB5DAE8F9.pdf (visited on 11 May)
[130]Global Journal of Finance and Management vol.10 No.1 (2018) pp1-20 https://www.ripublication.com/gjfm18/gjfmv10n1_01.pdf (visited on 11 May)

Sections 3 of the Competition Law aim to prevent any anti-competitive agreements and as per it all anti- competitive agreements are void per se. The agreements are anti-competitive if it is an agreement with regard to supply, production, distribution, storage, acquisition and control of goods and services that will have appreciable adverse effect on competition.

Section 19(3) of the competition act lays down parameters that define the appreciable adverse effect on competition and these parameters will determine whether an agreement is anti-competitive or not and they are as follows

a) An agreements to do predatory pricing to throw the competitor out of the market.

b) Exclusive supply agreements.

c) Creation of barriers for new entrants to prevent their entry in the market.

A) Exclusive Arrangement:-

The patents when granted give the monopoly power to the inventor who is at the discretion to decide how, when and to whom these patents can be given on a license. It is observed that the patentee use their patented invention to the exclusivity of others i.e. they tend to license their inventions to the competent traders which is never an issue. But when the terms of the license are observed and it's usually found that these terms are of anti-competitive in nature. They include the trade restriction which could be restriction on production or supply quality or quantity, which could be any restriction to trade, which could be exclusive dealings and later the license are granted to only those traders who comply these terms.

As we the above mentioned provision it's clear that these acts of the are trying to affect the fair market dealings and fair trade practices and they also tend to impede the sole purpose of the competition law via patent policies. Therefore CCI has authority to action against such competitive acts.

B) Patent Pooling

A technique in which all the Pharmaceutical companies give their patents to an independent organization called a patent pool. This pool then acts like a one stop patent shop which gives the companies and researchers the access to these patents in exchange for a fair royalty payment to the inventors. The patent law grants the patentee an ownership so he can sell, use the patented product. This is a very crucial initiative adopted which is not per se mentioned in the act but it is dealt under section 120 of the Patents Acts by the traders under the control of the government. When Patent pooling is done the competent traders buy these patents and in return pay the royalties or the incentive over the patent this pooling seeks to work in two dimensions 1st makes

drugs accessible to public at affordable prices 2nd ensures the sustenance of patentee by payment of royalties. In the consonance it is a form of cartel as defined in section 2(c) of the completion act but since it tends to fulfill the Doha Agreement and TRIPs agreement it is considered as legal but as and when these patent pooling is reported to indulge in any anti-competitive agreements it comes under the action requirement by CCI.

C) Reverse Payment Settlement-:

This is an unethical practice that is in recent trends in the pharmaceutical products which cause competition related concerns. Generally the patents are protected for 20 years depending on the medicine this technique is used by the patentee when the period of the patents is about to come to an end. Through this technique the patent holder tries to prevent the entry of the new players in the market which is generic medicine traders.

When the Patent period reaches to the end the patented product gets accessible to the generic manufacturers on the payment of certain amount to the authority that further makes the medicine accessible at lower prices. As reported in the case of Hoffman La Roche's and Cipla it was alleged that the cipla was involved in the infringement of a patented drug by Hoffman which on the observation by H.C. was found that there was no infringement by cipla.[131]

In India this unethical act occur but these patentees initiates the case and gets the other party held liable and later they provide the amount to these generics thereby preventing the entry of the generics and on the other hand gets the extension on the patent.

5. TRADE SECRETS

Trade secrets are the confidential information valuable for the originations. Trade secrets contain the information that allows the businesses to obtain an economic advantage over their competitors. These are the formulas, practices, processes, designs, instruments, patterns, commercial methods or a compilation of information. These in formations are commercially valuable in nature that are not readily accessible to public and are subject to secrecy protection depending upon the nations adopted legislation. Thus a trade secret is any information that can be used in the operation of a business or other enterprise that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.

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[131] Indian Competition Law Review "Reverse Payment Patent Settlement; Navigating the Anti Trust Liability in the Pharmaceutical Industry." Vol. 2 Issue 2 http://iclr.in/wp-content/uploads/2019/08/Vol.2-REVERSE-PAYMENT-PATENT-SETTLEMENTS.pdf (visited 0n 14May)

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5.1 Trade Secret Infringement & Remedies under India Law

Unlike most other forms of intellectual property rights in India trade secrets law is not codified but it is governed by the principles of Common Law. India courts have relied on Common Laws cases and principles in its decision on trade secrets cases. The infringement of confidential information can be reported in two specific forms

a) Infringement by way of Misappropriation of Trade Secret Agreement

When trade secrets are wrongfully acquired by third party. It occurs when there is an unlawful taking of a trade secret without expending any effort by techniques such as reverse engineering or independent research. The qualified remedy under criminal is theft, trespass and cheating.

b) Breach of Confidence –

When a trader invents any process or anything of similar nature and if the objective of such invention could be achieved through others person then the holder of such secret forms a Non Disclosure Information agreement to such disclosing person. If there arises any dispute of trade secret infringement courts generally orders documents to be placed under pleadings or designate specific persons as a part of confidential team. This enable not just a lawyer but also to courts to believe that such information which is disclosed is considered to be confidential information by the person or the team. The trade secret holder is required to have disclosed the secret information either expressly or impliedly to a third person where the use of such trade secret by the third party is beyond the use of authorization granted such acts by the third party is also considered as a breach of confidence.

Its claim may arise from a express or implied relationship of a confidence between the parties. Remedy can be sought in civil law in the form permanent injunction restraining the infringer and any unauthorized beneficiaries from using such trade secret or the court can give direction for delivery up of all the confidential information back to the trade secret holder or the holder can seek damages for losses suffered due to its leakage

5.2 Trade Secrets Related Competition Law Issues in Pharmaceutical Products

As per the reports released by medical authorities about the cumbersome process of drug manufacturing i.e. huge amount and efforts are drawn in conducting R&D also it has to go through critical testing before coming in to the market for consumer use. Therefore the inventor of the drug wishes to acquire exclusive rights or monopoly under Patent act 1970. When an application for patent is filed by the inventor it is the requirement of the provision as per which the inventor has to also disclose the testing results of the drug and the process involved in manufacturing Thus the traders in Pharma products claimed data exclusivity against such disclosure to patenting authority. It was claimed that their huge efforts would go waste if the

generics gets access to test data. Entire trade secret data under the hands of some authority was deemed to be affecting the interest of the inventor thus the demand for data exclusivity arose. Data Exclusivity is a tool that will help the traders as under this practice the trader gets the exclusion period i.e. the inventor for a certain period of time under which no test data conducted by generics would be required to register this test data is in regards with safety, affecasy.[132]

However such exclusivity is denied. It was purely a practice that would cause violation of TRIPs agreement article 27.2 and Doha agreement as per which protecting the interest of the inventors with more focus on making medicines accessible to public at affordable price for health safety. As after the grant of such exclusivity the inventor would have huge impact This data exclusivity was never granted to traders as it would dilute the purpose of section 84 and 92, 92(A) of the Patent Act 1970. If data exclusivity is granted then even in the cases of life saving drugs the authorities would not be able to grant compulsory licensing as if would then have to disclose trade secrets which if granted protection can't be given to generics for manufacturing.

On the other hand if the drugs would not be made accessible to public then it would become non compliance to TRIPs and Doha agreement and would defeat the purpose of competition law.

CONCLUSION

Observing the dynamics of the market the policies like Competition Act 2002 was a vital initiate by the government as this is the umbrella for all trade related legislation. This regime primarily focuses on fair trade practices for the welfare of the consumer keeping the spirit of competition high. Section 3 (5) of the act gives exclusion to the Intellectual properties which is basically not an absolute exception in addition to it section 4 of the Act regulates the practices of these rights holders when the dominant position is abused. Any conduct of the intellectual property holder on basis of the right granted will be subjective to the provisions of the competition law.

As observed from the findings pointed above it is further concluded that there exists a harmonious relation between competition law and patenting which further shows that remedies

[132] Journal of Intellectual Property rights Vol.16 July 2011 " Intellection of Trade Secret and Innovation Laws in India "
http://nopr.niscair.res.in/bitstream/123456789/12449/1/IJPR%2016%284%29%20341-350.pdf (visited on 15 May)

to infringement of the patent holder can be sought under the Patent Act1970 but if in case the remedy is sought under the Competition law it will have the same effect as that of the remedy under Patent Act 1970.

As observed the malpractices that are taking place in the field of pharmaceutical products like reverse payment settlement, Patent pooling that has unclear approach by the competent authority. Patent pooling which is widely adopted in US and EU in making drugs accessible to the consumer have not been determined under provision of any law. This is indirectly adopted by traders with inference to certain section of Competition Act 2002. However the practices of exclusive arrangements and ever-greening are well equipped by both the regime under sec 3and section 140 of the Competition Act 2002 and Patent Act1970.

In the end it was found that the two regimes were well balanced but there were certain lacuna in enactment i.e. under section 4 of the competition act abuse of dominant position doesn't include charging high prices as the abuse of dominant position. It was also noted that no legislation that defines the abuse of Intellectual Property right. It was also observed that both the regimes were proactive in achieving their purposes but somewhere the Competition law was required to proactive in the approach i.e. more robust when due to the individual interest the interest of society at large gets affected. Considering the trade secret agreement it could be said that it's the most conflicting issue. On one side if it gets codified then it would hinder generics from entering in market, affects the functioning of section 84, 92 &92(A) with article 27.2 of the TRIPs agreement and Doha Convention whereas if it is not codified then somewhere it would be immoral and unethical when several testing is done on animals and human body and would affect the interest of inventors the hard workers. Therefore it is recommended that the authorities shall endeavor in finding the mediation between the two by providing them the value of exchange.

It is also recommended that the authorities shall look for possible solution in

obligation of confidence through employment as a nondisclosure clause during the course of employment in the contract of employment is deemed to be valid however after the employment is concluded the validity of such agreement is not determined as this comes in conflict with ICA under section 27 which says that restrains on trade and Indian could have not yet set any precedent regarding the same.

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CRIME AGAINST WOMEN AND ITS IMPACT ON THEM

- GAURAV GUPTA

INTRODUCTION

Crime against a woman is the most frequent crime occurring across the World. Physical and sexual abuse perpetrated by husband or family members against women can have deep physical and psychological impact preventing the victim from leading a normal life. Such crimes are frequent and very widely occurring in India. Low level of education and socio economic background is a main factor causing domestic violence. One of the main causes of crimes against women is the predominantly male dominated Indian society. In spite of laws to protect women from being victims of such crimes, it is found that disparity which exists between gender, caste, class, sexual orientation and ability manifests itself in crimes against women. Strict laws and effective implementation of laws will help in bringing down these crimes but this is not enough. What is required is a social and cultural awakening to stop crimes against women. And by developing right attitude of society towards women. Crime against women became a top political issue in India, soon after the Nirbhaya gang rape case. Aggression, violence and crime against women which comprise about 49 percent of the population is a serious issue for us. India is traditionally a male-dominated country where women have to face various violence in the society from the ancient time. They are suppressed and subjugated by the men in this patriarchal society. They have been victims of the humiliation , exploitation and torture.

In present situation cases of murder , rape , molestation , sexual abuse and eve-teasing etc are increasing day by day . whereas discrimination/harassment at work , domestic violence etc are also at there extreme. Factors effecting this are :-

- Use of money and muscle power to save accused .
- Politics in the name of caste, religion etc.
- India at 108th place according to Global Gender Gap Index 2017. And according to global peace index India to be the fourth most dangerous country for women travelers[133].

Crime against women is a violation of human rights. This is the biggest hindrance to achieve gender equality. It's a crime that leads to physical and psychological harm to the woman. It can

[133] https://www.researchgate.net/publication/334761471_Crime_against_Women_and_its_Impact_on_Them (last visited on 20April,2020)

be a major hindrance for any society to achieve equality, development and peace. Such kinds of crime are direct consequence of gender inequality, unequal social power structures, illogical cultural practices based on blind beliefs and traditions, religious beliefs, customs and media to a large extent. An important finding of WHO report on "Crime against Women" is'Women who are less educated and have witnessed their mothers being abused or illtreated, develop an attitude of accepting violence as male privilege and women's subordinate status.

The WHO report It specifies that such acts of crime have a tremendous long term and sometimes permanent negative impact on the woman's physical, mental, sexual and reproductive health of a woman.

As per "The Thomson Reuters" survey in June 2018 India was ranked as the world's most dangerous country in the world for women. Surpassing even countries like Afghanistan and Syria[134].

Empirical Findings :-

(Most Frequent Forms Of Domestic Violence)

- Physical violence (57%)
- Emotional violence (21%)
- Sexual violence (8%)
- Economic violence (14%)

(Main Provokers Of Domestic Violence In Most Of The Cases)

- By Husband is 39%
- By Mother –in-law is 22%
- By Sister – in – law is 16%
- By Brother – in – law is 9%
- By Father – in – law is 8%
- By Relatives of husband is 6%

(Most Frequent Forms Of Domestic Violence)

Emotional violence or emotionally blackmail are experienced by most of the women belonging to upper class or upper middle class families .

(Frequency Of Violent Attacks)

- On Daily bases is 18%
- More than one times in a week is 19%

[134] https://www.researchgate.net/publication/334761471_Crime_against_Women_and_its_Impact_on_Them (last visited on 20April,2020)

 More than one times in a month is 15%

 More than one times in a year is 16%

 Not certain is 22%

 Occasionally is 10%

(**Major Causes Behind Violent Attacks**)

 Alcohol addiction of husband is 30% informed by most of the victims.

 18.3% of the victims told that their husbands or in- laws betten them if they disobey either to their husband or their in-laws.

 Dowry cases are 13.3%

 from Extra marital affairs of the victims is 10%

 from Unemployment of male partners is 8.3%[135]

So if we analyse this index if come to the conclusion that women empowernment can also be a best solution to minimize crime against women.

Therefore crime against women can be defined as "all acts of physical, psychological sexual or economic violence that may be committed by a family member or intimate partner" India since 2005 to 2015 around 88,467 women died due to dowry death. Which estimate that almost 22 women per day women die. Sadly this data on crime against women in India is seriously inadequate and numbers can be even more than this persent, if on time we don't take necessary action to stop crime against women in any form. Where as these are just reported cases however the numbers are much higher. And a large number of cases do not get reported due to compromises, threats, fear, ignorance or social order.

Crime against women includes :-

1) Psychological violence
2) Physical violence
3) Sexual violence
4) Financial violence
5) Spiritual violence

1. **Psychological violence :-** Involves such behavior that causes fear or It can also be understood as Emotional abuse like destroying the self esteem of the victim through

[135] National Domestic Violence Hotline https://www.thehotline.org/resources/statistics/ (last visited on 25April,2020)

continuous insults, humiliation, criticism, abuse insults , mockery , threats , abusive language , harassment , etc.

2. **Physical violence :-** The most obvious use of force to cause physical injury eg :- kicking, stabbing, choking, battering, punching, choking, forced to use drugs etc.
3. **Sexual violence :-** This form of violence also includes sexual assault, rape, sexual harassment etc.
4. **Financial violence :-** Encompasses various tactics like preventing education, prevention from employment, no access to money, being at the mercy of the partner, no access to food water or clothing, no access to medical treatment, etc.
5. **Spiritual Violence :-** Works to destroy an individual's cultural or religious beliefs through ridicule or punishment, forbidding practice of a personal religion or forcing women or children to adhere to religious practices that are not their own , etc.

Type :-

- Rape
- Outraging the modesty of a woman
- Child sexual abuse
- Sexual harassment in the work place
- Domestic violence

Causes:-

- Historically unequal
- Culture justifies
- Sexually controlled
- Privacy doctrine
- War
- Govt. Inaction

1. **Historically unequal power relations** :- The political , economic and social processes that have evolved over many centuries have kept men in a position of power over women.

2. **Control of women's sexuality :-** Many societies use violence as a way to control a woman's sexuality , and likewise in many societies violence is used to punish women who exhibit sexual behavior , preference and attitudes that violate cultural norms.
3. **Cultural ideology :-** Culture defines gender roles and some customs, traditions and religions are used to justify crime against women , when women go against these culturally assigned roles.
4. **Doctrines of privacy :-** The persistent belief in many societies that crime against women is a private issue seriously obstruct attempts to eradicate this violence.
5. **Patterns of conflict resolution :-** Links have been identified between crime against women in the home and community in areas that are in conflict or that are militarized. Often, heightened insecurity means that tensions within the home are more pronounced and contribute to the perpetuation of crime against women in the family. Equally, because eyes tend to be on the conflict , women's suffering is often overshadowed. Crime against women is also frequently used as a formal military tactic.
6. **Government inaction :-** Government negligence in preventing and ending crime against women establishes a tolerance of crime against women throughout the community.

How is globalization affecting Crime against women :-

Capitalist globalization with its tools of development and progress , including some aspects of modern science and technology , free market, rational knowledge system and the militarized . State seems to be intensifying existing violence and creating abnormal new forms against the already vulnerable – particularly women[136].

- The state has also become its violator – both through commission of violence and through omission to stop or end violence. For example , State sponsored education , employment but not safe environment

[136] https://www.researchgate.net/publication/334761471_Crime_against_Women_and_its_Impact_on_Them (last visited on 20April,2020)

" Women Are Worshipped As Goddess In India , But Not Given Her True Position." The main problems faced by women in past and present :-

- Gender discrimination
- Women education
- Female infanticide
- Dowry
- Marriage in same caste and child marriage
- Atrocities on women : with their age ,they have been raped ,kicked ,killed subdued and humiliated almost daily .

Individual role to protect crime against women.

Raise awareness – It is important to continue to raise awareness about the impact of crime against women so that more groups, communities and leaders priorities this as a part of work that deserves attention and resources.

Help to **empower women** and girls to protect themselves → It is essential to address the sources and perpetrators of violence , whether actual or potential. This requires hand –on engagement with men and boys to help shift attitudes about the use of violence and to empower.

Break the silence : Never condone crime against women. Always raise your voice and report it.

Know the law :- Gain basic awareness of the laws on crime against women so that you are able to recognize when crime against women is taking place and know what law to use when.

Build solidarity :- With a concerned and committed group of friends and colleagues build an informal solidarity group within your organization or institution which can extend solidarity to victims .

Connect with women's rights groups :- Get in touch with local women's rights groups if you hear of any crime against women – related incident. Or if you wish to attend or organize trainings on Crime against women for your colleagues, friends and peers.

Demand to know your rights as a women :- Within an institution or organization you have a right to find out the processes in place to combat crime against women . for instance, you have a right to know whether your office or college has set up an anti-sexual harassment cell, and the right to demand that it is set up.

Rape, sexual harassment , eve teasing , molestation limit women's freedom and perpetuate the notion that women need male protection in various stages of life . It substantiate—According to **Manu's code "**A women should never be independent . Her father has authority over her in

childhood, her husband in youth and her son in old age". But still we find women are being illtreated like.:- what all happens in **Nirbhaya case** inspite of being safeguarded by male .Even employment , various qualification can't safe women from being rape, or from various violences against them .Eg:- **Priyanka Radii case** she was well educated and serve the society as being a doctor . But nothing helped her or saved her from brutly rape senerio in her life.If we go deep into it we find that at every time period this had been the main focused problem of society to eradicate the violence against women .in spite of being independent and powerful women they had face numerous of challenges in their life even through they are not supposed to face .Eg. From our ancient scriptures :- **Ma Sita** from **Ramayana** and **Draupadi** from **Mahabharta.**

To some extend we find that the mind set and greed of society specially male matters a lot . When values goes out of the life , devil start ruling their body. Which leads to the destructive results in society. Crimes of such nature are frequent and very widely occurring specially in India. Socio economic background and low level of education is an another most important factor effecting women.

1. **Rape :-**

Forms :

- Within family
- As caste / class domination
- Rape of children , minors and unprotected
- Gangrapes during wars, riots
- Custodial rape

2. **Prostitution** :-

Non voluntary but situational compulsions give rise to prostitution.

Social reprobates and economic compulsions.

3. **Latent form of violence :-**

Discrimination in food , health, education , employment

<u>Why It Should Be / Need For Awareness to stop crime against women :-</u>

- Harassment
- Exploitation
- Discrimination
- Educational problems

- Society (family responsibility)
- Low confidence
- (absence of ambition for the achievement)
- Lack of unity (social status)
- Traditional barriers
- Poverty and ignorance
- And on the top of all is violence against women

LANDMARK JUDGMENT ON ACID ATTACKS

Laxmi v/s Union Of India (2006) is another landmark case, where Public Interest Litigation (PIL) was filed by an acid attack victim Laxmi in the Supreme Court praying for the upliftment of the acid attack survivors, Therefore Court provided various guidelines for the upliftment or betterment of the acid attack survivors and granting them justice. Which include amendment in CrPC requiring the government to compensate the victim, minimum compensation of Rs 3,00,000/- to be given to each acid attack victim, full and free medical treatment and further help to be provided to the victim even by private hospitals and also no hospital or clinic can refuse treatment.

Law is always consider as a reflection of society and with changing norms, the practices are questioned in a court of law. Recently, many petitions heard by the Apex Court(Suprem court) questioned the Right to Freedom of Religion of women in India and also various religious practices. And few landmark cases are :

• **Shayara Bano v/s Union of India (2017),** in this case the Supreme Court held that the practice of Instant **Triple Talaq (talak-e-biddat)** un-Islamic and against the basic tenets of Quran. And Shayara Bano challenged the practice when her husband of 15 years invoked instant triple talaq. The court therefore questioned the custom which is theologically sinful and why was it still part of the practice of a community. So the court directed the government to bring a legislation to this effect within six months.

And therefore the government introduced the Muslim Women (Protection of Rights on Marriage)Act2019 which state that :-

– Any pronouncement of talaq by a Muslim husband on his wife, by words, either spoken or written or in electronic form or by any other means whatsoever, shall be consider void and illegal;

for this husband will be punished with imprisonment , which may extend to three years, and shall also be liable to fine.

• **Sabarimala Temple case :-** this is another one of the most important case that initiated the debate between Right to Equality (Article 14-18) and Right to Freedom of Religion(Article25-28).

This case related to the temple in **Kerala** – where **Lord Ayyappa** is worshiped – there is an age-old tradition of not allowing women of menstruating age to enter in religious places. This practice was questioned in the court of law through a petition was file in September 2018, the Apex Court held that women of all age groups can enter Sabarimala Temple. The court lifted the ban and declared it as a violation of women's right to practice religion. It was review by larger bench in November 2019. The Suprem court ruled that restrictions on women for entering the premises was not limited to Sabarimala alone and was prevalent in other religions too. So this allowed menstruating women to enter the Sabarimala Temple in Kerala.

All India Muslim Personal Law Board (AIMPLB) In January 2020 filed an affidavit in Apex Court for the entry of women in mosque to be allowed as per Islam. However, it is not necessary for muslim women to join group prayer, as they can also offer prayers at home too. And This was in response to a petition filed by a Muslim couple from pune seeking to uphold the right of Muslim women to enter the premises of mosques willingly or freely and offer namaz[137].

Me Too movement :- Me too movement is also known as or popular with the #MeToo . It is a movement against sexual harassment and sexual assault of women. This was started by sexual harassment survivor **Tarana Burke** on social media in 2006 , 0n Myspace. This was there for various women across the globe to fight back and it give people the resources to have access to healing, and to advocate for amendments and effective implemention of laws and policies.

RIGHTS OF WOMEN UNDER THE CONSTITUTION OF INDIA :-

The rights of women in India can be understood into two categories, namely as constitutional rights and legal rights. The constitutional rights are classified as those rights which are provided in the various provisions of the constitution of India. And on the other side legal rights, are

[137] One India one People http://oneindiaonepeople.com/landmark-judgments-protecting-womens-rights/ (last visited on 01May,2020)

those rights which are provided in the various laws (acts) of the Parliament and the State Legislatures.

The Constitution of India and crime against women:-

India's constitution drafter's were very consious or serious regarding women's rights in order to bring them equal to men . Various articles in the constitution safeguard or protect the rights of women . The preamble ,the fundamental rights , DPSPs and other constitutional provisions provide several general and special safeguards to secure women's rights for the upliftment of society and for common good for all.

Preamble :- The preamble of the constitution of India assure justice ,social , economic and political ; equality of status and opportunity and dignity/ integrity to the individual. Therefore it treats both men and women equal.

FUNDAMENTAL RIGHTS :-

There are sufficient fundamental rights are provided for the betterment of women which assure the safety of women by right implementation of it.

- **Article 14** define **Right To Equality**

- **Article 15(1)** state that The state shall not discriminate against any citizen of India on the ground of sex . **No discrimination**
- **Article 15(3)** state that The state is empowered to make any **special provision for women.**
- **Article 16(2)** state that No citizen shall be **discriminated against** or be ineligible for **any employment** or office under the state on the ground of sex . therefore it deals with the equality of opportunity in public employment.

- **Article 21** deals with the **Right To Life And Personal Liberty**

- **Article 21a** deals with **Right To Education**

- **Article 23(1)** deals with **Traffic** in human beings and **forced labour are prohibited** or ban.
- **Article 39(a)** deals with the liability of state to secure for men and women equally the right to an adequate means of livelihood

- **Article 39(d)** deals with the responsibility of the state to secure **equal pay for equal work** for both Indian men and women

- **Article 39(e)** deals with the liability state to ensure that the **health and strength of women workers** are not abused and that they are not forced by economic necessity to enter avocations unsuited to their strength .

- **Article 42** deals with the responsibility of state to make provision **for securing** just and humane conditions of work and **maternity relief**[138]

- **Article 51-A(e)** state that It shall be the duty of every citizen of India to renounce practices derogatory to **the dignity of women**

- **Article 243** It ensures **Reservation Of Seats In Gram Pranchayat For Women**.

- **Article 39A** deals with the **free legal aid** . To ensure opportunities for securing justice.

Various Legal Rights to Women:

Our legislation's contain several rights and safeguards for women betterment :

1. Protection of Women from Domestic Violence Act (2005)
2. Immoral Traffic (Prevention) Act (1956)
3. Indecent Representation of Women (Prohibition) Act (1986)
4. Commission of Sati (Prevention) Act (1987)
5. Dowry Prohibition Act (1961)
6. Maternity Benefit Act (1961)
7. Medical Termination of Pregnancy Act (1971)
8. Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (1994)
9. Equal Remuneration Act (1976
10. Dissolution of Muslim Marriages Act (1939)

[138] Edu general Women Rights in India: Constitutional Rights and Legal Rights

11. Muslim Women (Protection of Rights on Divorce) Act (1986)
12. Family Courts Act (1984)
13. Indian Penal Code (1860)
14. Code of Criminal Procedure (1973)
15. Indian Christian Marriage Act (1872)
16. Legal Services Authorities Act (1987) provides for free legal services to Indian women.
17. Hindu Marriage Act (1955) Hindu Succession Act (1956) recognizes the right of women to inherit parental property equally with men.
18. Minimum Wages Act (1948).
19. Mines Act (1952) and Factories Act (1948).
20. Few more other legislation's also contain certain several rights and safeguards for women:
    1. Employees' State Insurance Act (1948)
    2. Plantation Labour Act (1951)
    3. Bonded Labour System (Abolition) Act (1976)
    4. Legal Practitioners (Women) Act (1923)
    5. Indian Succession Act (1925)
    6. Indian Divorce Act (1869)
    7. Parsi Marriage and Divorce Act (1936)
    8. Special Marriage Act (1954)
    9. Foreign Marriage Act (1969)
    10. Indian Evidence Act (1872)
    11. Hindu Adoptions and Maintenance Act (1956).
21. National Commission for Women Act (1990)
22. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal). Act (2013)[139]

IMPORTANT NGO'S WORKING FOR WOMEN RIGHTS *:-*

[139] Edu general Women Rights in India: Constitutional Rights and Legal Rights

https://edugeneral.org/blog/polity/women-rights-in-india/(last visited on 20April,2020)

- Justicve For Women
- Khushi Foundation
- Indraprashtha Sanjeevni NGO , Naraina
- Masum Zindagi ,R.K. Puram
- Women's Political Watch ,Hauz Khas
- SHUDDHI NGO , Prashant Vihar

We also have "**Naari Suraksha** ", " **Beti Bachao**" programs launched on a large national scale to impress the seriousness of Government in protection of women.

CEDAW (**convention of elimination of all kinds of discrimination against women)** and focus on the **4** essential areas like ….

1. Women's Political
2. Legal Empowerment
3. Women's Economic
4. Social Empowerment

IMPORTANT WOMEN HELPINE NUMBERS

- Delhi Commission For Women - 011-23379181/23370597
- Delhi Police Helplines - 1091/1291/23317004
- National Commission For Women - 011-23237166/23234918

Legal Aid

- Human Rights Law Network - 011 -243745501/243746922
- Lawyers Collective - 011-24373904/24372923

Shelter Homes/Hostels For Women

- Shakti Shalini - 011-24373737
- Ywca (Hostel For Working Women) - 011-23362779/23362975

Counseling /Support Services

- Snehi - 011-65978181
- Sanjeevani - 011-26862222[140]

As per section 164 of Criminal Procedure Code women has right to privacy while recording statement. Before District Magistrate woman who has been raped can record her statement, when case is under trail there is no one needs to be present. In this situation woman has the

[140] Indian helpline.com https://indianhelpline.com/WOMEN-HELPLINE/ (last visited on 24April,2020)

right to lodge an FIR (First Information Report) at any police station under the provision of Zero FIR.

SOLUTION:

Laws by government increases **awareness** with the efforts of government and various NGOs. Andre Beteille state that law decides the direction in which the society run and culture decide the way in which the society actually goes. Awareness among people especially women and **strict punishment and implementation of laws** for culprits can be the best solution for this. Prevention should begin early in life, by educating and working with young boys and girls promoting and encouraging respectful relationships and gender equality. Training for self defence /martial arts etc can be helpful to women to safeguard themselves . Capital punishment for heinous crime or violence like rape , acid attack etc, will bring sincerity in society

- **Shiksha** reflects **education**
- **Swasthya** reflects **health**
- **Swavlamban** reflects **self reliance**
- **Samajik Nyay** reflects **justice**
- **Samvedan** reflects **sensitivity**
- **Samanta** reflects **equality**

All these 6 "S" are there for easy and effective progress in society.

Another important factors which can be the right solution for the betterment of women are **Social media, Films, serials and TV shows** play an important or vital role in correcting social evils. Women should be shown in a position of dignity and honour rather than cheap objects of lust in all over social media. Today maximum time women are pretended **as sex objects** in all popular **Hindi serials and bollywood films**. Than the question arise how will a society respect its women if they are repeatedly seen as sex objects or self sacrificing all compromising start first and foremost all norms advocating male supremacy must be questioned or challenged? Big change only begins from individual only for that it must start from home as entry of only males in temples or restricting females from entering kitchen during **menstruation period** or making household work especially female focused. Men should be taught to share the household works like cooking and washing utensils, etc to make a equality biased work ethic even at home. **Women education and economic independence** should be priority in all developmental activities of the Government. Women empowerment schemes should be most effectively implemented. **Primary education** especially for girls should be made compulsory.

Festivals and days glorifying women like **Durga pooja, mother's day daughter's day, women's day** and other such practices should be encouraged by society and government to inculcate the cultural importance in people where woman is worshiped like a Goddess. Various studies reflect that crime rate during Durga pooja and Navratri goes down and plays an essential and significant role in attitudes and behaviors towards women.

For quick and effective justice especially for domestic crimes women courts may be introduced. Various sites like special portals and social media should be brought up where accused found guilty of domestic crimes are listed. This may bring shame on families and men indulging in such crimes. Due to public shaming this may bring reversal in such crimes .

CONCLUSION

Gender based discrimination is one of the important factor rooted in society. Some of the time women feel so **helpless, frustrated, insecure** as they find no means to get out to it. Therefore several suicide cases comes to the world at large. In India women are worshipped as Goddess but never achieved their true position even in the minds of people. Really it's so embarrassing being born by the women still fails to recognize their true place in our life. It is high time for all of us to recollect **our ideas and values** where women were respected and always honored by people around.. **Unity and deep cooperation** among women itself can be the best solution to find the right place to live in. There is a famous saying by African proverb that "If you educate a man you educate an individual but if you educate a Woman , you educate a Nation." Today women is the backbone and root of the nation so without empowerment of women the progress of the nations is not rapid….

In the honour of women "**INTERNATIONAL WOMEN DAY** is celebrated every year on **,8 MARCH** to realize the true value of women in our life and its a great tribute to the women by the world. And this day reflect the achievements of women and celebrate the progress made to advance women's equality.

Spiritual Guru Shri Shri Ravi Shankar state that "The role of women in the development of society is of utmost important . In fact, it is the only thing that determines whether a society is strong and harmonious ,or otherwise.w omen are the backbone of society". So we find that there are sufficient laws available to women and instead of asking for new laws there is need for **proper and effective implementation** of these laws. India is one of the few countries in the world with maximum number of laws that protect women and empower them. Indian society has always been patriarchal society and we find some changes in last few years, but

nothing much has changed in the rural areas. Women are still seen as objects that can be suppressed by male.

Violence and crime against women is a global and wide phenomenon, it requires urgent attention. Every woman is entitled to a fear free and **respectful environment**. And it's our responsibility and duty to create such a society where a woman **find themselves free and independent.** Not as it is a human right but because only then we will able to foster a mother, daughter and sister who creates loving and happy families and children who respect and love each other. Only just laws to protect women are not sufficient. What is required is a social **economic and political freedom** to women to resist such acts and building a society where men respect women. Social awareness, media, cultural events, and festivals can play an important role in building or cultivating this culture. **Government awareness programs and free legal aid** advocating women safety, protection and dignity will bring about changes in the attitudes towards women.

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NATIONALISM AND SOCIAL EXCLUSION: A CHRONICAL OF THE OUTSIDERS

- **SAKSHAM KHUNGER & SIMRANJOT KAUR**

'Neither the colourless vagueness of cosmopolitanism, nor the fierce self-idolatry of nation-worship, is the goal of human history.'
—Rabindranath Tagore

1. PROLOGUE

Social exclusion is the process through which individuals or groups are wholly or partially excluded from full participation in the society within which they live.[141] Gender, caste or ethnic disadvantage translates into social exclusion when the institutional mechanisms through which resources are allocated and values assigned operate in such a way as to systematically deny particular groups of people the resources and recognition which would allow them to participate fully in the life of that society.[142] This phenomenon is contrary to the value of human dignity as it contributes to the displacement of millions; rendering many stateless and condemning them to live in extreme poverty and constant fear with limited–if any–rights.[143] It denies justice because it defines fundamental rights on the basis of national, racial or religious origin, posing a threat to social cohesion at local level and to peace across the world.

The concerning matter is an increasing tendency among political actors to gain influence and control through simplistic political initiatives and schemes–which further can be spotted in the mainstream media getting amplified, and eventually instructing the general political agenda of a country in a nationalistic direction–based on the idea that prosperity and security can only be achieved by unilateral national measures, even if it would prove detrimental to other people's interest. Solutions based on discrimination or the ostracism of any segment of the society can never lead to a peaceful and progressive community.

[141] AMARTYA KUMAR. SEN, SOCIAL EXCLUSION: CONCEPT, APPLICATION, AND SCRUTINY(2004).
[142] What is Social Exclusion? A Story from the field, Developmentoutlook.org (2019), http://www.developmentoutlook.org/2014/05/what-is-social-exclusion-story-from.html (last visited Feb 2, 2019).
[143] Soto, Paul, and Lapeyre Frédéric. Youth and Exclusion in Disadvantaged Urban Areas: Policy Approaches in Six European Cities. Council of Europe, 2004.

National pride without the maturity to recognise its violent elements is implausible. Nationalism is a powerful force which instills national pride and a sense of strength while also, at times, creating scapegoats, real or imagined.[144] In the 1990s, leaders like Serbian Slobodan Milosevic and General Ratko Mladic engaged in severe human rights' violation and took refuge under the guise of nationalism, after perpetrating genocide and ethnic cleansing in various cities like Bosnia. Nationalism, translated into world politics, implies desirability of determining the extent of the state according to ethnographic principles.

By preventing certain people from contributing to and benefiting from development, the progress of the country as a whole is stunted. The causes of poverty and inequality are embedded in the structures of social systems and relationships i.e. in exclusionary processes, and not in individual inadequacies.[145]

2. The Unfolding Of (Hindu) Nationalism In India

'Nationalism is nothing more than an idealistic rationalization for militarism and aggression.'
—Albert Einstein

In the age of aggressive Hindu nationalism when Indian media and politics is demanding not unity but uniformity, the space for diversity within the Indian society is decreasing and marginalization of communities is increasing. Hindu nationalism is encouraging extremist forces who are taking over the mainstream, which in no way is new. According to G. Aloysius, in India, the first generation of nationalists, drawn more or less exclusively from the Brahmin and upper caste communities, could only articulate a nationalism that was traditional, sectarian and exclusive in its interests. Their political nationalism excluded spokespersons from the lower levels of social structure, like E.V.Ramaswamy Naicker, Jyotiba Phule and Narayana Guru.[146]

Hindutva activism in the context of Indian public culture is a mix of the paternalistic and xenophobic sentiments expressed by conservative Indians as a result of a changing Indian society.[147] This has led to Hindutva detractors projecting imagined or otherwise inaccurate wrongs done to Hindus onto minority communities.[148] Communal clashes, ethnic riots, political

[144] Ed Fuller, Nationalism: Back Again Like a Bad Dream Forbes.com (2019), https://www.forbes.com/sites/edfuller/2016/04/15/nationalism-back-again-like-a-bad-dream/#566d53484636 (last visited Feb 3, 2019).
[145] Colleen Reid, Exploring Exclusion, Poverty, and Women's Health, THE WOUNDS OF EXCLUSION 2 (2017).
[146] G. ALOYSIUS, NATIONALISM WITHOUT A NATION IN INDIA (1998).
[147] Seth Schoenhaus, Indian Dalits and Hindutva Strategies, 16 Denison Journal Of Religion 56 (2017).
[148] JYOTIRMAYA SHARMA, A RESTATEMENT OF RELIGION: SWAMI VIVEKANANDA AND THE MAKING OF HINDU NATIONALISM (2013).

secessionist movements and extremist violence are the outward manifestations of the entrenched culture of social exclusion in India.

Recent incidents which signaled the politics of division and polarization in India include- the lynching of Mohammad Akhlaq in Dadri, the 'Bharat Mata Ki Jai' controversy (insisting that if you don't say 'Bharat Mata Ki Jai' you may face exile), the killing of rationalists, and most recently the bogus sedition case against a bunch of JNU students which was used to launch a nationwide campaign of hyper nationalism to create the perception of an enemy within, so that whoever is dissenting will be declared anti nationalist.[149]

2.1 The Anti-Muslim Reign

The sentiment that Muslims pose a threat to the majority community was the root cause for the crystallization of a form of Hindu nationalism about one hundred years ago, its reactivation in the 1920s and 1930s, and then again in the 1980s and 1990s.[150]

Since 2014, Indian politicians have normalized hardline Hindu nationalism through draconian cow protection laws, the renaming of cities with Muslim names, and the appointment of extremist Hindu nationalists to powerful positions.[151] Yogi Adityanath, a Hindu warrior-priest who has been chosen to rule India's most populous state i.e. Uttar Pradesh, built an army of youth intent on avenging historic wrongs by Muslims, whom he has referred to as "a crop of two-legged animals that has to be stopped"[152].

Those in favour of Hindutva characterize the ideology as a defense of the Hindu religion alongside the recognition of the threat that 'outside' religious traditions, notably Islam, pose. However, the Bharatiya Janata Party webpage entitled 'Hindutva: The Great Nationalist Ideology' can be witnessed regarding the Muslims as 'barbaric', 'hordes', 'bloody' and 'unwilling to change'.[153]

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[149] Zoya Hasan, THE POLITICS OF EXCLUSIONTHE CITIZEN (2019), https://www.thecitizen.in/index.php/en/NewsDetail/index/4/7864/The-Politics-of-Exclusion (last visited Feb 7, 2019).

[150] CHRISTOPHE JAFFRELOT, RELIGION, CASTE, AND POLITICS IN INDIA (2011).

[151] Max Frost, MODI'S INDIA DOUBLES DOWN ON HINDU NATIONALISM THE NATIONAL INTEREST (2019), https://nationalinterest.org/feature/modis-india-doubles-down-hindu-nationalism-42957 (last visited Feb 8, 2019).

[152] Ellen Barry & Suhasini Raj, FIREBRAND HINDU CLERIC ASCENDS INDIA'S POLITICAL LADDER THE NEW YORK TIMES (2017), https://www.nytimes.com/2017/07/12/world/asia/india-yogi-adityanath-bjp-modi.html?mwrsm=WhatsApp (last visited Feb 8, 2019).

[153] Administrator, VISION OF MODI, http://www.bjp.org/index.php?option=com_content&view=article&id=369:hindutva-the-great-nationalist-ideology&Itemid=501 (last visited Feb 9, 2019).

2.1.1 The Ineluctable Victims of Cow Lynching

The media often presents cow-related lynching cases as spontaneous reactions of the mob, but the perpetrators' ideological orientation could be surmised from the fact that they often make their victims raise slogans such as "Gau mata ki jai (Hail the cow-mother)" or "Jai Hanuman (Hail Hanuman)".[154] In the pertinent scenario, the choice of victims for assault has less to do with cow protection than with underlying hostility toward Muslims which is evident in the way Hindu cow-breeders and transporters have been spared, whereas the others, all Muslims, are severely beaten, even to death. Not only has our prime minister abstained from condemning lynching, some legislators and ministers have extended their blessings to the lynchers, with very few convictions.[155]

2.2 The Politics of Caste

'Caste system is the perfect design of the most exploitative and longest surviving man-made system in the world.'
—Anand Teltumbde

In his essay, Caste, Class and Democracy[156], Ambedkar astutely argued that once the British left, an Indian elite who despised the 'untouchables' from the upper castes would simply step into their place, and would neither strive to represent their interests, nor put up 'untouchable' candidates. Instead, they would hog all the power and resources and serve their own class interests, which is indeed today's reality.

The Bharatiya Janata Party, a right-wing nationalist political party charged by its parent organization, the Rashtriya Swayamsevak Singh (RSS), in order to increase its share of power, has increasingly realized the need to reach out to Scheduled Caste voters, specifically Dalits, who have largely existed at the bottom of the Indian caste system, below even those considered untouchable.[157] Dalit communities in India have been systematically disenfranchised and disempowered, and such exclusion is not an aberration, but in the very DNA of the republic.[158] Dalit movements often complain that even their political leadership has no real power as Dalit

[154] Christophe Jaffrelot, HINDU RASHTRA, DE FACTO THE INDIAN EXPRESS (2018), https://indianexpress.com/article/opinion/columns/hindu-rashtra-de-facto-bjp-rss-gau-rakshak-mob-lynching-5301083/ (last visited Feb 9, 2019).
[155] Ibid.
[156] B. R. AMBEDKAR & VALERIAN RODRIGUES, THE ESSENTIAL WRITINGS OF B.R. AMBEDKAR (2002).
[157] Anand Teltumbde, *Hindutva Agenda and Dalits*, RELIGION, POWER & VIOLENCE: EXPRESSION OF POLITICS IN CONTEMPORARY TIMES 209.
[158] ANAND TELTUMBDE, REPUBLIC OF CASTE: THINKING EQUALITY IN THE TIME OF NEOLIBERAL HINDUTVA (2018).

politicians have to constantly appease majority non-dalit voter communities, whose interests never align with those from marginalised castes.[159]

The anti-caste movement which the Dalits have led and struggled for, inspired by Ambedkar, has been appropriated by political parties with no intention of working for the upliftment of the Dalits, but rather only to engage in vote bank politics. What this results in, is these parties pandering to the Dalit voters without any intention of bringing structural reforms in their favor or working towards Ambedkar's objectives i.e. the annihilation of caste.

2.3 Of Mandirs And Men

Indian political parties have more often than not turned to the soft corner occupied by religion in the hearts of Indians, by diverting the issue of religious temples–prominently the Ram Mandir in Uttar Pradesh and the Sabarimala Temple in Kerala–in the direction of political propaganda.

BJP, RSS and their associate outfits' leaders have managed to occupy the centre stage, riding on the emotional wave generated by the agitation for building a Ram temple at the disputed site in Ayodhya as a tactic of capturing power.[160] In the wake of the upcoming 2019 elections, Amit Shah, the President of BJP, has even gone ahead and said that Ram Mandir is going to be the next biggest achievement of our nation since independence.[161]

In the Sabarimala Temple case, in addition to politicising a religious issue, Hindutva forces have openly opposed a decision of the Supreme Court. The BJP Kerala state unit chief, P.S. Sreedharan Pillai, has even claimed that the BJP planned the whole protest when the temple was opened January, 2019.[162] In both the Sabarimala and Ayodhya cases, the prestige and authority of the Supreme Court vis-à-vis entrepreneurs in identity politics who use traditions in order to mobilise and polarise is at stake.[163]

[159] Dhrubo Jyoti, REVIEW: REPUBLIC OF CASTE BY ANAND TELTUMBDE HINDUSTAN TIMES (2018), https://www.hindustantimes.com/books/review-republic-of-caste-by-anand-teltumbde/story-EWhWcPEWsyuiTzsOoTeDUO.html (last visited Feb 8, 2019).
[160] K. N. Panikkar, WHEN CASTE & RELIGION SURGED THE HINDU (2011), https://www.thehindu.com/books/when-caste-religion-surged/article2045086.ece (last visited Feb 9, 2019).
[161] India Today Web Desk, INTERIM BUDGET 2019 BIGGEST ACHIEVEMENT SINCE INDEPENDENCE, SAYS AMIT SHAH, RAM MANDIR NEXT INDIA TODAY (2019), https://www.indiatoday.in/business/union-budget-2019/story/interim-budget-2019-biggest-achievement-since-independence-says-amit-shah-ram-mandir-next-1445183-2019-02-02 (last visited Feb 9, 2019).
[162] Christophe Jaffrelot, NO ROOM FOR LIBERAL DOUBT THE INDIAN EXPRESS (2018), https://indianexpress.com/article/opinion/columns/sabarimala-temple-women-entry-protests-bjp-5454465/ (last visited Feb 9, 2019).
[163] Ibid.

3. Conventional Nationalism From A Cosmopolitan Perspective

Social exclusion rising from nationalism has seeped in every corner of the globe. The American and French revolutions may be regarded as first powerful manifestations of nationalism. Nationalism came into the picture in Asia and Africa after World War I. It produced such leaders as Kemal Atatürk in Turkey, Saʿd Pasha Zaghūl in Egypt, Ibn Saʿūd in the Arabian peninsula, Mahatma Gandhi in India, and Sun Yat-sen in China.[164]

Nationalism also has the power to create competition between different nations[165], which can easily lead to war, as had happened during the World War I. The U.S. Department of Justice issued a report which stated that there were approximately 37 million casualties during WWI.[166] Within the 20th century alone, nationalism had the blood of millions on its hands. For instance, the rabid nationalism of the Japanese led them to treat other Asiatic peoples as less than human. The Japanese referred to Chinese in disparaging ways and, in the war of 1937, treated them brutally.

Public attitudes towards the poor in Britain—which are at best indifferent, at worst, hostile, in a context of socio-spatial separation of the poor from the better off—too illustrate the exclusionary potential of the political processes. This hostility is shaped, among others, by popular culture and political ideology propagated by the mass media, competition for jobs and other resources, and fear of poverty.[167] In our own world, ISIS (the Islamic State of Iraq and Syria) defines itself as a state. In the name of its ideology, it enslaves women, and murders those who disagree with its ideology, both in the Middle East and elsewhere.[168]

3.1 Parallelism of Trump's America and Hitler's Germany

Nationalism can easily lead to extreme movements, the most prominent case in point being the creation of Nazism. Hitler's love and pride for Germany sparked feelings in people that made them identify themselves completely with Germany, rather than as individuals. The killing of Jews, Communists, the disabled, and the challenged was all done in the name of purifying German blood. Hitler once proclaimed:

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[164] Hans Kohn, NATIONALISMENCYCLOPÆDIA BRITANNICA (2019), https://www.britannica.com/topic/nationalism (last visited Feb 9, 2019).
[165] Anita Brienza, The Nationalism Effect: Global Change in Today's Environment | Worldwide ERC® Blog Worldwideerc.org (2019), https://www.worldwideerc.org/article/nationalism-effect (last visited Feb 3, 2019).
[166] The Effects of Nationalism On Humanity, The Odyssey Online (2019), https://www.theodysseyonline.com/effects-nationalism-humanity (last visited Feb 3, 2019).
[167] Soto, Paul, and Lapeyre Frédéric. *Youth and Exclusion in Disadvantaged Urban Areas: Policy Approaches in Six European Cities*. Council of Europe, 2004.
[168] History.com Editors, ISIS HISTORY.COM (2017), https://www.history.com/topics/21st-century/isis (last visited Feb 9, 2019).

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'Our future is Germany. Our today is Germany. And our past is Germany. Let us take a vow this evening, at every hour, in each day, to think of Germany, of the nation, of our German people. You cannot be unfaithful to something that has given sense and meaning to your whole existence.'[169]

The preposterous notion that a nation is above all and serving it is crucial to one's existence led the Nazis to commit atrocities, causing multitudinous deaths.[170] The terrifying existence of similar trends can be witnessed in today's America as well. While accepting the Republican nomination for President, Donald Trump, who is currently the President of The United States, said:

'Our plan will put America First. *Americanism,* not globalism, *will be our credo*. As long as we are led by politicians who will not put America First, then we can be assured that other nations will not treat America with respect, the respect that we deserve. The American people will come first once again.'[171]

Trump has been pigeonholing 'real' Americans by excluding Mexican Americans, Muslims, African Americans, immigrants, and even women.[172] Nationalism constitutes arbitrarily choosing who belongs to the nation and who does not, through discrimination and ostracism of groups who supposedly don't form a part of 'us'.

3.2 Iraq: A Narrative of Sunnis' Communal Victimhood

'Injustice, marginalisation, discrimination and double standards, as well as the politicisation of the judicial system and a lack of respect for partnership, law and constitution, have all turned our neighbourhoods in Baghdad into huge prisons surrounded by concrete blocks.'

—Rafia al-Issawi, Iraq's finance minister

Iraq has been witnessing instability and friction between Sunnis, Shias, and Kurds for quite some time now. Sunnis in Iraq have faced widespread displacement, ethnic cleansing, destruction of their towns and Shiite-favoring demographic changes in various regions of Iraq, including the capital-Baghdad. Even after facing all the hostility, members in significant positions in the Sunni community aren't ready to budge in and resort to resolutions that will

[169] RICHARD A. KOENIGSBERG, NATIONS HAVE THE RIGHT TO KILL: HITLER, THE HOLOCAUST, AND WAR (2009).
[170] The Effects of Nationalism On Humanity, The Odyssey Online (2019), https://www.theodysseyonline.com/effects-nationalism-humanity (last visited Feb 3, 2019).
[171] David Smith, TRUMP'S REPUBLICAN CONVENTION SPEECH: WHAT HE SAID AND WHAT HE MEANT THE GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2016/jul/22/donald-trump-republican-convention-speech-transcript-annotated (last visited Feb 9, 2019).
[172] Lisa Wade, Why is Nationalism Dangerous? Sociological Images Thesocietypages.org (2019), https://thesocietypages.org/socimages/2016/12/26/why-is-nationalism-dangerous/ (last visited Feb 3, 2019).

involve politicking, reflecting on past errors, and many concessions.[173] Iraq requires 'a political compact based less on sectarian identities and more on individual citizens'.[174]

In the wake of the democratic transition process in from 2004 to 2005, Shiite Muslims and Kurd devised a constitution and a political system that deliberately marginalized minorities. The Badr Organization, a Shiite political party and paramilitary force, set up death squads that aimed at targeting and attacking Sunnis.[175] Moreover, exclusionary measures were also brought into being against the Ministry of Interior's Sunni personnel and Sunni members of the Iraqi security forces.[176]

At this point, addressing Sunni feelings of alienation is crucial. To build legitimacy and stability, the Shia-dominated state needs to launch a serious reconciliation plan.[177] Power should become less elitist, more decentralized, and more reflective of people's needs.[178]

3.3 The Marginalised Mexico

Marginalization of Mexico City's native population is a deep-rooted problem, formed by a historical process of displacement[179], segregation, supported by the negative and prejudicial colonial representation of indigenous people. Until now, the native issue has mostly affected the peripheral regions of Mexico: the depressed, rural areas, where the native population has been forced to live because of colonial policies. Specific native groups that have been settling in the city for decades are still considered outsiders, with their chances of integration into the urban society being very low.

Mexico continues to be trapped between its colonial past and a form of rule based on repression, mutilation, torture and corruption. The region, mired in poverty and plagued by rising insecurity, has fallen far behind other parts of the country economically.[180] The privatisation

[173] Rasha Al Aqeedi, DISARRAY AMONG IRAQI SUNNIS YIELDS OPPORTUNITY FOR NATIONALISM THE CENTURY FOUNDATION (2017), https://tcf.org/content/commentary/disarray-among-iraqi-sunnis-yields-opportunity-nationalism/?session=1 (last visited Feb 10, 2019).
[174] Harith Hasan Al-Qarawee, IRAQ'S SECTARIAN CRISIS: A LEGACY OF EXCLUSION CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, https://carnegieendowment.org/sada/?fa=55372 (last visited Feb 10, 2019).
[175] Sunnis in Iraq Face Marginalization, Exclusion and IS Violence, https://fanack.com/iraq/population/sunnis-in-iraq/ (last visited Feb 9, 2019).
[176] Ibid.
[177] Harith Hasan Al-Qarawee, IRAQ'S SECTARIAN CRISIS: A LEGACY OF EXCLUSION CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, https://carnegieendowment.org/sada/?fa=55372 (last visited Feb 10, 2019).
[178] Associated Press in Ramadi, IRAQ PROTESTS SIGNAL GROWING TENSION BETWEEN SUNNI AND SHIA COMMUNITIES THE GUARDIAN (2012), https://www.theguardian.com/world/2012/dec/26/iraq-protests-tension-sunni-shia (last visited Feb 10, 2019).
[179] Noticieros Televisa, Nearly 500 displaced indigenous people on the march in Chiapas, MEXICO NEWS DAILY (2018), https://mexiconewsdaily.com/news/nearly-500-displaced-people-on-the-march/ (last visited Feb 10, 2019).
[180] Reuters, POPE DENOUNCES 'SYSTEMIC' EXCLUSION OF MEXICO'S INDIGENOUS POPULATION SBS NEWS (2016), https://www.sbs.com.au/nitv/nitv-news/article/2016/02/16/pope-denounces-systemic-exclusion-mexicos-indigenous-population (last visited Feb 10, 2019).

ISSN: 2581-6349

of services by the Mexican government left the indigenous people without access to education, healthcare and sanitation services, reducing them to live under eternal poverty.[181] According to the United Nations' 2015 report on the status of the world's indigenous peoples, 80.6% of Mexico's indigenous population lives in extreme poverty.[182]

The indigenous movements for recognition and acceptance have been a constant part of Mexican history; however, the recent Zapatista movement has been brutally repressed. Even today the majority mestizos continue to reproduce schemes of discrimination and stigmatisation towards indigenous people.[183] The modern Mexico needs to accept, respect and include indigenous people as equal citizens not only in paper, but also in daily life. The distinction of racial, ethnic group and caste are social constructions that oppress and isolate people.

4. Conclusions and suggestions

The stresses and strains of a life of struggle and rejection undermine the excluded group's capacity to develop and grow personally, socially, and spiritually. The general population needs to put an end to the belief in separation and scarcity. Some imperative suggestions have been mentioned below:

- The exclusion of segments of a diverse citizenry in the society has often resulted in political and civil conflicts. Increasing the involvement of such groups in the processes of decision-making, representation and review, thus, elevating their status from mere consumers to participants—without yielding to the likely backlash from the dominant groups— is necessary. Enhancing opportunities for these groups to participate in democratic institutions and mechanisms will have a conflict-prevention effect. The affected community should steer the process and be conveyed the information in a manner that is relevant to the whole marginalized community, like in their own language.

[181] INDIGENOUS POLITICAL REPRESENTATION IN MEXICO GLOBAL AMERICANS (2017), https://theglobalamericans.org/2017/10/indigenous-political-representation-mexico/ (last visited Feb 10, 2019).
[182] Hilary Heath, MEXICO'S INDIGENOUS POPULATION CONTINUES TO FACE HIGH RATES OF POVERTY PANORAMAS (2016), https://www.panoramas.pitt.edu/health/mexicos-indigenous-population-continues-face-high-rates-poverty (last visited Feb 10, 2019).
[183] Stevenhagen Rodolfo, THE INDIAN RESURGENCE IN MEXICO CULTURAL SURVIVAL, https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indian-resurgence-mexico (last visited Feb 10, 2019).

- The policy makers need to actively listen to the excluded groups—and be first-hand sensitized to the issues that these groups face on a daily basis—leaning towards local knowledge more than arm's-length audits. They need to realize that the practice of democracy is as important, if not more, as its system. Reducing and eliminating social exclusion requires it to be overtly stated in the public policy agenda as a major social problem.
- Government initiatives for the excluded groups should be grounded in a thorough analysis which identifies the barriers to inclusion and entry points for change; otherwise they will fail to reach the target groups. Allocation of public resources for the reduction and elimination of the anti-life practice of social exclusion would mitigate social instability at all levels of society.
- An inclusive education system where educational institutions are responsive to the diversity is required in practice. Human rights' principles of tolerance ought to be incorporated into the formal as well as informal education curricula from an early age itself, so that the effective dismantling of stereotypes and patriarchy is brought to pass in the longer term.
- The presence of a 'central universal feedback system', permitting inputs from all segments of the society would lead to effective governance. In order to reach out to the marginalised groups and achieve social inclusion, designing actions not tied to formal citizenship/residence requirements is a prerequisite.
- The desires of the marginalized groups should not be suffocated or swept under the carpet, but rather prioritized by the ruling authorities. States actors should review and adopt electoral systems that will benefit the marginalized groups, like proportional representation with reserved or quota systems as opposed to majoritarian systems.
- There needs to be the diversification of national and global decision-making centers in order to make them more inclusive and reflective of global diversity. These initiatives also need to address the dominant culture's preparedness to accept the marginalized groups; reversing the stigmatization, discrimination, exploitation and political exclusion.

'Marcos is gay in San Francisco, Black in South Africa, an Asian in Europe, a Chicano in San Ysidro, an anarchist in Spain, a Palestinian in Israel, a Mayan Indian in the streets of San Cristobal, a Jew in Germany, a Gypsy in Poland, a Mohawk in Quebec, a pacifist in

ISSN: 2581-6349

Bosnia, a single woman on the Metro at 10pm, a peasant without land, a gang member in the slums, an unemployed worker, an unhappy student and, of course, a Zapatista in the mountains. Marcos is all the exploited, marginalised, oppressed minorities resisting and saying 'Enough'.'

—Sub-comandante Marcos, Zapatista leader in southern Mexico

ISSN: 2581-6349

THE LAW RELATING TO EXPERTS AND SCIENTIFIC EVIDENCE : A BETTER WAY FORWARD

- **UPASANA BORAH**

ABSTRACT

[184]The word "EVIDENCE" has been derived from the latin word "evidere" which implies to show distinctly, to make clear to view or sight, to discover clearly, to make plainly certain, to ascertain, to prove. According to Sir Taylor, "LAW OF EVIDENCE" means through argument to prove or disprove any matter of the fact the truth of which is submitted to judicial investigation.

According to Sir Blackstone, "EVIDENCE" signifies that which demonstrates, makes clear or ascertains the truth of the facts or points in issue either on one side or the other.

This is the approach of several writers. It has been found, however, that this formulation is unsatisfactory as it includes both substantive and procedural rules. While the definition of "EVIDENCE" has been considered by Courts, they have not attempted an exhaustive evidence.

LEGAL DEDFINITION OF EVIDENCE

Strictly in the legal context, Evidence can be defined as various things presented in Court for the purpose of proving or disproving a question under inquiry . It includes testimony, documents, photographs, maps and video tapes. These are termed as evidence. Section 3 of Indian Evidence Act, 1872 defines evidence in following words-

[185](1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2)[all documents including electronic records produced for the inspection of the Court;] such documents are called documentary evidence.

The definition of EVIDENCE given this Act is very narrow because in this evidence comes before the Court by two means only-

1) The statement of witness.
2) Documents including electronic Evidence.

[184] https://lawhelpbd.com/evidence-act/evidences-and-witnesses/
[185] https://indiacode.nic.in/show-data?actid=AC_CEN_3_20_00034_187201_1523268871700&sectionId=38798&sectionno=3&orderno=3

The Hon'ble Supreme Court in the case of, SIVRAJBHAN V HARCHANDGIR, held that "The word Evidence in connection with Law, all valid meanings, includes all except agreement which prove or disprove any factor matter whose truthfulness is presented for Judicial Investigation. At this stage it will be proper to keep in mind that where a party and the other party don't get an opportunity to cross-examine his/her statements to ascertain the truth then in such a condition this party's statement is not Evidence".

ATTEMPTS TO DEFINE LAW OF EVIDENCE

[186]The Law of Evidence can be defined as- Those rules which directly or indirectly:

1. Control what evidence may be received;
2. Control the manner in which evidence is presented and received;
3. Control how evidence is to be handled and considered once it is received and what concludes, if any, are to be drawn from particular classes of evidence;
4. [187]Specify the degree of satisfaction that the tribunal of fact must attain in determining whether a fact in issue is established and the consequences if such a level of satisfaction is not reached.

Law of Evidence is a body of law the subject-matter to which, however, is not properly defined. It is a critical task to define as it determines the rule of law to be reviewed and critically examined and the scope of any proposals.

In the middle of the 19th Century natural science began to develop by leaps and bounds. The mystic and advanced theories had explain the scheme of things began to lose ground as it is the clear and cold logic of scientific experiment gradually shed a new light on the mysteries of universe. The change in the point of view from the mystic to the scientific soon transformed and became apparent not only in criminal investigation but also in the various facets of the legal system. Now there emerged two facets of a single case. The facet stated and the facet from scientific view point. The era of Forensic Science has arrived. It is presumed that forensic science is the only branch of science which takes all branches of science to common man and helps the criminal justice system, which in turn tries to provide a crime free society for common man to live in . Forensic Science uses the basic principles of all physical and natural sciences and has evolved many domains of its own which includes Forensic DNA, Fingerprints, Ballistics, Hand writing, Computer Crime, Polygraph etc.

[186] https://legalserviceindia.com/article/l153-Forensic-Evidence.html
[187] http://arindspeaks3.blogspot.com/

Justice delivery system consists of Police, Prosecutions, Courts and Punishing the wrong-doer acquitting the innocent one.

RESEARCH METHODOLOGY

The research is primarily doctrinal research and the secondary data is collected from the websites and library and international journals and articles. The books collected and the literature review gives a better insight of the topic and the scope for research.

ADMISSIBLE TESTIMONY

[188]Admissible Testimony relating to a professional, scientific or technical subject.

a) Expert's Opinion and its Admissibility & Relevancy : Section 45- 51 of the Indian Evidence Act, 1872 under Chapter-II provides Relevancy of opinion of third persons, which is commonly called in our day-to-day practice as expert's opinion. [189]These provisions are exceptional in nature to the general rule that evidence is to be given of the facts only which are within the knowledge of a witness. The exception is based on the principle that the Court cannot form opinion on the matters, which are technically complicated and professionally sophisticated without assistance of the persons who have acquired special knowledge and skill on those matters. Conditions for admitting an expert opinion are as follows-
    a) That the dispute cannot be resolved without expert's opinion.
    b) That the witness expressing the opinion is really an expert.

ADMISSIBILITY OF EXPERT OPINION

[190]Expert opinion becomes admissible only when the expert is examined as a witness in the Court. The report of an expert is not admissible unless the expert gives reasons for forming the opinion and his evidence is tested by cross-examination by the adverse party. But in order to curtail the delay and expenses involved in securing assistance of experts, the law has dispensed with examination of some scientific experts.

As per the Code of Criminal Procedure, 1973 Section 293 provides a list of some Govt. Scientific Experts as following :

a) Any Chemical Examiner/ Asstt. Chemical Examiner to the Govt,

[188] https://baselineenvironmental.com/
[189] http://www.legalservicesindia.com/article/1583/Experts-Opinion-and-its-admissibility-and-relevancy
[190] http://www.legalservicesindia.com/article/1583/Experts-Opinion-and-its-admissibility-and-relevancy

b) The chief Controller of Explosives,
c) The Director of Finger Print Bureau,
d) The Director of Haffkein Institute, Bombay,
e) The Director, Dy Director or Asstt. Director of Central and state Forensic Science Laboratory,
f) The Serologist to the Govt,
g) Any other Govt. Scientific Experts specified by notification of the Central Govt.

The report of any of the above Govt. Scientific Exprts is admissible in Evidence in any inquiry, trial or other proceedings and the Court may , if it thinks fit, summon and examine any of these experts. But his personal appearance in the Court for examination as witness may be exempted unless the Court expressly directs him to appear personally.

WHO IS AN EXPERT ?

There are many interpretations as to who is an Expert. The most accepted interpretation is that of Powell, an social scientist. According to him, an Expert is one who has devoted time and studies to a special branch of learning and is especially skilled on the points in which he is asked to state his opinion.

However, according to Section 45 which deals with "Opinion of Third person when relevant" are as follows-

[191]"When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts".

Illustrations

A) [192]The question is, whether the death of A was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which A is supposed to death are relevant.

Section 46 of the Evidence Act, 1872 relates to the facts bearing upon opinions of experts- Facts, not otherwise relevant if they support or are in consistent with the opinions of experts, which such opinions are relevant.

[191] https://devgan.in/iea/section/45/
[192] http://education.dewsoftoverseas.com/vakilno4/indianevidenceact/CHAPTER2/S45.html

An expert may give an account of experiments performed by him for the purpose of forming his opinion. [193]An Expert, is therefore a person who has special knowledge to give his opinion, whereas an ordinary person is not competent to do so. Broadly the law on expert would cover all branches of human knowledge. Thus, medical men, artists, engineers, surveyors, engravers, mechanics, artisans and the diverse classes of specially skilled workmen would all be experts within the meaning of the section of course each in his own walk of life.

VALUE OF EXPERT EVIDENCE

Expert evidence must be viewed not as a piece of substantive evidence of a conclusive nature, but as a piece of corroborative evidence to other evidence in the case. The corroborative evidence in order to be of any value must on material particulars and the facts relied on for corroboration must be established by reliable and independent evidence. The expert evidence is weighed in the same way as other evidence. The court is not bound to accept the opinion of an expert automatically, but the grounds on which he gives his opinion would carry value to the evidence. Matters for consideration for the judge in this regard are-

1. Facts and circumstances of the case,
2. The nature of Expert testimony,
3. The extent to which the guilt of the accused person depends upon the expert testimony,
4. The credentials and qualification of the expert,
5. The circumstances in which he came to figure as a witness,
6. Reliability of the facts on which the expert based his opinion.

THE INDIAN SCENARIO

[194]Evidence includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things that are earlier-

a) Presumed to be true,
b) Which were proved by evidence, to demonstrate an assertion's truth.

In the LAW OF EVIDENCE, the production and presentation of evidence depends on first establishing on whom the BURDEN OF PROOF lies. [195]ADMISSIBLE EVIDENCE is that which a court receives and considers for the purpose of deciding a particular case. Two primary BURDEN OF PROOF considerations exist in the Law.

[193] https://quizlet.com/211776921/evidence-2-expert-evidence-flash-cards/
[194] https://lawhelpbd.com/evidence-act/evidences-and-witnesses/
[195] https://www.essaytown.com/subjects/paper/gilbert-law-evidence-summaries/166554

1. The first is on whom the burden rests. In many, especially Western Courts, the BURDEN OF PROOF is placed on the prosecution.
2. [196]The second consideration is the degree of certitude proof must reach , depending on both the quantity and quality of the evidence provided by the party in the Court of Law.

These degrees are different for both Civil and Criminal Cases the former requiring evidence beyond the reasonable doubt, the latter considering only which side has the preponderance of evidence, or whether the prosecution is more likely true or false. The decision maker, often the jury but sometimes a judge decides whether the BURDEN OF PROOF has been fulfilled. After deciding who will carry BURDEN OF PROOF, evidence is first gathered and then presented before the Hon'ble Court.

DIFFERENT KINDS OF EVIDENCES & WITNESS UNDER THE INDIA EVIDENCE ACT

FORMS OF EVIDENCE :-

1. Oral Evidence under section 60 ;
2. Documentary Evidence under section 3;
3. Primary Evidence under section 62;
4. Secondary evidence under section 63;
5. Real Evidence ;
6. Hearsay Evidence ;
7. Judicial Evidence ;
8. Non-Judicial Evidence ;
9. Direct Evidence ;
10. Indirect Evidence or Circumstantial Evidence .

KINDS OF WITNESS :-

1. Prosecution Witnesses ;
2. Defence Witness ;
3. Expert Witness;
4. Eye Witness ;
5. Hostile Witness .

PROVISIONS OF INDIAN EVIDENCE ACT

[196] https://en.wikipedia.org/wiki/Evidence

PROVISIONS OF INDIAN EVIDENCE ACT [197]Considering the provisions of Indian Evidence Act, Judicial Precedents and our day-to-day practice it's going to be submitted that the subsequent sorts of experts opinion could also be relevant-

a) Foreign Law

Foreign Law will be proved-

I. By the evidence of someone specially skilled in it;

II. By direct regard to the books printed or published under the authority of the foreign Govt.

b) Science or Art

[198]The science or art includes all subjects on which a course of special study or experience is important to the formation of an opinion. "SCIENCE" or "ARTS" isn't limited to Higher Science or creation, but it's original sense of handicraft, trade, profession and skill in work which has been carried beyond the sphere of the common pursuits of life.

c) Handwriting Expert's Opinion

Like other expert opinion, the opinions of handwriting expert is advisory in nature. The expert can compare disputed handwriting with the admitted handwriting and give his opinion whether if one person is the author of both the handwritings or not. The court shall exercise with great care and caution at the time of determining the genuineness of the handwriting. A handwriting expert can certify only probability and 100% certainty.

Different modes of proving handwriting-

1. Sec 47- A person who wrote the document can prove it,
2. Sec 47- A person who saw someone writing or signing a document can prove it,
3. Sec 47- [199]A person who is acquainted with the handwriting by receiving the documents purported to have been written by the party in reply to his/her communication or in ordinary course of business, can prove it,
4. Sec 73- The Court can form opinion by comparing disputed handwriting with admitted handwriting,
5. Sec 21- The person against whom the document is tendered can admit the handwriting,
6. Sec 45- The expert can compare disputed handwriting with admitted handwriting and thereby prove or disprove whether the documents were written by same or different persons.

[197] http://www.legalservicesindia.com/article/1583/Experts-Opinion-and-its-admissibility-and-relevancy
[198] https://books.google.ca/books?id=phI-AAAAIAAJ
[199] http://www.legalservicesindia.com/article/1583/Experts-Opinion-and-its-admissibility-and-relevancy

d) Fingerprint Expert's Opinion

[200]Expert opinion on fingerprints has the same value as the opinion of any other expert. The Court will not take up any opinion of fingerprint expert as conclusive proof of evidence but it must be examined his evidence in the light of surrounding circumstances in order to satisfy , itself about the guilt of the accused in any criminal case.

e) Ballistic Expert's Opinion

A ballistic expert may trace a bullet or catridge to a particular weapon from which it been discharged. Forensic ballistic may also furnish opinion about the distance from which the shot was been fired at what time the weapon was been last used.

f) Evidence of tracking dogs

Trained dogs are used in detection of crime science. They are specially trained up for conducting such behaviour . The evidence of the tracker dog is relevant to Section 45.

g) Medical Opinions

The value of medical evidence is simply corroborative . A doctor acquires special knowledge of drugs and surgery and in and of itself he's an expert. Opinions of a medical man, physician or surgeon could also be admitted conspicuous to show-

i. Soundness of someone.
ii. Age of an individual.
iii. Reason for death of someone.
iv. Nature and effect of the disease or injuries.
v. Manner or instrument by which such injuries were been caused.
vi. Time at which the injury or wound has been caused.
vii. Whether the injury or wound are fatal in nature .
viii. Cause, symptoms and peculiarities of the disease within the body whether likely to cause death of the person.
ix. Probable future consequences of an injury etc.

[201]Whenever there is an conflict between the medical evidence and ocular evidence, oral evidence of an eye witness has to get primacy as medical evidence is basically opinionative. Where the direct evidence is not supported by the expert evidence, the evidence is wanting in the most material part of the prosecution case and therefore it would be difficult to conflict the

[200] http://www.legalservicesindia.com/article/1583/Experts-Opinion-and-its-admissibility-and-relevancy
[201] http://www.legalservicesindia.com/article/1583/Experts-Opinion-and-its-admissibility-and-relevancy

accused on the basis of such evidence. [202]If the evidence of the prosecution of witness is totally inconsistent with medical evidence, it is the most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained , it is enough sufficient to discredit the evidence as well as to the entire case- **Mani Ram v State of U.P.**

Contrary Opinion- Where the opinion of one medical witness is contradicted by another and both experts are equally competent to form an opinion, the court will accept the opinion of that expert which supports the direct evidence in the case- **Piara Singh v State of Punjab.**

Can an expert suo moto examine and furnish his/her opinion?

No, an expert can't initiate examination or analysis and furnish his opinion unless the investing officer has sought his opinion in compliance with the formal procedure. An expert cannot do anything suo moto in regard to analysis or examination and formation of his opinion.

LEGAL ASPECT OF FORENSIC SCIENCE

As per Section 45 of the Evidence Act, 1872 – [203]"When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts."

Further as per Section 46 of The Indian Evidence Act, 1872- It is stated that facts, not otherwise relevant, are relevant if they support or are inconsistent with the expert's opinions, when such opinions are relevant . Thus the ingredients of Section 45 and Section 46 highlight that :-

1. The court when necessary will place its faith on skills of person who have technical knowledge of the facts concerned.
2. [204]The court will rely the bona fide statement of proof given by the expert concluded on the basis of scientific techniques.
3. The evidence considered irrelevant would be given relevance in the eyes of law if they are consistent with the opinion of the expert.

[202] https://indiankanoon.org/doc/175946337/
[203] https://devgan.in/iea/section/45/
[204] https://legalserviceindia.com/article/l153-Forensic-Evidence.html

ISSN: 2581-6349

This, we see that expert evidence helps the court to draw some logical conclusions from the facts presented by the experts , which are based on their opinions derived by their specialized skills acquired by the study and experience in their field.

HIGHLIGHTING THE MOST COMMON SITUATIONS SOUGHT AFTER EXPERTS

THE MEDICAL EXPERTS

In India, we have adversarial system of justice administration and ordinarily medical evidence is admitted only when the expert gives an oral evidence under oath in the Court of Law expect under some special circumstances :-

1. [205]When evidence has already been admitted in a lower court;
2. Expert opinions expressed in a treatise;
3. Expert cannot be called as witnesses;
4. Evidence given in a previous judicial proceedings;
5. Hospital Records like Birth certificates, Admission /Discharge certificate ;

[206]In India, it is a common perception that lot of time and effort is required to record evidence and therefore by and large members of medical profession do not like to be involved in Medico-legal cases. Some of the possible reasons put forward for this perception are-

1. Undue time consumption;
2. Repeated adjournments;
3. Lack of work culture in the courts.

DIFFERENT ASPCTS OF THE JUSTICE ADMINISTRATION CAN BE FURTHER IMPROVED BY THE FOLLOWING MEASURES

A. [207]Discouraging routine summoning of doctors;
B. [208]Calling expert witness at pre-scheduled time;
C. [209]Recording experts testimony by alternative judicial officer in case of non-availability of the presiding officer in the court that summoned him;
D. [210]Amending provision of criminal procedures to have admissibility of the medical records;

[205] https://www.scribd.com/document/365050637/forensicsss
[206] https://legalserviceindia.com/article/l153-Forensic-Evidence.html
[207] http://medind.nic.in/jbc/t07/i1/jbct07i1p20.pdf
[208] http://medind.nic.in/jbc/t07/i1/jbct07i1p20.pdf
[209] http://medind.nic.in/jbc/t07/i1/jbct07i1p20.pdf
[210] http://medind.nic.in/jbc/t07/i1/jbct07i1p20.pdf

E. [211]Recording of experts testimony through video-conferencing.

WITNESS : AN IMPORTANT ASPECT OF JUSTICE

Witness are the eyes and ears of judges in the Court. In order to provide justice evidence, the witnesses are very necessary and they hold a very important place in providing justice to the common people. With the help of Evidence produced, the judge reaches the final verdict of a particular case. As the laws are made for the welfare of the people while providing them justice in time where an accused shall be presumed innocent unless and until his guilt is proved. In criminal law, the basic concept of jurisprudence is that- 'Let hundred culprits go free but one innocent person shall not be punished'. In the present legal scenario, there is a huge dependence on forensic reports as they come to the rescue of the prosecution to establish a case despite the witnesses turning hostile and the evidences being tampered.

The consequences of error in investigation of a crime would defeat the very purpose of fair trial as envisaged in the justice delivery system in India.

The law of Evidence allows a person who is a witness to state the facts related to a particular case either to fact in issue or relevant fact but not his interference. It applies to both in civil and criminal law. The opinion of any person other than the judge by facts are as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons for this would invest the person whose opinion was proved with the character of the judge.

ROLE OF FORENSIC EXPERTS

Analysis of forensic evidence is used in investigation and prosecution of civil and criminal proceedings. Often it can help to ascertain the guilt or innocence of possible suspects. Forensic evidence is additionally accustomed link crimes that are thought to be associated with each other. It also works on developing new techniques and procedures for the gathering and analysis of the evidence. during this manner, new technologies may be used and refined not only to stay forensic scientist on the leading edge of science, but to keep up the very best standards of quality and authenticity of the reports .

CONCLUSION

[211] http://medind.nic.in/jbc/t07/i1/jbct07i1p20.pdf

There is a unanimity that medical and forensic evidence plays a crucial role in helping the court of law to arrive at logical conclusion. Therefore, the expert medical professionals should be encouraged to undertake medico-legal work and simultaneously the atmosphere in courts should be congenial to the medical witness. This attains utmost importance looking at the outcome of the case, since if good experts avoid court attendance, less objective professional will fill the gap ultimately affecting the justice. The need to involve more and more professionals in expert testimony has been felt by different organizations. The American College of Physician's guidelines for the physician as expert witness emphasizes on broad physician participation in providing this much needed assistance to the legal system.

A BETTER WAY FORWARD

The reality is that the courtroom is the place where lawyers should be examining the case-specific science and not the basic underpinning value of the overarching scientific object. The courtroom is not in the classroom so the time for teaching is during the preparatory stage before the business of testimony and evidence gets underway.

If all the scientific limitation could be agreed beforehand, this would leave only the details that relate to the case and the interpretation of the case-specific evidence to be addressed in the court.

A global strategic approach aiming to improve basic scientific underpinnings must also lie at the core of any future advance to provide better science to the courts. This is vital for the health of the subject and in turn can only benefit justice in long term.

In short, scientists must come up together in partnership with the law and funders to ensure a product that it fits for the purpose. This perhaps requires greater coordination and understanding between two ancient academic disciplines who have rarely been easy bedfellows : Law and Science.

ISSN: 2581-6349

ROLE OF FORENSIC SCIENCE IN CRIME SCENE OCCURRENCE

- **UPASANA BORAH**

ABSTRACT

The scene of occurrence is the place where the criminal act has been reported to have taken place. After a crime is been reported to the police, the investigation process is set into motion. Quite often, the success or failure of the entire criminal investigation will depend upon proper handling of the crime scene and processing of the evidence. The investigator who is very important person in every crime scene plays an active role and therefore must possess the knowledge and skill to preserve the evidence available at the crime scene. He must learn to recognise, identify, preserve and collect items of physical evidence. He must also be fully conversant with the legal as well as the scientific requirements in the collection of the evidence.

CRIME SCENE

The crime scene is not the domain of anyone but of the whole team. A scene of occurrence of a crime is the place where a particular crime has been committed or where physical evidence of such crime is found or taken place and first brought to the notice of the police. Thus, there are multi-point crime scene in most of the cases. [212]It is the starting point for the investigator, which provides him with the information on the victim and the suspect and to reconstruct the crime scene. In short, crime scene is a site where some evidence relating to the commission of crime is found. [213]Several organizational approaches to crime scene investigation and subsequent forensic laboratory activity exist sometimes involving a large number of personnel with varied educational backgrounds. In some jurisdictions, a single forensic examiner might also be the same investigator who goes to the crime scene, collects evidence, processes the evidence, conduct the analysis, interprets the evidence and testifies in court. Crime Scene Investigator collectors can include uniformed officers, detectives, crime scene investigators, criminalists, forensic scientists, coroners, medical examiners, hospital personnel, photographers, and arson investigators. The scene occurrence provides a wealth to clue material and other evidence which is useful to-

1. Establish Corpus Delicti;

[212] https://www.ipl.org/essay/Crime-Scene-Importance-FKA2HN2PJEDR
[213] https://www.nap.edu/read/12589/chapter/4

ISSN: 2581-6349

2. Link the criminal , the victim and the scene of occurrence inter se;
3. Evaluate the pattern of events;
4. Indicate modus operandi, sequences of the event;
5. Help reconstruction of the occurrence;
6. Find the criminal(s), victim(s) and evidence;
7. Find the number of nature of weapons;
8. Know the transport used;
9. Ascertain the routes of ingress and egress .

The scene of occurrence of crime cannot be limited to one specific place, it may extend to more than one place. It may also not be limited to the surroundings but thus it extends to a wider area depending upon the nature of crime.

In a compact of crime, such as Burglary the scene may be divided into-

1. Line of approach,
2. Point of entry,
3. Actual Scene,
4. Point to Exit,
5. Line of retreat.

The scene may be classified into outdoor or indoor. [214]A crime committed on a road or a field is an outdoor crime whereas the crime committed inside the house, car, building etc can be termed as indoor crime. The crime of indoor and outdoor nature like theft, robbery, dacoity, homicide, rape, traffic accident have invariably physical evidence at their scenes because of intense physical activities involved in their commission. [215]Physical Evidence found at the crime scene can be the key to the solution of a crime. There may be certain types of crimes, which have no 'scene' at all. The crime of this nature are forgery, embezzlement etc.

Every Crime scene leaves an unique way of aspects for the examination of the scene. The opportunity to examine the crime scene of occurrence is available only once. If the same is not investigated properly the wealth of information is lost forever. This examination of scene of occurrence should help to answer these few questions-

1. How did the criminal and the victim reach the scene of occurrence?
2. What were the routes of exit and entrance?
3. What was the number of criminals and victims?

[214] http://www.legalserviceindia.com/legal/article-1310-forensic-science-in-criminal-investigation.html
[215] https://legalserviceindia.com/legal/article-1310-forensic-science-in-criminal-investigation.html

4. How was the crime committed and what are modus operandi?
5. What kind of evidence has been exchanged between the criminal and the victim?
6. Is that alleged scene of occurrence genuine or simulated?
7. When the crime was been committed?
8. Who were the criminals and victims?
9. Whom did the criminal visit after committing the crime?
10. Why did the victim behave in a particular way?

Above listed are just the numbers of questions that used to arise while investigating the case but apart from these there are more unsolved mysteries of a case that will busted out after the examination of the crime scene. Actions taken at the outset of an investigation at a crime scene lead to assure proper resolution of a case.

RESEARCH METHODOLOGY

This paper is primarily based research paper where I tend to treat the methodology of crime scene occurrence which gives an better insight of the topic and scope for research. The secondary data is been collected from websites, international journal and articles.

HOW A CRIME SCENE IS INVESTIGATED?

All criminal investigation is concerned either with people or with things. Only people commit crime, but they invariably do so through the medium of things. It is these things that together constitute the broad field of physical evidence. Many investigations have failed in some degree to make the most efficient use of the physical evidence because of their neglect in looking for the physical evidence and placing reliance only on the people committing crimes. The circumstances that investigators encounter at the scene will largely dictate the approach used to process the scene. [216]A HOMICIDE will likely require different treatment and processing than a BURGLARY. However, to ensure a thorough process, the seven steps outlined below are often followed by the experts-

1. [217]Establish the scene dimensions and identify potential safety and health hazards;
2. Establish Security;
3. Plan, Communicate and Coordinate;
4. Conduct a Primary survey;

[216] http://www.forensicsciencesimplified.org/csi/how.html
[217] https://www.coursehero.com/file/p3d1d0f/1-Establish-the-scene-dimensions-and-identify-potential-safety-and-health/

5. Document and process the scene;
6. Conduct a Secondary survey;
7. Record and preserve evidence.

But the investigator must therefore have a balanced approach to the investigation of crime. For that he must understand-

1. What is physical Evidence?
2. How to collect and preserve it?
3. How and from where to obtain the information it carries?
4. How to interpret the information so obtained?

SAMPLES COLLECTED FROM CRIME SCENCE AND PRESERVATION OF CRIME SCENE

[218]A wide variety of physical evidence can be collected at a scene that is deemed valuable (probative) for collection and investigation :

- Biological Evidence (Eg Blood, Body Fluids, Hairs);
- Latent print Evidence (Eg Footprints, Fingerprints, Plamprints);
- Footwear and Tire Track Evidence;
- Trace Evidence (Eg Fibers, Vegetation);
- Digital Evidence (Eg Call Records, Internet Logs, Emails);
- Drug Evidence;
- Firearm Evidence;
- Tool and Tool mark evidence.

[219]The type of evidence collected will vary with the type of crime. In the case of a Burglary it would be common to perform task in the order listed below. This will help to ensure that evidence isn,'t inadvertently damaged or destroyed:

1. The photograph and document of the crime scene;
2. Collet trace material especially from the point of entry;
3. Collect low level DNA evidence by swabbing areas of contact;
4. Collect all the items that may contain biological evidence;
5. Locate and collect latent fingerprints.

[218] https://www.scribd.com/document/320068104/A-Simplified-Guide-to-Crime-Scene-Investigation
[219] http://www.forensicsciencesimplified.org/csi/how.html

Proper evalution of the scene of occurrence is very time consuming job so it requires to be patience to get the proper result-

1. Protection of the crime scene;
2. Photography of the crime scene;
3. Sketching an rough idea of the crime scene;
4. Searching for evidence at the crime scene;
5. Handling clues;
6. Recording of the scenes of occurrence.

Preservation the crime scene is the most important task of the police until the Forensic Experts arrived. The first person arriving at the scene should be able to protect the scene from curious onlookers and the family members. He should isolate the area and mark it "CRIME SCENE : DO NOT CROSS". Nothing on the scene should be touched, altered or changed by anyone until the investigating officers does not take a proper note of it. Once any material or any object is been replaced from the place where the crime has been committed it can't be stored exactly in the same place and the chance becomes less for finding appropriate evidence. The scene once touched, altered or changed will make the task hardle for the investigators to investigate but there will be again reconstruction of crime scene to identify the criminal and physical evidence, very difficult but not impossible.

THE LAW OF CRIMES IN INDIA

Definition of Crime- The word "CRIME" is derived from the GREEK word 'KRIMOS' which means social order and it is applied to those acts that goes against social order and are worthy of serious conditions. It is a branch of public law which deals with trails , punishments and their respective definitions. Further Criminal law can be divided into two parts.

Substantive Law- This class of law which defines and punishes the offences . INDIAN PENAL CODE is a substantive law.

Procedural Law- This class of law which prescribes procedures for prevention , investigation and trial. CODE OF CRIMINAL PROCEDURE is a procedural law.

CRIME AS A PUBLIC WRONG- Sir William Blockstone defines crime as, 'A Crime is an omission or an act that is a violation of public law forbidding or command it' and 'A crime is a violation of the public rights and duties due to the whole community . While Sir Stephen modifying the definition of Blockstone states that ' A crime is a violation of right, considered in reference to the evil tendency of such violation as regards the community at large'.

CRIME AS A MORAL WRONG- According to Raffeale Garafalo, ' A crime is an immoral and harmful act that is regarded as criminal by public opinion because it causes injury to such moral senses'.

CRIME AS A SOCIAL WRONG- According to John Gillin (a sociologist), 'Crime is actually an harmful act which has been shown to cause injury towards a society '.

CRIME AS A PROCEDURAL WRONG – Austin has stated that, ' A wrong which is persued by the sovereign and his subordinates is a crime which causes injury to a party and his representatives is a civil injury' .

DEFINITION AND MEANING OF CRIME

[220]A law that relates to a crime is known as criminal law. In these laws, punishment is used as a bearer torch. This is done to prevent and prohibit the citizens to avoid them from unsocial and wild behaviour or conduct. Also, this law ensures that the citizens of India are safe. Crime definition in India is defined using the criminal law. Donald Taft defines CRIME as a social injury and an expression of subjective opinion varying in time and place.

There are various definition of crime depending on the time and place but the most important factor that leads an act to crime is the guilty mind of the person who is generally known as criminal. Crime contains two elements i.e mala-in-se and mala-prohibita. Crime is not static, they are relative. There is vast different between crime, sin , vice and social wrongs as well as moral wrongs. The reason is that crime is forbidden by law. There is also prescribed procedure and machinery to punish the persons who commit crime, whereas there is no mechanism to punish anyone in the case of the sin, vices and social or moral wrongs. 'Sin' is concerned with religion. Therefore if a person commits a sin ,it is said that he will be punished by God himself. Likewise, Vices , Social and Moral Wrongs are wrongs only in the eye of moral codes or in social rules but they are not recognized wrongs in the eyes of law.

STAGES OF CRIME

- In case of every crime, Firstly there is an intention to commit it, At this stage the person has made up his guilty mind to do an illegal act which is considered as crime. Without criminal intention there is no commission of an offence. Every sane person of the age of discretion is presumed to intend the natural and probable consequences of his own acts.

[220] https://www.toppr.com/guides/legal-aptitude/indian-penal-code/definition-and-meaning-of-crime/

Every actual consequence is a natural and probable consequence unless and until the contrary is affirmatively shown.

- Secondly, preparation to commit it means to arrange all the way out for omission of the criminal act. Preperation is the acting of preparing or getting ready (Section 8 of The Indian Evidence Act, 1872); something that is prepared; something made for a specific purpose. Sec 276 of The Indian Penal Code, 1860; to make it ready beforehand. It is very difficult for the prosecution to prove that necessary preparation has been made for the commission of the offence.
- Thirdly, attempt . It is also known as "Preliminary Crime" and "Inchoate Crime" i.e (incomplete crime). Attempt is an effort or endeavour to do something; to try to accomplish or to attain any action or object. An attempt to commit crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The stage of attempt is attained by performing physical action that, if left unstopped , cause or are bound to cause injury to someone. Chapter XXII(Section 511) of The Indian Penal Code, 1860 deals with "Attempt to commit Offences" and also provides punishment for attempt.
- Lastly the accomplishment or the commission of crime. Actual commission of the offence is the final stage where the crime is done and drawbacks criminal liability for the commission of such acts.

ELEMENTS OF CRIME

Criminal guilt or act would attach to a man for violations of criminal law. However the latin maxim "actus non facit reum nisi mens sit rea" i.e no crime without a guilty mind. The act should be a wrongful act- "actus reas". A mere criminal intention not followed by a prohibited act cannot constitute a crime. Similarly, mere 'actus reus' ceases to be crime as it lacks "mens rea". In juristic concept actus reus represents the physical aspect of crime and in mens rea its mental aspect, which must be criminal. The chief elements necessary to constitute a crime are-

1. A human being under legal obligation has to act in a particular way and he is a fit subject for appropriate punishment for wrongful acts;
2. An act committed or omitted in furtherance of such an intent (actus reus);
3. An evil intent on the part of such a human being (mens rea);
4. An injury to another human being or to society at large by such act.

RECORDING OF CRIME SCENE

After taking an immediate action to protect the crime scene, the investigator should then proceed to record the evidence. But before doing, he should take help from two reliable independent witness who can give proper incident of the crime. It can be either nearby neighbors , family members or friends as their presence will act as an witness statement and strengthen the case of the prosecution at the time of trial. [221]No evidence should be picked up or touched or even disturbed till it has been minutely described in a notebook, as its location shown in the sketch graph and photographs taken.

PROCESSING OF CRIME SCENE

1. [222]A Lane or Strip Searches are accomplished by the searchers walking in parallel along defined lanes in the same directions. The whole area to be searched is blocked into a rectangle and four searchers proceed along tracks parallel to one side of the rectangle looking for clues. [223]With every clue discovered the searchers inform the leader who arranges for proper collection and preservation of clues. The process continues until the searchers cover the entire crime scene area. The search must be cautious, slow and steady that no physical evidence is been missed. (FIG. 1)

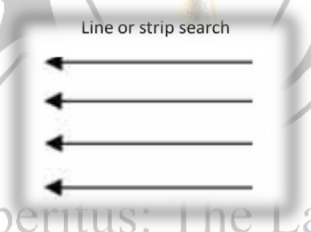

FIG.1

2. A Grid is a lane search that is conducted by completing a lane search in one direction and then completing a lane search in a perpendicular direction. While it takes twice as long as a lane search , it provides a more thorough search of an area. (FIG.2)

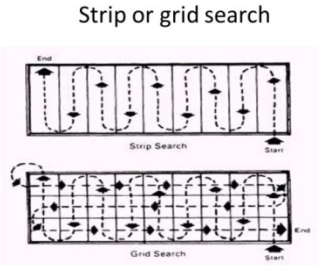

FIG. 2

[221] http://www.legalserviceindia.com/legal/article-1310-forensic-science-in-criminal-investigation.html
[222] https://www.utsystem.edu/sites/default/files/offices/police/policies/Crime-Scene-Investigation.pdf
[223] https://www.facebook.com/forensicvideos/posts/302370094031453

3. [224]A Search Zone involves dividing the area to be searched into adjacent zones. [225]The smaller the size of the zone, the more methodical the search can be. [226]Zone searches may be done by multiple searches per zone. (FIG.3)

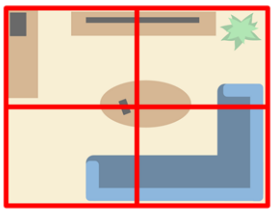

FIG. 3

4. A Spiral Search involves spiral into (inward) or out from (outward) a crime scene. A practical disadvantage with outward spiral searches is the evidence may be destroyed as the searchers move to the center of the crime scene area to begin their outward search. Then they repeat the process several ties depending on the size of the circle. (FIG.4)

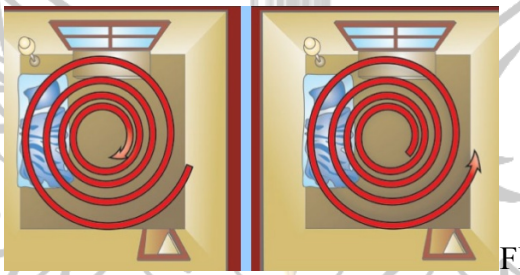

FIG. 4

i. If the crime scene is committed in the indoor, the investigator must be careful, thorough and systematic in his search for traces. He must make keen observations and proceed methodically by searching along the line of approach and departure as also on the scene of crime itself. Search in a room or other enclosed place like railway compartment or a vehicle should be conducted in a definite order.

ii. If the crime scene has been committed outdoor, it will be convinent to employ a team of officers and distribute the area amongst them. Such a team may consist of the leader and four members who were been trained in searching of clues for crime scene investigation.

RECONSTRUCTION OF CRIME SCENE

[224][224] https://quizlet.com/319592515/criminal-investigation-flash-cards/
[225] https://quizlet.com/424065029/criminal-investigation-brcc-35-flash-cards/
[226] https://quizlet.com/446956190/nc-blet-2019-criminal-investigations-flash-cards/

[227]Crime Reconstruction or Crime Scene Reconstruction is the forensic science discipline in which one gains "explicit knowledge of the series of events that surround the commission of a crime using seductive and inductive reasoning, physical evidence, scientific methods and their interrelationships. The Association for Crime Scene Reconstruction was formed in the year 1991 by a group of crime scene professionals who "saw a need for an organization that would encompass an understanding of the whole crime scene and the necessity of reconstruction that scene in order to better understand the elements of the crime and to recognize and preserve evidence. [228]Crime Scene reconstruction has been described as putting together a jigsaw puzzle but doing so without access to the box-top ; the analyst does not know what the picture is supposed to look like. Further, not all of the pieces are likely to be present, so there will be holes in the picture. However, if enough pieces of a puzzle are assembled in correct order, the picture becomes quite enough that the viewer is able to recognize the image and answer the critical questions about it.

[229]In Forensic Science, there are three areas of importance in finding the answers and determining the components of a crime scene :

1. Specific Incident Reconstruction;
2. Event Reconstruction;
3. Physical Evidence Reconstruction.

HOMICIDE ; SUICIDE

Forensic Science mobile unit in Rajasthan routinely visited various "Scene of Occurrence" to assist the investigating agencies to collect and preserve the clue materials left by the culprit at the spot for laboratory examination. But sometimes forensic experts helps through examination of spot, reconstruction of the same and another aspect to find out the actual truth behind the crime scene. The spot examination dealt with the question of I.O. that whether the matter is related to suicide or a homicidal attempt.

The Crime scene usually includes line of approach , point of entry, the actual scene, the point of exit and the line of departure. The Physical Evidence from any of these sources will be an excellent piece of evidence, as provided in SECTION 157 of the CODE OF CRIMINAL PROCEDURE, 1973 the investigating officer has to proceed to the spot to investigate all the

[227] https://en.wikipedia.org/wiki/Crime_reconstruction
[228] https://context.reverso.net/translation/english-russian/doing+jigsaw+puzzles
[229] http://www.jugaadin.com/uploads/2/2/6/2/22629116/crime_scene.docx

facts and circumstances of the case. The crime scene is a potent source of diverse types of physical evidence that can lead to successful detection of a case.

MEANING AND SOURCES OF PHYSICAL EVIDENCE

[230]The word "EVIDENCE" has been derived from the latin word "evidere" which implies to show distinctly, to make clear to view or sight, to discover clearly, to make plainly certain, to ascertain, to prove.

According to Sir Taylor, "LAW OF EVIDENCE" means through argument to prove or disprove any matter of the fact the truth of which is submitted to judicial investigation.

Evidence can be defined as various things presented in Court for the purpose of proving or disproving a question under inquiry . It includes testimony, documents, photographs, maps and video tapes. These are termed as evidence. Section 3 of Indian Evidence Act, 1872 defines evidence in following words-

[231](1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2)[all documents including electronic records produced for the inspection of the Court;] such documents are called documentary evidence.

[232]Physical evidence means any and all objects that can establish that a crime has been committed or can provide a link between a crime and its victim or a crime and its perpetrator. If physical evidence is to be used to aid the investigator, its presence first must be recognized at the crime scene. The evidence in general is anything that tends to prove or disprove a point under investigation or consideration. Physical Evidence is an evidence having a physical or material quality-a tangible article, no matter whether microscopic or macroscopic. It encompasses all the objects, living or inanimate, solid, liquid or gas. Physical Evidence is the most valuable possession of investigator in pursuing a successful and fruitful investigation. It can establish the actual crime scene that has been committed or can provide a link between the crime and the victim.

THE PRELIMINARY EXAMINATION

The process of evaluating the crime scene-

[230] https://lawhelpbd.com/evidence-act/evidences-and-witnesses/

[231] https://indiacode.nic.in/show-data?actid=AC_CEN_3_20_00034_187201_1523268871700&sectionId=38798&sectionno=3&orderno=3

[232]http://www.chemistry.armstrong.edu/nivens/Forensics/CHEM%204600/Chem%204600%20Crime%20Scene.pdf

[233] – First, the boundaries of the scene must be determined.

– Second, establish the perpetrator's path of entry and exit.

– The investigator then proceeds with an initial walk-through of the scene to realize an overview of things and develop a strategy for the systematic examination and documentation of the complete crime scene this can be done before processing the crime scene for physical evidence.

SOURCES

The Physical Evidence can be obtained from the three basic sources-

1. The Scene of the crime;
2. The Victim;
3. The suspect and his environment.

The crime against property will usually involve only (1) or (3) from the sources mentioned above whereas, crime against a person will attract all the three sources.

CONCLUSION

One can understand the significance of Locard's principle of exchange where it has stated, "Whenever two entities come in contract, mutual exchange of traces takes place" [234]there is something left behind regardless of its minutiae and it is up to the criminality to find it. The victim can no longer speak about what happened to them but the evidence left behind by the criminal gives a full drawback of the full crime scene. While Crime Scene investigation is of the value when reconstruction is started at the scene during the initial phases of investigation, during the investigation and during the adjudication process. The Forensic Expert, may determine while the interviews are been conducted to find out the criminal. By knowing the events as reconstructed, the I.O conducting the interviews may be able to detect deception or Crime Scene Reconstruction inconsistencies as reported by Forensic Experts. The use of this knowledge can be a powerful tool in the hands of an experienced investigator.

[233] https://www.coursehero.com/file/p5fun4t/First-the-boundaries-of-the-scene-must-be-determined-Followed-by-the/
[234] https://www.hilarispublisher.com/open-access/study-of-suspected-burning-case-a-homicide-or-a-suicide-2157-7145.1000135.pdf

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MSMES AS A FORM OF BUSINESS

- **PRIYATAM BHARDWAJ**

ABSTRACT

Across the Globe, MSMEs have been acknowledged as the engine of growth and recognised to be promoting equitable development. They are acknowledged as sector to generate vast employment only next to agriculture sector. In India, it has given employment to around 120 million peoples. This Sector Accounts for 6.11% of country's manufacturing GDP and 24.63% of GDP from Service Sector. None the less, also account for more than 45% of export Industry in India. Government is ambitious to promote this Sector to account for 50% of GDP growth by the year 2025.

Although, the ambition of the government will depends a lot upon how things will unfold down the line amid Covid-19 outbreak but for the time being, government has unleased slew of measure added to already existing benefit in a bid to tide them over the Crisis as least effected as feasible. In the Article we will discuss in brief the benefits available to this industry in backdrop of Government vision to enhance the easy of doing business in India and will further critically look in the judicial approach in light of fairness and equity.

INTRODUCTION

MSMEs plays a pivotal role in growth of any economy. It hold vast amount potential in prospect of employment and industrial development.

Lately, the Government of India has announced numerous measures in support of MSMEs in order to enhance the ease of doing business and tide them over the ongoing Pandemic Covid-19 Crisis. So, let's understand what is called as MSMEs?

WHAT IS MICRO SMALL MEDIUM ENTERPRISES (MSMES)?

Micro Small Medium Enterprise is referred as MSMEs. It is the class of business entity engaged in manufacturing of good mentioned in First schedule of the Industries (Development and Regulation) Act 1951 and rendering service with specified Investment and turn over. Every Nascent industry when set up or start-up embarks upon its venture is bound to strive tremendously for recognition and establish a favourable market amid high competition from well-established business entities. As per the terms of objective and purpose mentioned in Act,

it was brought about to promote, develop and enhance the competitive capability of MSMEs. In addition to this, Abid Hussain Committee (1997) and Study Group under Dr SP Gupta (2000) make recommendation that small scale enterprise shall be relieved of requirement to comply with many rules and regulations. Hence, the need was felt to recognise them as small scale enterprise and extend support to them.

To be precisely, MSMEs is defined in Micro Small and Medium Enterprise Development Act, 2006. Lately the criteria for classification of MSMEs have been changed.

Earlier Classification

Classification	Micro	Small	Medium
Manufacturing	Investment less than equal to ≤25 Lakh	Investment Less than equal to ≤5 Crore	Investment less than equal to ≤10 Crore
Service	Investment Less than equal to ≤ 10 lakh	Investment Less than equal ≤2 Crore	Investment Less than equal to ≤5 Crore

Revised Classification

Classification	Micro	Small	Medium
Manufacturing and Service	Investment ≤ 1 Crore And [&] Turnover ≤5 Crore	Investment ≤10 Crore And [&] Turnover ≤50 Crore	Investment ≤50 Crore And [&] Turnover 250 Crore

Why to choose business as MSMEs?

MSMEs employs vast number of human capital and for that reason government occasionally but often announces various scheme and programmes to support and promote MSMEs. Business entity often endeavour to limit it business undertaking within the class of MSMEs on account of harnessing manifold benefits and facilities and relaxations granted by MSMEs. Facets of benefits are discussed the below.

How Register as MSMEs?

To register as an MSME all it takes is to file a web-based online form at the link https://udyogaadhaar.gov.in/UA/UAM_Registration.aspx wherein the applicant is required to have an Aadhaar card along with a linked mobile number to get it certified. The process has

been so simplified that the certificate is generated while making an application itself and the fields of the e-form for MSME registration are listed out below:

Step-by-step procedure to register as MSMEs i.e. submission of Udyogaddhar of Memorandum (UOM)

1. **Aadhaar Number:** Fill 12-digit Aadhaar number issued to the applicant in the appropriate field.
2. **Name of Applicant:** Fill the name of the applicant strictly as mentioned on the Aadhaar Card issued by UIDAI.
3. **Social Category:** Fill the Social Category (General, Scheduled Caste, Scheduled Tribe or Other Backward Castes (OBC)
4. **Gender:** Fill in the gender of the applicant
5. **Physically Handicapped:** Select the status from provided options
6. **Name of Enterprise / Business:** Fill the name of Business / Enterprise which will get printed on MSME Certificate
7. **Type of Organization:** Select the type of organization from the given options which will get printed on the MSME Certificate.
8. **PAN:** Fill 10 Digit PAN Number in case of Co-Operative, Private Limited, Public Limited, and Limited Liability Partnership It. Will be optional in the remaining type of Organization.
9. **Location of Plant:** Fill the address of the plant. In the case of multiple plant locations, the applicant can click on the add plant button.
10. **Office Address:** Fill in the office address, if the office address is different from the plant address.
11. **Date of Commencement of Business:** Fill the date of Commencement of Business, the same shall be mentioned in the MSME Certificate.
12. **Previous Registration Details(if any):** If Applicant's enterprise, for which the Udyog Aadhaar is being applied, is already issued a valid EM-I/II by the concerned GM (DIC) as per the MSMED Act 2006 or the SSI registration prevailing prior to the said Act, such number may be mentioned in the appropriate place.
13. **Bank Details:** Fill the applicant's bank account number and bank IFSC Code.
14. **Major Activity:** The major activity i.e. either "Manufacturing" or "Service" may be chosen by the enterprise for Udyog Aadhaar.
15. **National Industry Classification Code (NIC Code):** Fill in the NIC Code of the business activity.

16. **Person employed:** Fill in the total number of persons employed who are directly been paid salary/ wages by the enterprise.
17. **Investment in Plant & Machinery / Equipment:** Fill in the total investment made in the plant & Machinery/Equipment.
18. **DIC:** The Applicant, based on the location of the Enterprise, has to fill in the location of DIC. This Column will be active and show the option only when there is more than one DIC in the district.
19. **Submit**: Click on the submit button and enter the OTP that will be shared on the registered/linked mobile number.

Further Provided, if there are any changes in the investment in plant & Machinery or the equipment and the enterprises have already filed Udyog Aadhaar Memorandum (UAM) shall inform the District Industries Centre of the same in writing within three months of the change. For Delhi which is

Dy. Commissioner of Industries / Nodal Officer(MSME) O/o the Commissioner Of Industries 419, Udyog Sadan, Functional Industrial Area, Patparganj, Delhi- 110092

Computation of Investment limit in Plant and Machinery

As per the Central Government vide notification S.O. 1722(E) dated 5th October 2006:

While calculating the investment in Plant & Machinery the original price is to be taken into count irrespective of whether the Plant & Machinery is new or old. The cost of below mentioned **11** items shall be **excluded** while computing investment in plant & Machinery:

1. Equipment such as tools, jigs, dyes, molds and spare parts for maintenance and the cost of consumables stores;
2. Installation of plant and machinery;
3. Research and development equipment and pollution controlled equipment;
4. Power generation set and extra transformer installed by the enterprise as per regulations of the State Electricity Board;
5. Bank charges and service charges paid to the National Small Industries Corporation or the State Small Industries Corporation;
6. Procurement or installation of cables, wiring, bus bars, electrical control panels (not mounted on individual machines), oil circuit breakers or miniature circuit breakers which are necessary to be used for providing electrical power to the plant and machinery or for safety measures;
7. Gas producer plants;

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8. Transportation charges (excluding sales-tax or value-added tax and excise duty) for indigenous machinery from the place of their manufacture to the site of the enterprise;
9. Charges paid for technical know-how for erection of plant and machinery;

- Such storage tanks which store raw material and finished products and are not linked with the manufacturing process; and
- Firefighting equipment.

In the case of imported machinery calculations, the following items shall be included:

1. Import duty (excluding miscellaneous expenses such as transportation from the port to the site of the factory, demurrage paid at the port);
2. Shipping charges;
3. Customs clearance charges; and
4. Sales tax or value-added tax.

Further, investment in Land, Building, Vehicles, Furniture and fixtures, Office Equipment, etc shall not be considered in determining the threshold limit of plant and machinery or equipment as the case may be.

MAJOR FACETS OF BENEFITS

Advancement of Collateral free credit

The Ministry of MSMEs, government of India and SIDBI set up the credit guarantee fund trust for Micro and Small Enterprises (CGTMSE) with a view to facilitate flow of credit to the MSE sector without the need for collaterals/third party guarantees. The credit Guarantee scheme (CGS) seeks to reassure the lender that, in the event of an MSE unit which availed collateral free credit facilities, fails to discharge its liabilities, the Guarantee trust would bear the loss incurred by the lender up to 85% (or 80%/ 75%/ 50%) depending upon the credit exposure) of the outstanding amount in default. The CGTMSE would provide cover for credit facilities up to Rs 200 lakh without collateral/third party guarantees.

Lately government of India has created an online portal through which one can get the loan within 59min as per their mission statement shown on website.

Technology and Quality Upgradation (TEQUP)

Under TEQEP scheme, a capital subsidy of 25% of the project cost subject to a maximum of Rs 10 Lakh shall be provided for implementation of energy Efficient Technology to MSMEs, the balance amount is to be funded through loan from SIDBI/Bank/Financial Institutions.

Also, in this scheme, MSME manufacturing unit will be provided subsidy to the extent 75% of the actual expenditure incurred by them for obtaining product certification Licenses. The

ISSN: 2581-6349

Maximum GOI assistance allowed per MSME is 1.5 Lakh for Obtaining product licensing /marketing to National Standards and Rs 2 lakh for obtaining certification.

Incubation

The main objective of this scheme is to promote & support new and innovative idea such as new designs and new products. The government provides financial assistance to host Institutions (HI) which are exploring and implementing new ideas in their respective service sectors. The financial assistance of upto 1 crore for purchase & installation of plant & Machinery and upto Rs 15 Lakh per idea for developing & nurturing the idea shall be provided.

Credit Linked Capital Subsidy Scheme (CLCSS)

The Scheme aim at facilitating technology up-gradation by providing 15% capital subsidy upto 15 lakh (provided maximum investment in approved machinery is Rs 1 crore) to MSE unit including tiny, khadi, village and coir industrial unit on institutional finance availed by them for making a well-established and upgradation technology.

Women Entrepreneurship

The scheme takes care of women who may not have adequate educational background for handling entrepreneurship and hence provides training in such fields. The government provides capital, counselling and training to these women so that they can manage their business and expand it. Under the scheme, women entrepreneur are scheme under special category and are entitled to 25% & 35% subsidies for the project set up in urban and rural areas respectively.

TReDs and Financing of Invoice/ Bills by MSMEs

MSMEs don't hold large capital and hence they can withstand long payment recovery period. To diminishes and support MSMEs against this, government brought a payment settlement mechanism called TReDS for MSMEs. In this setup MSMEs invoices and bills will be financed by financial Institutions i.e. MSMEs can sell their claim through invoice to a financial Institution.

RBI has set up a platform name TReDs wherein only MSMEs being a seller can sell its invoices or Bills to a financier. The Platform shall consist of three participant which are the MSMEs as seller, Corporate entity, PSUs or Government department as buyer and Financial Institution as Financier.

Vide Gazette notification S.O. 5621(E) dated 02.11.2018, it was directed that all companies with a turnover of more than Rs 500 [Rupees Five Hundred Crore] and all CPSEs shall be required to get onboarded on the trade receivables discounting system platform (TReDs).

MSME Samadhaan portal && Micro and Small Facilitation centre (Herein after referred as "MSFC"): These MSMEs don't hold large capital, liquid assets and resources to

sustain delayed recovery and nor can bear immoderate legal cost and hence government launched this scheme. Under this scheme Every State Government has created Micro and Small facilitation council under MSMED Act, 2006. MSMEs can report through filing a complaint for non-payment or delayed payment against the buyer. It is mandatory for buyer to make the payment of any good or service availed by buyer within 45 days if the supplier is an entity falling within MSMEs. Any MSME can file a complaint against buyer for non-payment and MSFCs will take up the take to resolve the dispute on behalf of MSME like referring it for conciliation or arbitration etc.

It has been made further easier upon creation of portal through which MSME can file online complaint for delayed payment and track the status of case.

Other Relevant Support sponsored to MSMEs

1. All PSUs to compulsorily procure 25% from MSMEs of their total purchases. And out of all 25% mandated procurement, 3% is reserved for women entrepreneurs. (Vide Gazette Notification No. S.O. 5670(E) dated 9th November, 2018)
2. All central Public sector undertaking to compulsorily procure through Gem Portal.
3. Returns under 8 labour laws and 10 union regulations to be filed once in a year.
4. Single consent under Air and Water pollution laws. Return will be accepted through self-certification and only 10 percent MSME units will be inspected.

Compliance on companies dealing with MSMEs

5. As per notification issued by MCA vide S.O. 368 (E) dated 22nd January 2019 and Gazette Notification S.O. 5622(E), published in official gazette of India, require, every company who receives good and services from Micro and small enterprise and failed to make payment to supplier within 45 days, to submit a half yearly return to MCA stating the amount of payment due and reason for such delay. They shall submit the form MSME form I.

Non-compliance with this provision would lead to punishment and penalty under the provision of section 405(4) of companies Act which is: Fine upto 25,000 for companies and for directors, CFO and CS (KMP) would be imprisonment upto 6 months and fine upto 300000 per son but not less than 25,000.

ISSN: 2581-6349

New Benefits announced under "Atmanirbhar Bharat Scheme"

Amid Covid-19 every industry is facing liquidity crunch in their business. They run out of working capital due to halt of industrial operations. In a bid to fuel the working capital crunch government has announced several assistance packages for Business and of preponderance to MSMEs. MSMEs were bound to suffer Sorley on account of being small scale industry involving low or minor capital. MSMEs don't have vast capital resources to in the back to tide over any major setback.

Collateral free loans to Businesses including MSMEs

Automatic Loan to business/MEMEs from bank & NBFC 2020 shall be provided up to 20% of entire outstanding credit as on 29th February 2020, subject to condition that existing borrowers having outstanding loan of upto Rs 100 cr to Rs 25 crore and turn over up to Rs 100 Cr are eligible to avail this scheme and loans to have tenure of 4 years with moratorium of 12 months on principal repayment. This scheme can be availed till 31st October 2020 with no guarantee & no fresh collateral securities.

Subordinate Debt for stressed MSMEs

Due to covid-19, stressed MSMEs are facing a problem of equity in their business. To overcome such situation, government of India will facilitate provision of Rs 20,000 Cr as subordinate debt by providing a support of Rs 4,000 Cr to CGTMSEs. All the functioning MSMEs which are NPA or stressed are eligible to avail the benefit of this scheme. Promoters of the MSMEs will be given debt by bank which will then be infused by promoters of the MSMEs which will then infused by promoters as equity in the business.

Equity Infusion through Fund of Funds

In order to provide equity funding to MSMEs to grow potentially, there will be funds of funds, which will be operated through a mother fund and few daughter funds. Fund structure will help leverage 50,000 cr of funds at daughter funds level. It will help to expand MSME size as well as capacity. Such an intuitive will encourage MSMEs to get listed on main board of stock exchange. Lately, after this announcement, Bombay Stock exchange announced that they will reduce the annual fee for listing on its SME exchange i.e. BSE SME by 25%. It was launched in year 2012 and charges Rs 25,000 or 0.01 per cent of the full market cap of the company, whichever is higher. This facility will be available to both existing and upcoming small businesses.

Global tender to be disallowed

Global tenders will be disallowed in government procurement tenders up to Rs 200 crore. This step is to support Make in India & help MSMEs to increase their business.

Judicial Approaches

The Government and legislature may ordain rules and regulations but it is judiciary who vested with responsibility of interpretation and enforcement of these rules and regulations. It is imperative to have a glimpse of the judicial approach and decisions.

Who is "Supplier"?

In chapter V of MSMEs, every benefit facilitating avenues are being stipulated keeping in view the person who would be supplier in terms of Section 2(n) of MSMED Act, 2006.

In a controversial judgement by Delhi court in case of ***M/s Ramky Infrastructure Private Ltd. v. Micro and Small Enterprises Faciliatation Council & Anr. (W.P.(C) 5004/2017, decided on 04.07.2018)*** have expounded the parameters of the term supplier in section 2(h). Delhi high court stated that it is in two parts. The first limb defines the supplier to mean a micro or small enterprise which has filed memorandum with the authority as referred to in section 8 (1) and second limb refers to (i) National Small Industries Corporation; (ii) the Small Industries Development Corporation of a State or a Union territory; and (iii) a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises. The court observed that the second limb, which specifies three categories to fall within the definition of the term _supplier', is in addition to the category of small and medium enterprises that have filed the Memorandum under Section 8(1) of the Act. Thus, the term _supplier' as defined under Section 2(n) of the Act must be read to comprise of four categories: (i) micro or small enterprises that have filed the Memorandum under Section 8(1) of the Act; (ii) National Small Industries Corporation; (iii) Small Industries Development Corporation of a State or a Union territory; and (iv) a company co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises.

In this same judgement Delhi high court refuted the contention that the entities falling under Section 2(n)(iii) of the Act are only those entities that source goods/services from other micro/small enterprises and stated that this premise is not persuasive on account that it is difficult to accept that an entity sourcing goods/services from a third party micro/small enterprise would be _supplier' but would cease to be one if it sources the same from its undertaking.

ISSN: 2581-6349

This derivation was even upheld by Gujarat high court in M/s Easun Reyrolle Limited v/s Nik san Engineering co Ltd (2018) SCA/ 6265.

WHETHER REGISTRATION IS COMPULSORY TO AVAIL BENEFITS OF CHAPTER IV OF MSMED ACT, 2006

After M/s Ramky Infrastructure Private limited case (Supra) it has been held that even if a company or firm is not registered as MSMEs during the disputed transaction but is engaged in production of goods and rendering services which are produced and rendered by MSMEs would be regarded as MSME even if it is not registered i.e. hasn't submitted memorandum under section 8 MSMED Act.

However, Bombay High court in case **of M/s Scigon Biopharma pvt v/s M/s Jagtap Horticulatuer pvt Ltd,** through judgement dated 21st November 2019 held otherwise. And it contented that section 8(1) of MSMED act envisages two type of companies, one which is future enterprise which is certainly a future venture and another category would be existing small scale industries which has obtained registeration on the date of commencement of this Act and is required to file memorandum within 180 days of the commencement of the Act. And it acknowledge those entity which otherwise would have been but hasn't file memorandum as intending enterprise.

It further stated subsequent registration not on the date when parties have enter into contract creates legal consequences. First consequence would be that change of legal status of one of the contracting party, unilaterally without consent and knowledge of the contracting party, which in a given case may cause prejudice to the other party. Another consequence would by allow to have effect of subsequent filing retrospective would amount to adding of another clause between them without the consent of other party.

However, I personally believe, if we follow Ramky infrastructure case it will lead to another facet of dispute as court was unclear about premises on which one can determine whether the particular supplier was actively engaged in business as to fall within definition of section 2(n) of MSMED Act during the relevant period of time. Whereas if what court observed in Ramky infrastructure case would have been the intent of legislation then it would have confirm status of MSMEs automatically on all existing small industries eligible for same in lieu of giving 180 days duration to file Entrepreneur memorandum. Added to that, it will add another prospects that it wind up depriving the existing Small or other industries who though fall within the purview of MSMEs but sought not to be avail the benefits on any account. Wouldn't this infringe the freedom of trade and expression guaranteed under Article 19(1)(g) of Indian

Constitution. The Legislator make it compulsory to register in order to avail the benefits, impliedly it vest them with option to choose or not to choose to be governed as MSMEs availing the benefits of government.

LEVY OF EXORBITANT INTEREST ON DEFAULTER UNDER SECTION 16 OF MSMED ACT, 2006

Section 16 of MSMED Act, 2006 levy three fold interest on buyer who defaulted or delayed in making payment for goods or services availed. Levy of Interest is equal to penalizing someone and that too with absence of mental rea. Which itself is against the principle of criminal Jurisprudence. The reason for this act accounts that it is for benefit of MSMEs. It is possible that on MSMEs avails the service rendered or goods supplier by another MSME. It is very much possible that the supplier failed to make payment due to some bona fide account for instance during Covid-19 effect. To what extent is it appropriate to award one and punish another for bona fide incapacities of a person? It clearly violates the principles of Unjust enrichment.

Section 19 of MSMED Act 2006 laid a stipulation that for making an appeal against any order of MSE facilitation council to any appellate court, the applicant(except applicant not being a supplier) must deposit with it 75% of amount in terms of order, decree as the case may be. It is an additional hardship on buyer because supplier are exempt from such condition of deposit.

INSOLVENCY APPLICATION ON ACCOUNT OF RECOVERY OF INTEREST UNDER SECTION 17 MSMED ACT, 2006

As MSMEs are recognised as unsecured operational debtor in terms of IBBC, 2016, they can make an application under section 9 of IBC to initiate insolvency proceeding against corporate debtor.

The NCLT, Mumbai Branch, in case Monaco Exim Private Limited V/s Janus International Private Limited[235] , denied initiation of insolvency proceeding on account of failure by corporate debtor to pay interest with having corporate debtor is willing to pay the principal interest.

Even in Govind sales v Gammon India Private Limited[236] the NCLT, Mumbai Bench, denied initiation of Insolvency proceeding against corporate debtor who has paid the principal amount

[235] C.P. No. 2463/I&BP/2018
[236] CP 1727/IBC/NCLT/MAH/2017

but is reluctant to pay interest rate as per Section 17 of MSMED act, 2006. The tribunal observed that right to claim interest under MSMED act in various circumstances is to be determined by court and adjudicating authority under IBC code don't have power of civil court to adjudicate upon the entitlement of the operational creditor to the benefits accruing from the MSME Act.

NCLT, Hyderabad Bench, in Shri Shrikrishna Rail engineering Private limited v Madhucon Project Limited, in para 23, upheld the right of petitioner qua operational creditor to claim interest under MSMED act 2006 and didn't even refer the party to Micro & Small Enterprises facilitation council and admits the section 9 application for insolvency by operational creditor. NCLT, Hyderabad has impliedly endorsed the right to proceed for insolvency against corporate debtor even for Interest due.

We must note that section 5(21) of I&B code defined the operational debt as "a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the central government, any state government or any local authority". In this definition the term interest has not been mentioned to be included in operational debt. Whereas in definition of term of financial creditor does under section 5(8) reads as "financial debt means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes… ", here the use of term "alongwith interest, if any" only in definition of financial debt vividly manifest the intention of legislature that he do not seeks to include interest while computing operational debt in course of insolvency proceeding. This is inferred by application of doctrine of literal rule of interpretation.

I believe, the proper authority to adjudicate upon the imposition of extravagant interest rate as allowed in section 17 of MSMED Act is Micro and small enterprise facilitation council [Herein after referred as "MSE facilitation centre"]. The adjudication pronounced by MSE facilitation centre can be recovered as liability qua debt as defined under section 3(11) of I&B code.

However, the award is most definitely susceptible to appeal under section 34 of arbitration and conciliation Act, 1996 if it is being passed by arbitral body which happens in preponderance of cases. And as Supreme court has held in *K kishan v M/s Vijay Nirman Company Pvt Limited (2018) 17 SCC 662*, application under section 9 by operational creditor must not be admitted till the debt is attributable as disputed debt. The apex court citing the case of *Mobilox Innovation Private Limited v Kirusa software Private Limited, (2008) 1 SCC 535*, states that CIRP cannot be initiated by operational debtor vide application under section 9 if there exist a dispute between parties or pending suit or arbitral proceedings before the demand notice was

sent to operational debtor. The Supreme court in para 19, has also pointed that only where the possibility of appeal under section 34 is exhausted on account of being barred by limitation act then only it would be clear case to put the insolvency process in operation.

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TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2ND ED.) BY RICHARD SUSSKIND

- **TRIVENI SINGAL**

"It is not that computer systems will replace all legal work by, say, 2020. Of course not. But around that time and from then on it will become commonplace across the legal profession for all
substantial and successful legal businesses to be converting their business processes from human handcrafting to ever more sophisticated and capable technology- based production."

This excerpt from the book justifiably points out its intimate relationship with the emerging legal trends. It bestows immense knowledge which every lawyer of today must equip himself with to become a finer lawyer tomorrow.
Due to the pandemic that struck the world in 2020, work from home has become a prerequisite and thus the usage of information technology has compounded in all spheres of life. This has also accelerated the evolution of the law profession from traditional methods to modern tech-based methods. Recently the news has been filled with e-fillings, e-litigation, virtual courts, etc. which creates many dilemmas in the minds of young lawyers, including myself. Fair trials in virtual courts? What new skills do young lawyers need to focus on? How will an e-judicial system be beneficial? How will it be harmful? Will the scope of the law profession expand?
At first, I was fascinated with these impending revolutions but soon realized that it meant altering my outlook regarding my future, which I am sure many of you too have given a thought.

This book not only answers those questions but offers much beyond that. Afterall a book that inspires its readers and coerces them to introspect and reap fresh ideas must be on every bookshelf.
The period of transformation for the world of law is here and we must train for it.

Tomorrow's Lawyer – An Introduction to Your Future (second edition) by Richard Susskind was published in 2017, while the first edition was published way back in 2013. The preface to the first edition has been furnished within this book which is a benediction for readers like

myself who have not read it. But why should you read a three-year-old book? Let's dive into the book a little more and you will find that answer!

This book is chiefly construed for all the young aspiring lawyers out there who find themselves at crossroads more often than lawyers who have deep knowledge and experience of the legal world.

Nonetheless, in the words of our author "All lawyers, unless they are retiring today, are tomorrow's lawyers" and so anyone can benefit from this book.

This academic read aims to take account of recent advances in the legal marketplace alongside the developments in the author's own thinking and experience. The author yearns to encourage open-minded debate and brainstorming among law professionals, to improve the legal system. And the most important inclination of the author is towards teaching lawyers to get ready for the future according to the changes that will happen.

The book is very well structured and is organized into three sections. The first section talks about three main factors (only one of them being technology) which according to the author are the root cause of the shift from conventional methods in the law profession. The second section focuses on the new trends which follow these root causes, the actual changes taking place in the functioning of the legal world be it law firms or in-house lawyers. The third and final part is most exciting of all which speaks about the prospects for lawyers, their new probable employers, important pieces of training, and lot more.

The overall language of the book is plain, understandable, and very precise. Since the author focuses on young lawyers as his target, he defines all terms and concepts in a very plausible manner, coupled with diagrams, flowcharts, and tables. The writing style of the author is engrossing making the book interesting to read.

Experience has always been regarded as the best teacher and, our author also shares his personal experiences on the given topics which is beneficial to understand the concept and its practicality. And personally, for me reading the personal experiences of an author connects me well with him.

The author not only presents contentions supporting his claims strongly but also mentions probable opposing contentions and answers to them justifiably, which gives relief to logical and curious minded readers.

As lawyers, we have all read the bare acts and very well comprehend the importance of illustrations given in them. The author also similarly gives examples of various kinds almost on every topic he picks up. He had used the example of online games to show the merger between law and technology, which surely all millennials and Gen Z lawyers would grasp in seconds.

The author has discussed 16 sources of legal service, 13 disruptive legal technologies. more than 10 points on the shift in legal paradigm observed, 10 new jobs for lawyers, 10 new evolving tomorrow's employers all within this approximately 220 pages book! Knowledge has been abundantly showered by the author, it's we who need to collect it now.

The author in his first edition had predicted that the legal world will change more in the next 20 years than it has in the past 2 centuries and we all can agree to that one. The last 20-25 years have been very fundamental in the growth of the internet, information technology, and people themselves.

But every person would always try to protect the problem to which he is a solution and thus, the traditional methods for delivery of legal service to clients are so deeply embedded in the system. But clients are not satisfied with it lately. Our author elaborately explains the reasons for this dissatisfaction among clients. Hourly billing was one concept that caught my attention. Any person who is paid hourly will take maximum time to do his task and value of such a person that is his productivity decreases greatly. But clients can't afford it anymore and the author explains that when pressure from clients continues to increase, new service provides emerge, new technologies are used, it would be unwise for firms to not think about working differently.

The author also gives a path for people who want to start their firms to follow so that they can be at par with their competitors. The author asks small firms to ponder on what unique value can they bring as a small legal business and offers some answers too like the fact that smaller businesses can offer high-quality service at lower costs.

He stresses the fact that junior lawyers must prepare themselves to engage in virtual hearings and online courts if they wish to prosper beyond 2020 which is ironically the transition occurring around us now.

Apart from this, the author has also included several frequently asked questions by his students or junior lawyers, which very well clears the air for us too in some way or other. For me, the

dilemma as to what was I going to acquire from senior lawyers and will that be enough was answered beautifully in this book.

Another fundamental thing to consider is that the book also provides the risks involved in this evolution process and the methods to cope up with that.
More people will have access to the internet in the coming years than access to justice and that is why young lawyers must think beyond today's customs.

Another thing that caught my eye was how non-lawyers could benefit from these changes. Using the example of the game Solitaire, the author had explained how in the coming years' legal rules will be embedded into systems and procedures (which I agree to). This meant that non-lawyers will not have to worry about or even have the responsibility of recognizing when legal input is required.
Many other points have been given regarding benefits to non-lawyers which was eye-opening for me.
"A court becomes a service rather than a place." Borrowed from chapter 11 of the book (Online courts and online dispute resolution), this sentence showcases the deeper meaning of the change law profession is experiencing. The fact that as more and more people realize their rights, there will be more legal disputes and quick, affordable decisions will be the need of the hour.
Courtroom appearances will diminish and virtual hearing, e-fillings will surge in the coming years and the author provides ample proves for the same.

Now coming to my most favored part of the book. Being a law student, I was most thrilled to see a section devoted wholly to what law schools can do to better prepare the students. Reading those paragraphs, I had a sense of what I wanted to learn after I finish law school apart from just the legal rules and Acts. It gave me ideas which I could pitch in my law societies/classroom/seminars etc.

Why do I always hear that the practical world is different from what you are learning at law schools? What should law schools focus on apart from theoretical concepts? These persistent thoughts of mine have received certain closure. This book gave me ideas on how to fully exploit my time at law school, what skills I have to master while I have the time.

What better than to have those ideas flow from within me than having to read from somewhere. And if it happened to me it will happen with every reader out there. New ideas that will help upgrade you will flow irrespective of whether you are a law student, young lawyer, small law firm, large law firm, in-house lawyer, senior lawyer, or even a non-lawyer person.

Lastly, the book tells us some of the questions we can ask our employers in interviews when given a chance (one of the most dreaded movements for all applicants!). The author does not stop there and continues to give answers to those questions and what the answers mean, given your employer gave similar answers. So now I can understand better my employer's vision and that's definitely what job seekers wish to achieve.

"The end result is a tailored solution, delivered by an advanced system rather than by a human craftsman. That is the future of legal service."

With countless core changes going on around us, everyone has lots of unanswered questions about their health, career, future, so why not read a book that answers at least some of them! The book is readily available online and can be downloaded for free in pdf format. And on that note, I conclude my review.

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RAPE LAWS IN INDIA: AN ANALYSIS OF 2013 AND 2018 AMENDMENTS

- **DEEPIKA KANDA**

INTRODUCTION

Adverse time and situation faced by a country often induces changes in the laws which govern it. Significant changes have been brought in the laws governing rape after the horrors which were brought into light in 2012 and 2017. These horrors gave birth to Criminal Law (Amendment) Act, 2013 and Criminal Law (Amendment) Act, 2018. Rape has been an evil which has kept on destroying countless lives from time immemorial. However, Nirbhaya case showed peak of cruelty and inhumanness which shook our nation and caused the country to come together and raise its voice against it. A female physiotherapy intern was brutally gang raped which resulted in her death. The protests that were generated brought into light the inadequacy and incompetence of the laws which control rape in our country. A committee headed by former SC Judge J.S Verma was constituted to suggest the amendments in the rape laws. Verma committee's suggestions were then incorporated in our law through an ordinance which was passed on 1 February 2013. The ordinance was followed by a bill which was passed by the Lok Sabha on 19 March 2013. This is how the Criminal Law (Amendment) Act, 2013 came into force in India.

Kathua rape case and Unnao Rape case were two such shocking incidents that necessitated further changes in the laws. In the Kathua Rape case a mere 8 year old girl named Asifa Bano was abducted and raped continually and later on murdered. In Unnao Case a teenage girl accused an MLA of raping her. Both these incidents were condemned nationally and internationally. Following this Criminal Law Amendment Ordinance was promulgated on 21 April 2018 which was replaced by the Criminal Law (Amendment) Act 2018 which came into force on 6th August 2018.

Chapter 16 of the Indian Penal Code criminalises the offences affecting the human body, in which Section 375 to Section 376 E specifically deals with Rape as an offence. Criminal Law (Amendment) Act, 2013 amended Section 375, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, and inserted Section 376E into the code. While Criminal Law (Amendment) Act, 2018 amended Section 376, Section 376 E, and inserted Section 376AB, Section DA, Section DB into the code. Hence, the amendments have left no Section untouched

rather it has added more Sections widening its scope. Both these Amendments brought major changes into the rape laws of the country such that the laws are now more stricter and has less loopholes. This paper will delves into how the current law has evolved through such amendments and on the adequacy of the amendments

I. Rape [Section 375]

Rape is constituted from a Latin word *rapio* which implies "to seize". Hence, Rape is a violent seizure of a woman's body by a man against her will or without her consent. It affects a woman both mentally and physically and is violative of her Right to life and personal liberty guaranteed u/a 21 of the Constitution. Section 375 gives us the definition of Rape which whose scope is clearly beyond just inserting of the male organ into female organ. Section 375 of The Indian Penal Code 1860 says;-

*"**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"*[237]

It also mentions the ingredients as mentioned below:-

1. **"Against her will"**[238]- A man is said to have committed Rape if he has had sexual intercourse with a woman against her will or without her consent. Although these two phrases "against her will" and "without her consent" interlace often but these two phrases have different meanings as an "act done "against the will" is obviously done "without her consent" but not every Act done "without the consent" is "against the will". The Supreme Court explained the difference between the two phrases in the case **State of U.P v. Chottey Lal**[239]**-**

[237] Indian Penal Code 1860, s.375.
[238] Indian Penal Code 1860, s.375.
[239] State of U. P v. Chottey Lal, (2011) 2 SCC 550.

"The expressions "against her will" and "without her consent" may overlap sometimes but surely the two expressions in clause *firstly* and clause *secondly* has different connotations and dimensions. The expression "against her will" would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition, On the other hand the expression "without her consent" would comprehend an act of reason accompanied by deliberation."

The difference would be better understood with the following illustrations- **Illustrations 1-** X raped Y while Y screamed and pushed him away with all her will. In this case the Act done was "against her will" and "without her consent". **Illustration 2 –** X promised Y that he would marry her and they would live happily ever after. X had sexual intercourse with a willing Y as she thought that he would marry her. Later on X did not marry her and she came to know that he had made the same promises with other woman so that he could rape them. This Act is Rape which although was not "against her will" but was "without her consent" as consent obtained by fraud is no consent at all.

2. **"Without her consent"**[240]- IPC does not define "consent by giving it a positive definition. Section 90 of the Indian Penal Code explains that "consent given first under fear of injury and second under a misconception of facts is not consent at all". However in understanding the meaning of "consent for the purpose of Section 375, the judgement given by SC in the **Deelip Singh @ Dilip Kumar v. State of Bihar** [241]is imperative which said that for the purposes of IPC the definition of consent given under Section 90 is not exhaustive.

In **Queen v. Flattery**[242]a 19 year girl who was suffering from ill health visited the accused who was a doctor for treatment. The accused advised a surgical operation to which she consented. Instead of an operation the accused had sexual intercourse with her. Here there was no consent at all and the act amounted to Rape for which he was convicted.

3. **"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"**[243] **-** It is clear that it is not a valid consent if the consent is obtained by causing another person to believe that she or her kin will be injured or killed if the

[240] Indian Penal Code 1860, s.375.
[241]Deelip Singh @ Dilip Kumar v. State of Bihar, 2005 (1) SCC 88.
[242]Queen V Flattery, 1877 QBD 410.
[243] Indian Penal Code 1860, s.375.

consent is not given. The words "or any person in whom she is interested in" was added by Criminal Law (Amendment) 1983 thereby increasing the scope of this clause to include fear of death or hurt not only to herself but her children, father, mother, husband etc. In the case **State of Maharashtra v. Prakash**[244] the accused constable after beating the husband of the victim threatened that he would be remanded. Under this threat he had sexual intercourse with the victim. This act falls under clause iii of section 375. For an act to fall under this Section the apprehension of causing hurt or injury is also sufficient.

4. **"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**"[245]- Such cases involve situations when a man through deception makes a woman believe that he is her husband. In **R v Doe**[246]a man entered the bed of a woman during the time when his face couldn't be seen. While in intercourse commenced the woman realised that he isn't her husband and hence resisted him and ran out before the intercourse could be over. This is Rape under 375.
5. **"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"[247]-** This clause was added in the Criminal Law (Amendment) Act 1983 and with the intent to safeguard the interests of the those victims who due to unsoundness of mind are unable to understand the nature and consequences of the Act and hence unable to give consent for the same. In **TulsidasKanolkar State of Goa**[248]the court held that a girl who is of unsound mind is legally incapable of giving consent.

[244]State of Maharashtra v. Prakash, AIR 1992 SC 1275.
[245] Indian Penal Code 1860, s.375.
[246]R v. Doe, (19840 15 Cox 579.
[247] Indian Penal Code 1860, s.375.
[248]TulsidasKanolkar v State of Goa, (2003) 8 SCC 590.

6. **"With or without her consent, when she is under eighteen years of age"[249] -** A woman who is under 18 years of age is still a minor by law and her consent is no consent at all and hence even if she consents to the act it amounts to Rape
7. **"When she is unable to communicate consent"[250]-** There might be cases when a woman is unable to communicate consent and hence it will amount to rape.

Amendments in Section 375 through Criminal Law (Amendment), 2013

The following amendments have been made in Section 375 through Criminal Law (Amendment) Act 1983-

1. Clauses (a) to (d) have been added in Section 375 through the amendment. This is change gives a wider scope to the "rape". Now Rape doesn't only include penetration but other Acts as mentioned in the Section as well.
2. The age in clause *sixthly* has been changed to 18 years rather than 16 years. So clearly now if a girl is below the age of 18 i.e if she is a minor then sexual intercourse with her would amount to rape.
3. Clause *seventhly* has been added to include in Rape the situations when a woman in unable to communicate consent.
4. The Explanation which says that sexual intercourse is sufficient to constitute rape has been omitted.
5. Explanation 1 and 2 has been added which defines what is "vagina" and "consent".
6. Exception 1 which excludes medical procedures from rape has been added.

II. Punishment for Rape [Section 376]

Section 376 reads as follows-

Section 376 Clause (1)- *"Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall*

[249] Indian Penal Code 1860, s.375.
[250] Indian Penal Code 1860, s.375.

ISSN: 2581-6349

not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine."[251]

Section 376 Clause (2) – *"Whoever (a) being a police officer, commits rape- (i) within the limits of the police station to which such police officer is appointed*

(ii) in the premises of any station house

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman

(g) commits rape during communal or sectarian violence

(h) commits rape on a woman knowing her to be pregnant

(j) commits rape, on a woman incapable of giving consent

(k) being in a position of control or dominance over a woman, commits rape on such woman

(l) commits rape on a woman suffering from mental or physical disability

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."[252]

Section 376 Clause (3) "*Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years,*

[251] Indian Penal Code 1860, s.376, cl.1.
[252] Indian Penal Code 1860, s.376, cl.2.

ISSN: 2581-6349

but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."[253]

Section 376 has undergone drastic changes by the way of the amendments in 2013 and 2018. This Section provides for the punishment for committing rape. This Section also includes special circumstances for which higher punishment is warranted. However the proviso to section 376 gives a little discretion to the courts to give lesser punishment when 'special and adequate reasons' exist, This ensures that the courts can call equity, justice and good conscience.

Amendments in Section 376 through Criminal Law (Amendment), 2013

The following amendments have been made in Section 376 through Criminal Law (Amendment) Act 1983-

1. By the amendment rape was to be punished with rigorous punishment of term which shall not be less than 7 years but which may extend to life imprisonment. Punishment also includes fine. This amendment removed the provision which gave lesser punishment to rape which is committed on one's wife & a woman not under 12 years of age.
2. Sub-section 2 has been amended to include certain cases which are so heinous that it should get bigger punishment than normal rape. These include custodial rape, rape of woman under the age of sixteen, rape of pregnant woman, rape of woman suffering from mental or physical disability etc.
3. The definition of the term "armed forces" has been added in the Explanation.
4. The provisions related to Gang Rape have been omitted.

Amendments in Section 376 through Criminal Law (Amendment), 2018

1. Minimum punishment of rape has been amended to be 10 years instead of 7 years.
2. Sub-Section 2, clause (i) which provides punishment from raping woman under sixteen years of age has been omitted.

[253] Indian Penal Code 1860, s.376, cl.3.

3. Instead of Sub Section 2 clause (i), Sub-section 3 had been added to Section 376 which provides for a much stricter punishment of rigorous imprisonment of not less than 20 years or which can be extended to life imprisonment including fine for committing rape on a woman under sixteen years of age.

III. Analysis of S.376A

"Section 376A-Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death."[254]

Criminal Law (Amendment) Act, 2013 amended Section 376 A which provided for the punishment is case the Act of Rape caused death or causes a woman to be in vegetative state. Before the amendment, Section 376A provided for "Intercourse by a man with is his wife during separation"

IV. Analysis of S.376AB

"**Section 376AB-**Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death.

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."[255]

This Section was inserted in IPC by Criminal Law (Amendment), Act, 2018. It provides for the punishment in case rape is committed on a woman under 12 years of age.

[254]Indian Penal Code 1860, s.376A.
[255]Indian Penal Code 1860, s.376AB.

V. Analysis of S.376B

"**Section 376B-**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.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375."[256]

Criminal Law (Amendment) Act, 2013 amended Section 376 B which provides for the punishment in case a man rapes his own wife during separation. Before the amendment, Section 376B provided for "Intercourse by public servant with woman in his custody."

The ingredients to invoke this Section include-

1. Sexual intercourse is committed by a husband upon his wife.
2. When the wife id living separately under a degree of judicial separation or otherwise.
3. Absence of wife's consent to the intercourse.

VI. Analysis of S.376C

Section 376C reads as follows-

"Whoever being (a) in a position of authority or in a fiduciary relations

(b) a public servant

(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

(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."[257]

[256]Indian Penal Code 1860, s.376B.
[257] Indian Penal Code 1860, s.376C.

Criminal Law (Amendment) Act, 2013 amended Section 376 C which provides for the punishment in case a sexual intercourse is by a person in authority. Here the offence does not amount to rape due to the consent given by the woman but it is still an offence as the situation is compelling.

Amendments in Section 376C through Criminal Law (Amendment), 2013

Changes in Section 376 brought by the amendment are-

1. The scope of this Section has been widened by providing punishment for "Sexual intercourse by person in authority" rather than "Intercourse by superintendent of jail, remand home, etc" only. Punishment for sexual intercourse by "a person in position of authority or in a fiduciary relationship", "a public servant", and "management or staff of the hospital" has been added to this section.
2. The punishment has been increased for this offence, The punishment for this offence is rigorous imprisonment for a term not less than 5 years but which may extend to 10 years with fine.

VII. Gang Rape Section [376D]

"Section 376D-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."[258]

Criminal Law (Amendment) Act, 2013 amended Section 376 D which provides for the punishment in case of a Gang Rape. Before the amendment, Section 376B provided for "Intercourse by any member of the management or staff of a hospital with any woman in that hospital."

[258]Indian Penal Code 1860, s.376D.

ISSN: 2581-6349

VIII. Analysis of S.376DA

"Section 376DA-Where a woman under sixteen years of age 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 imprisonment for 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."[259]

This Section was inserted in IPC by Criminal Law (Amendment), Act, 2018. It provides for the punishment in case a woman under 16 years of age is gang raped.

IX. Analysis of S.376DB

"Section 376DB-Where a woman under twelve years of age 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 imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:

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."[260]

This Section was inserted in IPC by Criminal Law (Amendment), Act, 2018. It provides for the punishment in case a girl under 12 years of age is gang raped.

X. Analysis of S.376E

[259]Indian Penal Code 1860, s.376DA.
[260]Indian Penal Code 1860, s.376DB.

"Section 376E-Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376AB or section 376D or section 376DA or section 376DB, and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death."[261]

This Section was inserted in IPC by Criminal Law (Amendment), Act, 2013. It was further amended by Criminal Law (Amendment) Act, 2018 to include Section 376AB, 376DA and. 376DB. It provides for the punishment in case of repeat offenders.

CONCLUSION

Since 2013 the provisions as to rape have been made much stricter due to the increasing cases of rape in the society. In Section 375 the definition of Rape has been made much broader and its scope doesn't only include sexual intercourse. This is a very positive move as before this change many criminals were given a very small penalty for outraging a woman's modesty. Section 376 has been drastically amended in both the amendments making the punishments much more stricter and categorical. Later Sections have been amended and inserted to account for various kinds of rapes like Gang Rape, Custodial Rape, marital rape, rape of a minor and Rape causing a woman to exist in a vegetative state. Although marital rape is only punishable if a man commits sexual intercourse with a woman who is living separately from him or is under 15 years of age. Otherwise marital rape is not punishable. It is submitted that the law should criminalize marital rape which is forceful, coercive and causes injury to the body of the woman.

In light of the following amendments one would expect that the rape cases in India would decrease. One look at the statistics would clarify the efficacy of these amendments. "Facts state that the crime of rape is committed every 20 minutes in India. Only 10 percent of the rapes committed are reported, amongst which 25.5 percent of the reported criminals are convicted. Since 2014, crimes against women are on an upward trend, at least according to the statistics provided by the National Crime Records Bureau (NCRB) 2016. From 38, 385 cases in 2014

[261]Indian Penal Code 1860, s.376E.

and 41, 0001 in 2015, the number of cases of crimes against women has risen to 41,761 in 2016"[262]

This sorrowful state makes it clear that the effort by the legal system of the country is not by itself sufficient against the battle against this crime. Social efforts are very much required. One way it can be tackled is by making children and adults study about the punitive actions that are available in the IPC against the rapists. The people of the country need to be made aware about rights of the woman and the consequences of infringing those rights. The fear inculcated may help fight against the crime. Most women due to the fear of social stigma or illiteracy are unable to report the crime. They don't know their rights and are too afraid to approach the corrective authorities. The women need to be informed about their rights and how it can be enforced so the crime doesn't go unpunished. Further the parents and teachers must think of it as their moral responsibility as guiders and the citizens of the country to drive it into their children that crimes shouldn't be committed.

Hence, the positive changes brought about by the two amendments in the rape laws need to be empowered and enforced hand in hand with the social changes for them to show any results. We hope for a safer country for the women in India.

[262] *Growing Rape Cases in India: These Statistics Reveal 7 Ugly Truths about Sexual Violence in The Country,* ASSOCIATION OF DEMOCRATIC REFORMS (May 15, 2020, 16:30 P.M), https://adrindia.org/content/growing-rape-cases-india-these-statistics-reveal-7-ugly-truths-about-sexual-violence-country

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PRIVACY RIGHT AND THREATS TO HUMAN SECURITY: LEADING TO PERSONAL DATA PROTECTION BILL 2019

- **BHAKTI VAKIL**

ABSTRACT

With the advancement of technology, the way of conducting crime is becoming more sophisticated, complex and there has been a significant change in the outlook of world in human perspective. The 'netizen' require protection of their data and are more exposed to the risk of privacy infringement. The right to privacy is the most cherished for human beings giving nature and importance of this right. Privacy is the most urgent issues associated with information technology and digital media. The author seek to conceptualize the right to privacy, its legal status and its infringement leading to some of cybercrimes. As Indian judiciary recently ruled that right to privacy is protected as an intrinsic part of right to life and personal liberty under Article 21 of constitution of India. This judgment compel the government to make laws separately to achieve better framework of governance in data protection matters, leading to Personal Data Protection Bill. The author makes an analysis of various provision of the Bill through which the bill seeks to protect the data privacy of the citizen. The article also address the negative aspect of the Bill. The biggest concern about the bill is the grant of exemption to the government for data collection which has given enormous power in the hands of government.

I. INTRODUCTION

Data protection and privacy rights are two important right conferred by any of the civilized nation. Every individual and organization has a right to protect and preserve their personal and sensitive and commercial data and information. With the advancement of computer related technology, the cyber-crimes are the order of the day. This crime knows no boundary and limits. The internet has become an indispensable tool for data retrieval. Communication and business transactions. As India has emerged into the IT hub of the world and hence it is important to protect right of privacy in every manner. "The right to privacy refers to the specific of an individual to control the collection, use and disclosure of personal information".[263] Under Constitution of India, there is no specific provision pertaining to right to privacy. But Indian

[263] Aashit Shah and Nilesh Zachrias *"Right to data protection and privacy"*, NISHITH DESAI ASSOCIATES, 2001.

Judiciary, recently ruled in K. Puttaswamy v. Union of India[264] that right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and other freedoms guaranteed by Part III of the Constitution. As Puttaswamy illustrates, there are various accounts and definitions of privacy. A 'descriptive' account of privacy views it as a condition or state of being.[265].

After the judgment, government constituted a committee of experts to make recommendation and review present privacy norms. The committee released a White Paper on Data Protection in 2017[266] and submitted its final report titled "A Free and Digital Economy: Protecting Privacy, Empowering Indian" along with draft law, 'The Personal Data Protection Bill, 2018'[267] in July 2018. This created a healthy debate on privacy as in India there was no data protection laws. Though in the year 2000, effort has been made by our legislature to embrace privacy issues relating to computer system under the purview of IT Act, 2000.

In recent times, privacy consideration arising out of the Cambridge Analytica scandal, the WhatsApp-Facebook privacy sharing arrangement, the Apple-FBI dispute, the snowden leak and the Aadhaar Act have dominated headlines. The increasing availability, storage and ease of mining the personal information online has created a public policy conundrum over balancing the benefits of big data with the threat to the right to privacy.

II. RIGHT TO PRIVACY AND ITS LEGAL POSITION

Right to privacy is not enumerated in Indian constitution specifically, but the Indian Judiciary has time to time debated on the existence of his right Indian Legal framework and has culled the same from Article 21.

A. 1950-2000

In 1954, an eight judge bench in M.P. Sharma V. Satish Chandra Bose[268] while dealing with the power of search and seize documents from Dalmia Group, dismissed the existence the right to privacy on the basis that the makers of Constitution had not envisaged a fundamental right to privacy.

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[264] K. Puttaswamy v. Union of India (2017) 10 S.C.C. 1.
[265] Adam Moore, *Defining Privacy*, 39(2) J. of SOC. PHILOSOPHY 411, 412(2008).
[266] Ministry of Electronic and Information Technology, *Committee of experts under the chairmanship of Justice of B. N. Shrikrishna, Data Protection Committee Report* (2017), https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf
[267] Ministry of Electronic and Information Technology, *Draft on The Personal Data Protection Bill, 2018*, https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf
[268] M.P. Sharma V. Satish Chandra Bose AIR 1954 S.C. 300.

However, in Kharak singh V. State of UP[269], six judge bench of the apex court acknowledge the right to privacy, though not expressly declared in the Constitution, as an "essential ingredients of personal liberty". But in Gobind V. State of Madhya Pradesh[270], the apex court upheld the existence of fundamental right of privacy under Article 21 but could be interfered with by a procedure established by law. Reiterating the same in R. Rajagopal V. State of T.N.[271] the infamous case named as Auto Shanker case, it was held that, "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. No one can publish concerning the above matters without his consent, whether truthful or otherwise whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in the action of damages." Again, in People's Union for civil liberties V. Union of India[272], the apex court held that individuals had a privacy interest in the content of their telephone communications. Making just exceptions to the complete cover, it said that rigorous standards are required for law that derogates privacy and that mechanism used should be targeted, based on specific suspicion of identifiable individuals and be the only means possible to fulfil the government's goals of public safety and crime prevention.

B. 2000-2016

It was held in Sharda V. Dharampal[273] that the right to privacy is subject to restriction. It is not enshrined in the Indian Constitution but has been drawn out from the extensive interpretation of Article 21. One of the prominent and recent case dealing with right to privacy is Ram Jeth Milani V. Union of India[274], wherein the ratio of the case,, "Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner." Another recent judgment is Thalappalam Ser. Coop. Bank ltd and Ors V. State of Kerala and Ors.[275] The honorable court held that right to privacy falling under Article 21 is not absolute and needs to regulate in public interest as in the modern state, no right can be absolute. But the right gets it conformity in Puttaswamy case, the court establish committee of experts in order to strengthen the privacy.

C. 2017

[269] Kharak singh V. State of UP AIR 1963 S.C. 1295.
[270] Gobind V. State of Madhya Pradesh AIR 1975 S.C. 1378.
[271] R. Rajagopal V. State of T.N AIR 1995 S.C. 264.
[272] People's Union for civil liberties V. Union of India (1997) 1 S.C.C. 301.
[273] Sharda V. Dharampal AIR 2003 S.C. 3450.
[274] Ram Jeth Milani V. Union of India Writ Petition (CIVIL) NO. 176 of 2009.
[275] Thalappalam Ser. Coop. Bank ltd and Ors V. State of Kerala and Ors (2013) 7 S.C.J. 862.

The apex court on 24th August, 2017 while reaching out to the foundation of constitutional culture of India, proclaimed privacy as a postulate of human dignity. The Supreme Court has, however, clarified that like most other fundamental rights, the right to privacy is not an 'absolute right'[276]. Subject to the satisfaction of certain tests and benchmarks, a person's privacy interests can be overridden by competing state and individual interests. The judgment contains six opinions and only the majority opinion in a judgment is binding on future cases. In this case, J. Chandrachud wrote the plurality opinion, on behalf of four judges, while the remaining judges wrote concurring opinions. Thus, the operative part of the judgment which is binding is only the order that has been signed by all nine judges, which holds "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution."

Writing plurality opinion, J. Chandrachud opined that "privacy was not surrendered entirely when an individual is in the public sphere. Further, it found that the right to privacy included the negativity right against State interference, as in the case of criminalization of homosexuality, as well as the positive right to be protected by the State. On this basis, the judges held that there was a need to introduce a data protection regime in India."

J. Chelameswar on the other hand, said that "the right to privacy implied a right to refuse medical treatment, a right against forced feeding, the right to consume beef and the right to display symbols of religion in one's personal appearance etc."

J. Bobde observed that consent was essential for distribution of inherently personal data such as health records.

J. Nariman in this concurring opinion, classified the facets of privacy into non-interference with the individual body, protection of personal information and autonomy over personal choices.

J. Sapre said that "the right to privacy included an individual's rights to freedom of expression and movement and was essential to satisfy the constitutional aims of liberty and fraternity which ensured the dignity of the individual."

J. Kaul discussed the right to privacy with respect to protection of informational privacy and the right to preserve personal reputation. He said that the law must provide for data protection and regulate national security exceptions that allow for interception of data by the State.

Hence, the court recognized that the right was not absolute but allowed for restriction where this was provided by law, corresponded to a legitimate aim of the State and was proportionate

[276] K. Puttaswamy and Anr V. Union of India and ors. (2017) 10 S.C.C. 1.

to the objective it sought to achieve. For that matter, government establish committee which drafted Personal data Protection Bill, 2018.

III. THREATS LEADING TO CYBER CRIMES

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. The government recognizes such sort of crimes after Ritu Kohli case[277] wherein the accused was arrested for stalking Ritu Kohli by illegally chatting using her name. He used obscene and obnoxious language and disturbed her residence, telephone numbers, inviting people to chat with her on phone. As regards exact definition of cyber-crime, it has not been statutorily defined in any statute or law as yet. However it may precisely said to be those species of crime in which computer is either an object or a subject of conducting constituting the crime or may be even both.[278]

Basically, the information which is steeled or anyone using the information that one has shared is privacy infringement. There are different kinds of cyber-crimes arising out of this infringement:

1) Cyber Stalking

This is a type of online harassment wherein the victim is endangered to a barrage of online messages and emails. Normally, these stalkers know their victims and instead of resorting to offline stalking, they use the Internet to stalk.[279] This is an indirect attack on an individual, herein offender stalk and gather information of victim in order to harm either their identity or may be followed by serious violent attacks.

2) Unauthorized Access or Hacking

In hacking, the criminal uses a variety of software to enter a person's computer and the person may not be aware that his computer is being accessed from a remote location. Many crackers also try to gain access to resources through the use of password cracking soft wares with intention to steal the information as in RBI phishing case[280].

3) Phishing

Phishing is the act of sending an e-mail to a user falsely claiming to be an established legitimate enterprise in an attempt to scam the user into surrendering private information that will be used

[277] Kuber Sharma, *Cybercrime: Prevention better till foolproof firewalls in place*, HT, Dec 23, 2003.
[278] Dr. Vishwanath Paranjape, *Legal Dimensions of cybercrimes and preventive laws*, 54 J. of INDIAN LAW INSTITUTE 408, 408-412 (2010).
[279] Ritu Kohli case.
[280] Sivrajbhan V. Harchandgir AIR 1954 S.C. 564.

for identity theft. Cybercriminals are becoming more established and many of these emails are not flagged as spam. Users are tricked into emails claiming they need to change their password or update their billing information, giving criminals access.[281]

4) Computer Vandalism

It is a type of cybercrime that Damages or destroys data rather than stealing. It transmits virus. This is an attack in which the criminal floods the bandwidth of the victim's network or fills his e-mail box with spam mail depriving him of the services he is entitled to access or provide. This kind of attack is designed to bring the network to crash by flooding it with useless traffic. The National Crime Record Bureau (NCRB) said in its latest 2018 report[282], 27248 cases for cyber-crime was registered in India, leading to closely 13569 arrests. While Uttar Pradesh recorded highest number of cyber-crimes at 6280, Karnataka followed by 5839. The wars of the 21st century will be to capture, manipulate or destroy others' data. Digital systems powering organizations and nations around the world have become prime targets for attack—from individual criminals, well-organized cybercrime gangs, and state-sponsored hackers.

As the internet becomes all pervasive and the world gets increasingly interconnected, cyber-attacks are bound to create widespread impact. The WannaCry hacking attack in May 2017 that crippled computers across 150 countries is just an example of the pervasive nature of this problem. Billions of dollars are being wasted in the destruction, downtime and replacement costs arising as a result of cyber insecurity. Cyber security the various technologies, processes and practices that protect networks, computers and digital data from attack is a prime focus area for all types of organizations.

Various studies and analyses of cyber-attacks across the world have shown that in more than 90% of the security breaches, the enabling factor has been the negligent behavior of users. According to survey titled, 'A Christmas Carol: Scam edition' by McAfee, about 56% Indians were victims of discount scams, while 28.6% lost ₹15,000-20,000 as a result of fake online retail sites, while cyber-criminal activity continues to grow in sophistication, popular scams like email phishing (25.3%) and text phishing (21.1%) still result in close to a quarter of Indians being duped throughout the season.[283] Many are not even aware of what comes under cyber-crimes and hence greater sensitization is required. Primarily, it is utmost necessary to have education on cyber security, so that there would more awareness on such frauds and crimes.

[281] Dr. J. J Irani @ Jamshed J. Irani V. State of Jharkhand and Anr, 2006 (4) JCR 117 Jhr.
[282] National Crime Record Bureau (NCRB), *Crime in India, 2018 Volume II.* https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%202.pdf.
[283] Nandita Mathur, *56% Indians prey to discount scams, reveals McAfee's Christmas Survey,* LIVEMINT Dec 10,

Also, insurance against cyber-crimes is a very nascent phenomenon in India, mostly because the method of risk calculation for cyber security in the Indian context has not yet been well developed.[284].

IV. PERSONAL DATA PROTECTION BILL, 2019

The personal data protection bill, 2019 was introduced in the Lower House on December 11, 2019 by Minister of Electronics and Information Technology, Ravi Shankar Prasad. The Bill aims to protect personal data as an essential facet of informational privacy and to create a collective culture that fosters a free and fair digital economy, and ensuring empowerment, progress and innovation through digital governance and inclusion.[285]

The bill owes its origin to the landmark case on data privacy, Puttaswamy case. On 31st July, 2017 the government of India constituted a 'Committee of experts on Data Protection', which was chaired by Justice B.N. Srikrishna, to examine the issues relating to data protection. The committee submitted its report on 27th July, 2017.

SALIENT FEATURES OF BILL

The Bill is an important step forward towards giving meaning to the right to privacy and creating robust data protection framework in India. The bill lays down obligations on agencies collecting personal data to collect only that data which is required for a specific purpose, that is, data fiduciary and with express consent of data principal. But here are certain grounds mentioned in Section 12 of the bill where personal data can be processed without consent of data principal. The bill creates a special category of 'sensitive personal data' and states that such data can be processed only with 'express consent'. Consent has to be taken after giving the user adequate information about the kinds of data that will be collected and the purposes for which it is being collected. According to the bill, data fiduciaries must institute mechanisms for age verification and parental consent when processing sensitive personal data of children[286] as provided in Section 16.

The rights of the data principal have been enumerated for the first time in Chapter VI. These include the right to confirmation and access; right to correction; right to data portability; and the right to be forgotten. The bill also sets up Data Protection Authority of India (DPAI) to

[284] Pawan Duggal, *cybercrime expert across India tell us how to pad up our online security*, Dec 23, 2019.
[285] Arindrajit basu, Justin Sherman, *Key Global Takeaways from India's revised Personal Data Protection Bill,* Jan 23, 2020. https://www.lawfareblog.com/key-global-takeaways-indias-revised-personal-data-protection-bill
[286] Vishal Chawla*, Big story: All you need to know about India's Upcoming personal Data Protection Bill*, ANALYTICS INDIA MAGAZINE Dec 5, 2019. Available at https://analyticsindiamag.com/personal-data-protection-bill-india/

protect the interests of individuals, prevent misuse of personal data, ensure compliance and promote awareness about data protection.

- **NECESSITATION OF CONSENT**

The key regulatory approach adopted in the Personal Data Protection Bill seeks to protect consumers from uses of data that could be harmful practices. It makes user consent an important part of the data protection framework. In order to do so, it mandates that personal data can only be collected after providing notice and taking consent, as mentioned in Section 12 of the bill. Also, such consent must be free, informed, clear, and specific and there must be provisions that allow users to withdraw it. Though, Section 13-17 of the bill creates exceptions for such principle. The bill requires that data fiduciaries give notice of these right to consumers before collecting their data[287]. The Srikrishna committee regarded these provision as foundational to the legislation: "the notice and choice framework to secure an individual's consent is the bulwark on which data processing practices in the digital economy are founded. It is based on the philosophically significant act of an individual providing consent for certain actions pertaining to their data."

Regarding exceptions, the primary exception is given to state, section 13 allows processing of personal data without consent of the data principal as long as such processing is 'necessary for any function of Parliament or State legislature' even though what includes in term 'necessary' has not been defined in the bill. In case of private entities, the exception is couched in wider terms. Section 16 allows employers to process personal data of their employees, if it necessary for their recruitment or termination or for any activity relating to their performance assessment. As long as consent in such situation is 'not appropriate', the consent of data principal employee becomes irrelevant.

The bill incorporates a preventive frameworks, that is, it concludes that since individuals are incapable of consenting in meaningful manner, consent must be regulated. But securing consent has become meaningless as a basis for data protection, not just because the problem with the idea of meaningful consent but also sweeping technological changes rendered the idea even more redundant. Whether doubling down on a consent-based framework is likely to protect personal data in India, is till questionable

DATA LOCALISATION

The bill requires data fiduciaries to store certain data in India, and provides an escalating framework for the storage and processing of data based on its sensitivity. It proposes to create

[287] Section 8 of Personal data Protection Bill, 2019.

three tiers of data with different localization requirements for each personal data, sensitive personal data and critical personal data. Personal data may be transferred freely. The bill makes certain allowance for sensitive personal data to be transferred beyond the country's borders for processing purposes only, as long as the government has granted approval before hand and as long as users have explicitly given their consent.[288] The bill does not allow critical personal data to be transferred outside the country, except on limited grounds and after meeting certain specified conditions.

- **RIGHT TO FORGOTTEN**

The 'Right to forgotten' has been a debated topic since the bill issued. The right empowers individuals to ask organization to delete their personal data. The logic behind creation of this right is that a person must be able to control their data by seeking erasure of data being processed by a data fiduciary. In simpler words, one aspect of this right is the simple deletion of data that is held by as service provider. The second aspect, which is controversial, involves the deletion of information from the internet. This right though not recognized by any legislation before data protection bill, had featured in judicial decisions. In Vasunathan V. The Register General, High court of Karnataka and Ors,[289] the court held that High Court registry should ensure that any internet search should not reveal the name of the woman who had filed a case for annulment of marriage and subsequently arrived at compromise with her husband. The court held that this would be in line with the 'Right to be forgotten' of Western countries.

According to Section 27 of the bill, a data principal has a right to prevent the data fiduciary from using such data or information if data disclosure is no longer necessary, the consent to use data has been withdrawn or if data is being used contrary to the provisions of the law. Further, Section 27(2) says the adjudicating officer (Data Protection Authority) can decide on the question of disclosure, and the circumstances in which he thinks such disclosure can override the freedom of speech and the citizen's right to information. This also raised question that 'who owns personal data?' On July 16, 2018, the Telecom Regulatory Authority of India released a recommendation paper on "Privacy, Security and Ownership of the Data in the Telecom Sector" whereby it recommend that the ownership of the data or personal information shall vest with its user and the entities controlling or processing such information are merely guardians.[290] Still the question was unanswered.

[288] Section 40 of Personal data Protection Bill, 2019.
[289] Vasunathan V. The Register General, High court of Karnataka and Ors, Writ Petition No. 62038 of 2016 (kar.).
[290] TRAI, *Recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector, (2018),* https://trai.gov.in/sites/default/files/RecommendationDataPrivacy16072018_0.pdf

ISSN: 2581-6349

DRAWBACKS

Although there are many strong and encouraging provision in the bill, there are some provisions and features of the bill which tend to raise significant concerns regarding the effectiveness of the bill in protecting the data of citizens. They are dealt in subsequent paragraphs:

- **Independence of data protection Authority-** The new law reduces the powers and independence of the data protection authority by weakening the commission that will appoint the Chairperson and members of such authority. It is not sufficiently independent, the central government has significantly control over the regulatory regime. The bill gives the central government the power to appoint members of the data protection authority upon the recommendation of selection committee,[291] the appointment is for five years,[292] which seems much too short to give a new institution sufficient time to learn the ropes and gain the independence it needs to be an effective regulator. Where the drafted bill of 2018 said that they were to be appointed by a diverse committee with executive, judicial and external expertise, the new law limits it to members of the executive. The bill requires that the members of the authority have "specialized knowledge of, and not less than ten years professional experience in the field of data protection, information technology, data management, data science, data security, cyber and internet laws, and related subjects." India has such a small pool of experts that fit that description that a revolving door will likely be established between the regulator and data fiduciaries being regulated.
- **Social Media user Verification-** Another criticism which has been faced by the bill is its provision that requires the companies to provide options to the users to verify their identity voluntarily. If users do not verify their identities then they will be a target to government scrutiny or investigation. This provision will incentivize the collection of sensitive personal data from government IDs that are submitted for this verification, which can then be used to profile and target users. It will also increase the risk from data breaches and entrench power in the hands of large players in the social media space who can afford to build and maintain such verification systems.[293]
- **Forced Transfer of non-personal data-** The law also mandates that certain companies can be forced to transfer non-personal data to the government for public good and

[291] Section 50 of Personal data Protection Bill, 2019.
[292] Section 51 of Personal data Protection Bill, 2019.

[293] Jochai Ben-Avie and Udbhav Tiwari, *India's new data protection bill: Strong on companies, step backward on government surveillance OPEN POLICY AND ADVOCACY*, Dec 10, 2019.

policy planning purposes. This will not only significant privacy concerns but have a disastrous impact on companies as many a time, companies keep trade secrets in the form of non-personal data on its share, they might suffer a setback.

WIDE EXEMPTION TO THE GOVERNMENT

The bill drafted with an aim to protect the data of the individuals and prevent any kind of misuse is now under threat. The main reason why the bill has raised many eyebrows and is criticized by experts, businessman and lawyers alike is chapter which contains the exceptions. Under the bill, the central government can exempt any of its agencies from the provisions of the Act in the interest of the security of the state, public order, sovereignty and integrity of India and friendly relations with foreign states. Personal data can be processed without consent for medical, security and natural emergencies, employment-related purposes and other reasonable purposes. The blanket powers that the bill provides the government with, to access customer's data is termed 'dangerous'.

Under Chapter IX of the bill[294], there are certain exemption which clearly depicts enormous power in the hands of government. It allow the processing of personal data in the interests of the security of the state if authorized and according to procedure established by law. In addition, it permits processing of personal data for prevention, detection, investigation and prosecution of any offence or any other contravention of law. This access to all personal data by the state poses huge threat to the right to privacy given the weak safeguards that exist in India against state surveillance. On such enormous powers, Justice BN Shrikrishna who headed the committee which originally drafted the bill has called it as 'a piece of legislation that could turn India into an Orwellian state'.

V. CONCLUSION

Across every industry, leaders and technologists are facing an increasingly complex world. In a world deeply influenced by rapid technology evolution, challenges came along as a bona fide add-on. With India moving towards digitization, the need to protect the data was acknowledged by the government through Data protection Bill. The introduction of such a stringent privacy watchdog in India will be revolutionary with far-reaching consequences, as it will change the way privacy is perceived and practiced Indian businesses. As after analyzing the bill, it can be said that bill takes welcome steps in regulating private sector entities, but fails to adequately protect citizen from the action of the State.

[294] Section 42 to 48 of Personal data Protection Bill, 2019.

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Cyber space offers plethora of opportunities for cyber criminals to cause harm to innocent people. It is important to strengthen the security of netizen, being a part of right to privacy. The bill so drafted will affect how user information is secured and kept private. The bill is expected to give controlling force in the hands of the data principles, furnishing users with the privileges to access, the privilege to data transportability and right to be forgotten. With the benefits rendered by the bill, the legislation also needs significant revisions regarding exemptions given to government. We are at historical moment, poised to enact a privacy law that will affect the lives of more than billions. This will help gain and establish better trust on the larger global trade lands.

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STUDENT PROTESTS: IS IT A GODSEND OR ANATHEMA FOR STUDENTS

- SHAURYA SHUKLA

INTRODUCTION

[295]Student Protest or Campus Protest is an activity performed by the students all over the world in which they gather at a place and show their dissatisfaction for a political decision or any new or running policy of the administration of the college. Student protest is a part of student activism by which students stand united for their rights, to get a possible remedy for the existing problems of the universities. The protest can be done in many ways like in a moderate manner it is done by sit-ins, strikes, etc. But student protests sometimes become very extreme and students start committing suicides to show their dissatisfaction, it was witnessed in Kostas Georgakis' protest against the Greek military junta of 1967-1974.

All of this began in the 12th Century with the university of Paris Strike (1229), which lasted for 2 years and it was followed by various revolutions. The later part of the 19th Century witnessed various displays of student activism like student strikes by French people in 1968, the student strike of 1970, etc. The scenario is still the same, no matter what era. Recently South Africa witnessed a student protest led by South African Students' Congress (SASCO) to demand more support from National Student Financial Aid Scheme (NSFAS), India witnessed a protest by AMU and Jamia students for taking back the CAA (Constitutional Amendment Act),2020 and there are many more protests rampant across the world.

❖ WHY IS STUDENT ACTIVISM OR STUDENT MOVEMENT NECESSARY?

Students do protest against that policies of the administration of college or government which are the curtailing the interest of the students. Student protest is a very effective way in which students put their views and interests forward and student activism plays a vital role in personality development of a university student. Student activism teaches some very important skills to students which they cannot learn by reading books only. Various ways in which student activism helps a student are:

- Student protest helps a student to get out of the comfort zone, a comfort zone is something that ensures a mental security but while doing a protest students challenge themselves.

[295] Student Protest, 21 May 2020, 6:12 pm, https://en.wikipedia.org/wiki/Student_protest

While doing protest, students have to attend various meeting and organize big events which help them to kill their social anxiety and makes them more bold .

- Going to meetings everyday and getting involved in many events of a protest, helps a student to build confidence.
- There is a African proverb [296]" if you want to walk fast, walk alone, if you want to walk far, walk with others." If students gets involved in a student organization, they will meet many people on a daily basis, which will help them to build connections and these connections can be very helpful for them in future even as one takes a decision to become a full time worker from a student.
- Working with a student organization and doing various tasks like organizing a event or a protest helps students to discover their hidden talents and their limits because they have to carry out various tasks on their own and this helps them a lot to discover their threshold.
- If you involved in a organization, you meet a lot of people which also includes many onerous and irritating people and it dealing with them can be very fruitful in future because it builds tolerance and patience in a person, if helps one to deal with a troublesome and annoying boss or senior officer.
- Student also get to raise their voice and express their ideas freely. Student activism gives students a platform to express their ideas and thoughts and it also gives satisfaction for not only voicing one's own opinion and thoughts but also voicing the opinions and thoughts of one's colleagues.
- Last but not the least, getting involved in student organization gives a student various experiences and learnings of life that a student can inculcate in later part of his life to avoid getting into any labyrinth problem or getting out of any labyrinth or warren problem.

❖ SOME FAMOUS AND HISTORIC STUDENT PROTEST WHICH BECAME A REVOLUTION:-

There are a few protests that happened across the world and all these protests were so strong that these protests gained a lot of attention and solidarity from the rest of the world like :

- ✧ **Kent State:** On May 1, 1970 the students of the Kent state university started a protest against the Vietnam war. They created a havoc in the city during the protest. They attacked police men, they destroyed public property and they also looted stores,etc. The national

[296] The Third Eye, 7 Reasons Why Student Activism Is Beneficial, 22 May 2020, 11:18pm, https://thirdeyemalta.com/7-reasons-why-student-activism-is-beneficial/

security guard was asked to maintain peace. The students set their university on fire. They also obstructed the firefighters to quench the fire, then there was no other way left with National Security Guard than to use tear gas for clearing the area. On the following day, the protestants again clashed with the national security guard and when the national security guard used tear gas on them they started throwing stones on them. Some of the guards open fired on protestants, killing 4 people and wounding nine. The result of this event was that colleges of the area were closed in the fear of more violence.

- **Soweto Uprising:** On 16 June 1976, a peaceful protest was started by the students in Soweto, South Africa against an act rolled out by the government named " Bantu Education Act" which severely deteriorated the level of education for the black people. Students gathered in a soccer stadium to protest. Police tried to scatter them by tear gas and by warning them that if they will not disperse police will open fire on them. The students didn't moved from their place so the police opened fire on them. In this incident two students were killed and hundreds were injured. This event gave rise to major protests across the nation and a big anti- Apartheid movement was born.

- [297]**Tiananmen Square:** In 1989, numerous students gathered on the Tiananmen square against the oppressive communist government and those students decided to do strikes and boycott the classes. A few weeks later these students resorted to do a hunger strike to get the government in dialogue with them, the Chinese government imposed the martial law but to no avail in the response of the protests. Then came the D day for the protestants on June, 4 1989. On this day Chinese troops open fired on the protestants and early on the next morning tanks arrived on the scene and plowed the remaining protesters in the ground. In this way the protest was crushed by the communist government. No official death toll was released by the government, but it was estimated that about 10000 innocent students died in these protests. It was a mass human right violation by the communist government of China.

- **Umbrella protest in Honk Kong (2014):**

This revolution began on 22 September 2014, when thousands of students boycotted their classes in support of full democratic elections. People other than students also got associated

[297] History of student Protests, 1 June 2020, 4:45 pm, https://www.history.com/topics/vietnam-war/history-of-student-protests

with these students in demand of democratic elections. These people forced the businesses and banks to shut down. This protest were named as umbrella revolution because police wielded tear gas and pepper spray to stop the protest. Protestants decided to use umbrella to keep them safe from the dangerous mists. These protest lasted for three months but demands for the universal suffrage made by the protestants was not met.

❖ STUDENT PROTEST : A BOON OR BANE?

As we have gained an understanding about the history of student protests and their results, let's talk about student politics because it is the seed of crop named student protests.

Are student politics more detrimental than fruitful? Is the student protest the start to greater pain? What effect student politics puts on studies of students?

The author will try to answer all these questions in this part of the article.

Protest is not a futile term and it is not equitable that student politics should be eradicated because it has its own advantages. If students are having any problem like poor infrastructure of the university, lack of transparency in the examination procedure or any scholarship related issue they can put forward their views in front of administration by way of protest. [298]Some advantages of protests are:

- It creates awareness about an issue
- It gains worldwide attention to an issue and we have seen in history of protests that many protests took a momentous turn after being squashed by an authoritative government. This turned them into a massive revolution.
- It helps in bringing change and reforms.
- Protests promote democracy because it questions the accountability of the people in power.
- It is a way of expression for the students to express their views.

But according to the writer, student protest is more of a bane than a boon. The author will try to elaborate the problems in the status quo of student politics and give his suggestions.

Student politics of various institutions has been marred by the involvement of various politicians in the student politics of the college. These politicians influence the students to protest for selfish needs of the political parties like spreading an ideology or canvassing for a political party. The students who admire the politicians are used by them as goons and they end up becoming a hooligan or criminal and the purpose for which they take admission in the

[298] Pros and Cons of protesting, 3 June 2020, 10:52 am, https://www.prosancons.com/politics/pros-and-cons-of-protesting/

college i.e. Education is brutally killed. The second problem with student activism is lack of volition. [299]If we have a look at the protests in some of the most prestigious universities of our country like JNU and Jadavpur university which have given various bright minds to our country, protest in these universities have the catastrophic effects on the students who don't want to take part in the protests because of their apolitical nature but they have to take part in protests because of the peer pressure. The research funding of these universities goes in vein because the bright minds whom the government is thinking are indulged in research are doing protests even if they don't want to do it. [300]Various other problems linked with student protest are:

- **It often becomes a violent affair:** The protests which are started in a peaceful manner, if turns violent vandalizes public property and people are killed.
- **Result is not fruitful in most of the cases:** Our society has a lot of protests, but not all of them have been successful and many of them have failed miserably. [301]If we have a look at the 2016 fee hike protest in South Africa by the students failed miserably when it was crushed by the government.
- **It affects the economy badly:** Protests and student politics affect the education system of a country and it causes unemployment, which leads to putting a bad effect on the economy of a country.
- **It affects the education and learning:** [302]The biggest ill effect of the student protest is on the education system because the students who join the student union often skip the classes for the work of the union. The valuable time of the students gets wasted in the rallies and debates. Poor scores give such students incentive to quit the college and pursue politics. The primary reason for the unrest and indiscipline in the educational institutions is the student politics.

CONCLUSION AND SUGGETIONS:

At last, we can conclude that the concept of student politics and student protests lays a very bad impact on the education of the students. Student politics, which is contemporarily practiced

[299] Gouranga Kumar Basistha, Student Politics in Educational Institutions- pros,cons and solutions, 3 June 2020, 3:57 pm, https://www.indiastudychannel.com/resources/177516-Student-Politics-in-educational-institutes-pros-cons-and-solutions
[300] Id.
[301] Greg Nicolson, Student Protest: Only the start of greater pain, 3 June 2020, 3:45 pm, https://www.dailymaverick.co.za/article/2016-09-28-student-protests-only-the-start-of-greater-pain/
[302] Disadvantages of Politics to Students, 3 June 2020, 4:02 pm, https://blog.essaybasics.com/disadvantages-of-politics-to-students-essay-sample/

will bring no good to the students, but it will only deteriorate the education system and create chaos or pandemonium in the universities and society. If some positive reforms can be made in the status quo of student politics, it will not affect the education as well as it will add a lot to the personality of a student. Firstly the will and volition of a student should be noticed and respected, no one should be dragged in the student politics by force because it is not necessary that everyone is keen in protesting and a protest by forced unity does not last long. If a student union is protesting for genuine reasons, then the students who are of non-political nature will join themselves, only if the reason is of vital importance for everyone. So, a student union should always protest for genuine needs and should never force someone to indulge in protests. Secondly, the influence of political parties should be removed from the universities because the only thing these parties is **"blighting"** the student culture of the colleges for their selfish needs, this is affecting the education and study of the students at large. Study and education is paramount and it is the very reason why students take admission in the college and anything which is somewhere affecting the education system of a college should be removed instantly and education should not be sacrificed at any cost.

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CHINA & COVID – 19: AN INTERNATIONAL LAW STUDY

- SIDDHANT NANODKAR & DIVYA TYAGI

I. INTRODUCTION

The COVID-19 pandemic is wreaking human, economic, and social havoc around the world. The Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) has infected over 90 lakh people all over the world and has claimed over 4.5 lakh lives (at the time of writing). The virus has forced several States to go into complete lockdowns causing global economic and financial loss.

There has been a lot of back and forth on whether the virus started in a laboratory or a market. However, it is undisputed in the world community that the virus originated in the Wuhan District in China. Apart from the obvious moral and economic implications that China may have to face, there are ongoing discussions as to the legal responsibility of China for the virus and its accountability towards the other States.

International Law has been slow to deal with medical and health violations by States, but an in-depth analysis does provide a reasonable answer as to the position of international law in such cases. The World Health Organisation (WHO), the United Nations (UN) and some customary and general practice deals with cases of spread of diseases and the liability of States whose wilful or unwilling negligence lead to the spread of the disease.

A few States like Japan, South Korea, USA, etc. have imposed economic sanctions on China. In addition, since the virus was domiciled in China and the fact that almost every States has incurred losses on all fronts owing to the pandemic, the legal implications, if any, have to be borne by China. This article aims to provide an analysis of the relation between international law and the legal responsibility for global health violations with a major focus on the current pandemic situation.

II. Legal Responsibility under International Law

International law is based on international cooperation. This cooperation is expressed by States *inter-alia* via mutual treaties and agreements. One such document, which now holds an unprecedented position in the realm of responsibility and accountability of States in international law, is the Articles on Responsibility of States for Internationally Wrongful Acts

(ARSIWA)[303]. The document that started out as a draft proposal was finally adopted by the International Law Commission at its fifty-third session, in 2001. The intention of ARSIWA was to formulate, codify and develop, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. ARSIWA did not intend to provide the rules and obligations that bound States, but intended to put forth the responsibility and the liability of States in case they violate their obligation under *inter-alia* treaty or customary law.

Thus to prove the responsibility of States, one must fulfil each ingredient provided by ARSIWA for this purpose. Article 1 of ARSIWA dictates that every internationally wrongful act of a State entails the international responsibility of that State.[304] The Permanent Court of International Justice (PCIJ)[305] and the International Court of Justice (ICJ)[306] have regularly applied the principle set forth under Article 1. Now the first question that arises is what exactly constitutes an internationally wrongful act of a State. Article 2 of ARSIWA provides two conditions that make up an internationally wrongful act. It states that an internationally wrongful act occurs if either an act or an omission of a State:

i. is directly attributable to the State under international law; and
ii. constitutes a breach of an international obligation of the State.[307]

The existence of the word "and" between the elements dictates that both conditions must be fulfilled for an act to be considered as "internationally wrongful". These elements were dealt with in detail by both the PCIJ[308] and the ICJ[309] in landmark cases.

A State is a real entity recognised by international law. However, a State, being a non-living entity cannot act on its own. An act of a State has to entail an act or omission by a human being or a group of human beings. States can act only by and through their agents and representatives.[310] The question that arises now is which persons can be considered as agents

[303] Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission to the General Assembly, GOAR, 53rd Sess., Supplement No. 10 (A/56/10), chp. IV. E. 1 (2001) [ARSIWA];
[304] *Id*. Art 1.
[305] Phosphates in Morocco, (Ita. v. Fr.), Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28 [Phosphates in Morocco]; Factory at Chorzów, (Ger. v. Pol.) Jurisdiction, Judgment, 1927, P.C.I.J., Series A, No. 8, p. 21 [Chorzow Factory].
[306] Corfu Channel Case, (U.K. v. Alb.), Merits, Judgement, 1949 I.C.J. 4, (9 April 1949) at p. 23; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgement, 1986 I.C.J. 14, (27 June 1986) at p. 142, ¶149, 283, 292 [US-Nicaragua]; Case Concerning the Gabčikovo-Nagymaros Project, Judgement (Hung./Slov.), 1997 I.C.J. 7, (25 September 1997), at p. 38, ¶47. [Gabcikovo-Nagymaros]
[307] ARSIWA, *supra note* 1, Art. 2.
[308] Phosphates in Morocco, *supra* note 3.
[309] United States Diplomatic and Consular Staff in Tehran, Judgment, 1980 I.C.J. 3, (24 May 1980) at p. 29, ¶56.
[310] German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6, p. 22.

or representatives of States, whose acts will bind the State under international law. Article 4 of ARSIWA clarifies this query. It states that the conduct of an organ of a State shall be considered as an act of that State whether such organ exercises legislative, executive judicial or any other function irrespective of the organ's position or character in the organisation of the State.[311] An organ of a State means any person or entity which has such status in accordance with the internal law of that State.

The ICJ in Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights said that according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State and that this rule is of a customary character.[312] This attributability not only flows from organs of a State under internal law but also from persons or entities exercising elements of governmental authority, organs placed at the disposal of a State by another State, conduct of organs or persons or entities exercising governmental authority even if they exceed such authority or contravene instructions, conduct directed or controlled by State, conduct carried out in the absence or default of the official authorities or conduct of an insurrectional or other movement and conduct acknowledged and adopted by a State as its own.

Integrating what has been discussed above to the current pandemic the article will now discuss China's responsibility in the current situation.

Internationally Wrongful Act

The first ingredient to attract any form of State responsibility under ARSIWA is an internationally wrongful act which is committed when a State breaches its international obligation. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.[313] For the conduct of any State to be inconsistent with an international obligation, the conduct should be contrary to an international obligation arising from an applicable rule or principle of international law whether such rule is imposed by customary law, treaty or a decision of an international organisation. This is now a well-established principle which was first affirmed by the PCIJ in 1927 in the S.S. Lotus Case[314].

[311] ARSIWA, *supra* note 1, Art 4(1).
[312] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, (29 Apr.il 1999) at p. 87, ¶62.
[313] ARSIWA, *supra* note 1, Art 12.
[314] S.S. "Lotus" Case (Fr. v Tur.), Judgement, 1927, P.C.I.J. Series A, No. 10, p. 5.

Thus to fulfil the criteria for liability under ARSIWA, China must be in breach of at least one international obligation. This section of the article will examine both customary law and treaty violations by China with reference to the current pandemic situation.

1. The Precautionary Principle

The Precautionary Principle is one of the pillars of environmental law all over the world. There are various definitions of the principle in modern times, but the origin of the principle can be traced back to 1974 in Germany via a law that was passed for securing clean air. The principle of precaution commands that the damages done to the natural world (which surrounds us all) should be avoided in advance and in accordance with opportunity and possibility.[315]

The Rio Declaration 1992, which is one of the most important documents on environmental law provides for the precautionary principle as "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation".*[316]

The European Union's communication on the precautionary principle explained the principle as, *"The precautionary principle applies where scientific evidence is insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen by the EU."*[317]

The precautionary principle has etched itself into customary environmental law and is now one of the most important principles, regularly used in disputes in international courts. The Statute of the International Court of Justice defines customary international law as "evidence of general practice accepted as law".[318] The ingredients that form a custom have been explained by the ICJ in the Nicaragua Case and the Continental Shelf Case.[319] According to the ICJ, customary international law is formed when States follow a practice in an extensive and virtually uniform

[315]The Precautionary Principle, UNESCO World Commission on the Ethics of Scientific Knowledge and Technology, 2005 [UNESCO on PP].

[316]United Nations Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, Princ. 15, U.N. Doc. A/CONF.151/26/Rev.1 (1992) [Rio Declaration].

[317] Commission of the European Communities, Communication from the Commission on the Precautionary Principle, 2000 at p. 13.

[318] Statute of the International Court of Justice, Art. 38 ¶1(b), T.S. 993 (1945).

[319] Continental Shelf (Lib./Mal.), 1985 I.C.J. 13, (3 June 1985) at 29, ¶27; US-Nicaragua, *supra* note 4 at p. 97, ¶183.

manner (State Practice) and this practice is followed by the States as if it is obligatory to do so under international law (Opinio Juris). Evidence of State practice and opinio juris primarily stems from treaties, decisions of international and national courts and domestic legislation. The primary sources are generally supplemented by declarations, opinions and statements of States in international forums like the UN General Assembly, meetings of the International Law Commission, correspondence between States, etc.

The precautionary principle has been included in various treaties on climate change[320], environmental protection and biodiversity[321] and atmospheric and marine pollution[322]. Overall, this principle has been enshrined in over 90 international declarations and agreements[323], thus showing widespread ratification and acceptance of the precautionary principle as a rule of law. As far as domestic law in concerned, the principle has been incorporated in German[324], Belgian and the Nordic Countries[325] (Denmark, Norway, Sweden, Finland and Iceland), Australian[326], Canadian[327] and Indian[328] domestic laws, to name a few.

The international courts have also been firm on the use of this principle. The ICJ has applied the precautionary principle famously in the Gabcikovo-Nagymaros Project case[329], the French Underground Nuclear Test case[330] and the Aerial Herbicide Spraying case[331]. Various States have regularly invoked this principle as a norm of general international law in proceedings

[320] Second World Climate Conference Oct. 29 - Nov. 7, 1990, Ministerial Declaration (1990); Framework Convention on Climate Change 1992, 31 ILM 849.

[321] United Nations Convention on Biological Diversity. 31 ILM (1992); Rio Declaration, *supra* note 4; United Nations Conference on the Human Environment, June 5-16, 1972, Stockholm Declaration on the Human Environment, Princ. 15, U.N. Doc. A/CONF.48/14/Rev.1 (1973) .

[322] United Nations Conference on Environment and Development, Agenda 21, (1992); Convention on the Protection of the Marine Environment of the Baltic Sea Area. OJ L73 20 (1994), Art. 3, ¶2.

[323] L Bonkourt; Principle of International Environmental Law: Precautionary Principle; (2007) 7 Review of International Environmental Law, p.3.

[324] Gesetz zum Schutz vor schaedlichen Umwelteinwirkungen durch Luftverunreinigungen, Geraeusche, Erschuetterungenund aehnliche Vorgaenge (Bundes-Immissionsschutzgesetz–BImSchG). Vom 15. Maerz 1974 (BGBl I S. 721, 1193), Art. 5, par. I.2.

[325] Arie Trouwborst, Implementing the Precautionary Principle: Approaches from the Nordic Countries in Review of European Community & International Environmental Law (Nicolas de Sadeleer ed., 2008).

[326] Environment Protection Act, 1993. Sec. 10, par 1b.

[327] Environmental Protection Act, Para 2(1/a).

[328] Vellore Citizen Welfare Forum v. Union of India, AIR 1996 SC 2715; M.C. Mehta v. Union of India, AIR 1997 SC 734; Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.

[329] Gabcikovo-Nagymaros, *supra* note 4.

[330] Nuclear Tests (NZ. v. Fr.), Judgement, 1974 I.C.J. 457, (20 December 1974).

[331] Aerial Herbicide Spraying (Ecu. v. Col.), Order, 2013 I.C.J. 278, (13 September 2013).

before the International Tribunal for the Law of the Sea (ITLOS), *inter-alia* in the MOX Plant Case[332], the Southern Bluefin Tune Case[333] and the Land Reclamation Case[334].

Based on the above evidence, it can be concluded that the precautionary principle has now been enshrined into the realm of customary international law.

Furthermore, one of the crucial ethical foundations of the precautionary principle is culpable ignorance. This concept can be used in three different ways, one of which is its use in order to hold a person, firm or a State culpable for any damage they may have caused even if they did not know that damage would follow their action. This is because people have a moral responsibility to make an effort to find out whether their actions might lead to damage. Ignorance is considered blameworthy when an action is taken that is or could have been disastrous, even if, due to chance, no actual damage follows the action. What is blameworthy is not that one was ignorant, but that one did not make an effort to reduce that ignorance.[335]

2. 2005 International Health Regulation

The International Health Regulations (IHR) was first introduced by the WHO in 1969 to help monitor and control four serious diseases that had significant potential to spread between countries. Over the years, the regulations underwent several modifications and additions and the third edition of the regulations was released in 2005.

Article 2 of the 2005 regulations states that the purpose of the IHR is to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.[336] Further, according to the WHO, the IHR are not limited to specific diseases but apply to new and ever-changing public health risks and they are intended to have long-lasting relevance in the international response to the emergence and spread of disease.[337]

China being one of the 194 States party to the IHR is legally bound by the obligations and the directives given by the regulations. Furthermore, China's declaration under the regulations displays its intention to be bound by and implement the directives given under the IHR.[338]

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[332] MOX Plant Case (Ir. v.U.K.), 126 I.L.R. 310 (2003).
[333] Southern Bluefin Tuna (Aus. v. Jap. & N.Z. v. Jap.), 38 ILM 1624 (1999).
[334] Land Reclamation (Mal. v. Sin.) ITLOS Case No. 12, ICGJ 345 (2003).
[335] UNESCO on PP, *supra* note 13 at p. 18.
[336] World Health Organisation, International Health Regulations, (2005, 3rd ed.). [IHR]
[337] World Health Organisation, Strengthening health security by implementing the International Health Regulations (2005) available at https://www.who.int/ihr/publications/9789241580496/en/.
[338] IHR, *supra* note 34 at p. 62.

Article 6 of the IHR necessitates States to provide expedited, timely, accurate, and sufficiently detailed information to the WHO about the potential public health emergencies in order to galvanize efforts to prevent pandemics.[339] Article 7 requires States to provide all relevant public health information to the WHO if it has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern.[340] The WHO also gives a mandate in Article 10 to seek verification from States with respect to unofficial reports of pathogenic micro-organisms.[341] States are required to provide timely and transparent information as requested within 24 hours, and to participate in collaborative assessments of the risks presented.[342]

Thus it is now clear that China's obligations with regard to the current pandemic stem from the customary Precautionary Principle and the legally binding IHR.

Now hereunder, this article will examine how China has breached its abovementioned obligations.

3. Breach of the Precautionary Principle

The first reports of the existence of coronavirus came in on December 26, 2019 when an anonymous lab technician who claimed to work at a lab contracted by hospitals said that his company had received samples from Wuhan and reached a stunning conclusion as early as the morning of Dec. 26. The samples contained a new coronavirus with an 87 percent similarity to SARS, or severe acute respiratory syndrome.[343]

Thereafter, Li Wenliang, an ophthalmologist at Wuhan Central Hospital, raised a red flag in an online chatroom on the 30th of December. Li and other medical professionals who tried to disclose the emergence of the virus were suppressed or jailed by the Chinese regime.

On Jan. 1, the state-run Xinhua News Agency warned, "The police call on all netizens to not fabricate rumors, not spread rumors, not believe rumors." Four days after Li's chatroom discussion, officers of the Public Security Bureau forced him to sign a letter acknowledging he

[339] *Id.* Art. 6.
[340] *Id.* Art. 7.
[341] *Id.* Art. 10.
[342] *Ibid.*
[343] The Washington Post, Early missteps and state secrecy in China probably allowed the coronavirus to spread farther and faster available at https://www.washingtonpost.com/world/2020/02/01/early-missteps-state-secrecy-china-likely-allowed-coronavirus-spread-farther-faster/.

had made "false comments," and that his revelations had "severely disturbed the social order."[344]

Thus China supressed the news of the emergence of a new virus and failed to inform the world community, any global forum or its neighbours of this potential pandemic.

Further China did not meet the requirements of the precautionary principle by not applying measures to keep the spread of the virus in check and causing harm to human environment. Even though the "wet markets" in China were closed, the government did not take steps to stop wildlife trade. On Dec. 31, the Wuhan Municipal Health Commission falsely stated that there was no human-to-human transmission of the disease, which it described as a seasonal flu that was "preventable and controllable."

By the end of January 2020 the virus had infected more than 570 people, but China continued to supress information, at times even more aggressively. On Feb. 1, the *New York Times* reported that "the government's initial handling of the epidemic allowed the virus to gain a tenacious hold. At critical moments, officials chose to put secrecy and order ahead of openly confronting the growing crisis to avoid public alarm and political embarrassment."[345]

4. Breach of the IHR

China also failed to fulfil its obligations under the IHR. Firstly, China failed to share any information with the WHO, expeditiously. China waited until the 14th of February, almost 2 months into the crisis to disclose to the WHO that over 1700 healthcare workers had been infected. Even after repeated requests by the WHO, China did not provide clear and accurate information, thereby obstructing the WHO from drawing up plans to tackle the virus and its spread.[346] Secondly, China rejected repeated offers of epidemic investigation assistance from the WHO in January and the U.S. Centers for Disease Control and Prevention in early February, without explanation.

Thus China clearly breached Article 6, 7 and 10 of the IHR 2005. Further it is also pertinent to note that similar actions by China of supressing and withholding important information during the 2002 SARS crisis had led the WHO members to adopt the IHR 2005.

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[344] Texas National Security Review, War on the Rocks, China is Legally Responsible for Covid-19 Damage and Claims Could Be in the Trillions available at https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/. [War on the Rocks]

[345] *Ibid.*

[346] The Washington Post, World Health Organization: China not sharing data on coronavirus infections among health-care workers available at https://www.washingtonpost.com/world/asia_pacific/world-health-organization-china-not-sharing-data-on-health-care-worker-coronavirus-infections/2020/02/26/28064fda-54e4-11ea-80ce-37a8d4266c09_story.html

A research conducted by the University of Southampton, UK found that had China acted efficiently one, two or three weeks early, the affected cases could have been reduced by 66%, 86% and 95% respectively.[347]

From the above facts and evidence, it is clear that China has breached its international obligations under the precautionary principle of international environmental law and the International Health Regulations 2005 by its actions in reference to the Covid-19 pandemic.

Act Attributable to State

The second and final element for culpability under ARSIWA is that the act of the State which causes breach of an international obligation should be attributable to that State. The breach by China under the precautionary principle as well as the IHR flows from the failure of the Wuhan local authorities, right up till the President of China, Xi Jingping which are all organs of the State performing executive duties in the governmental structure, to take immediate steps to inform the world community about the virus and take action individually and in cooperation with other States. The concept of local authorities falling within the purview of Article 4 was recognised by various States in the 1930 Hague Conference[348]. This principle subsequently gained widespread judicial recognition in the decisions of the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise*[349] case and the ICJ in the LaGrand case[350].

In arguendo, even if China were to disavow conduct by local authorities or state media as not necessarily directly attributable to the national government, such actions nevertheless are accorded that status if and to the extent the state acknowledged and adopted the conduct as its own, as was done by the officials in Beijing.[351]

Thus China's inaction falls well within the purview of attributability given under Article 4 and Article 11 of ARSIWA.

III. Liability under International Law

As it has been discussed above, ARSIWA aims to codify *inter-alia* the rules to penalise States who have committed an internationally wrongful act. The in-depth discussion in the previous section has sufficiently shown that China has committed an internationally wrongful act. Once

[347] Shengjie Lai *et. al.*, Effect of non-pharmaceutical interventions for containing the COVID-19 outbreak in China, Nature Research Journal (4 May 2020).

[348] League of Nations Conference for the Codification of International Law, March 13 – April 12, 1930, Bases of Discussion for the Conference drawn up by the Preparatory Committee: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners, p. 90, C.75.M.69.1929.V.

[349] Heirs of the Duc de Guise, 1951 13 R.I.A.A. 150, at p. 161, Sales No. 64.V.3 (15 September 1951).

[350] LaGrand (Ger. v. U. S.), Provisional Measures, 1999 I.C.J. 9, (3 March 1999) at p. 16, ¶28.

[351] War on the Rocks, *supra* note 42.

any act that has been committed is against an established law, it invites repercussions. These repercussions have been enshrined in ARSIWA.

Article 31 requires states to make full reparation for any injury caused due to an internationally wrongful act.[352] Injuries include damage, both material and moral. This requirement and responsibility of States was observed by the ICJ in the Chorzow Factory case when it noted that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."[353] The court further went on to say that the responsible State must endeavour to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[354]

Article 34 further goes on to explain that reparation includes restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of chapter II of ARSIWA.[355] Restitution means that the injured state is to be placed in the same position as it was in before the wrongful act was committed or as if the wrongful act had never been committed. In case restitution is not possible, States are obligated to compensate the affected States for the damage caused under Article 36.[356] Compensation should include all assessable financial damage including loss pf profits. Although satisfaction has been provided as a remedy, it is generally used in cases where the damage is of a non-material nature, such that it cannot be mathematically assessed.[357] In some cases, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act is also sought.[358]

Thus China is legally responsible to the whole of the world community for the widespread loss, damage and injury, both infrastructural and financial caused by its inaction, negligence and wilful default in honouring its obligations under the customary precautionary principle and the binding 2005 IHR.

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[352] ARSIWA, *supra* note 1, Art 31.
[353] Chorzow Factory, *supra* note 3.
[354] *Id.* at pg. 47.
[355] ARSIWA, *supra* note 1, Article 34.
[356] *Id.* Art. 36.
[357] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, 1990 20 R.I.A.A. 215, Sales No. E/F.93.V.3 (30 April 1990); *Magee* case, M. M. Whiteman, Damages in International Law 221 (Vol. I, 1937).
[358] "Chronique", RGDIP, vol. 80 (1976, p. 257.

IV. CONCLUSION

It is pertinent to note that although it is undeniable that China has committed an internationally wrongful act, it will not wilfully fulfil its obligations or undertake the steps given under ARSIWA to pay reparations. This brings up the issue whether injured States can approach the ICJ to get appropriate relief. Although international law does dictate that States may bring disputes before the ICJ or other relevant tribunals, it itself imposes that restriction that States cannot be forced to appear before ICJ without free consent.

Even though the situation looks bleak in terms of courts and tribunals, ARSIWA does provide some relief to the injured States. It states that affected States can take countermeasures against the guilty State but only in order to induce that State to comply with its obligations and debts.[359] Article 50 and 51 of ARSIWA imposes restrictions on such countermeasures by dictating that such measures should be proportionate to the injury caused by the wrongful act[360] and cannot be in breach of the obligation not to use or threaten to use force, obligation to protect fundamental rights and other binding obligations under international law[361]. One example of countermeasures is the economic sanctions that have been imposed on China by USA, Japan, South Korea and Russia and recently by India.

Therefore, States are bound by the obligations put on them by international law, and any breach of such obligations that is attributable to them bring about some liability under this law, which may take the form of reparations by the culpable State or countermeasures by the injured State.

[359] ARSIWA, *supra* note 1, Art. 49.
[360] *Id.* Art. 51.
[361] *Id.* Art. 50.

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GENDER PERSPECTIVES TO ELECTRICITY ACCESS IN INDIA: CRITICAL APPRAISAL OF LEGAL AND POLICY FRAMEWORK

- **AKASH SHUKLA**

INTRODUCTION

Energy access remains a quintessential factor for ascertaining the human development and overall growth. Access to energy is also a significant pointer in the socio-economic growth of a state. At the International forefront, it has been recognized that development has a direct connection to Energy, however, the link between access to modern energy facilities and poverty was relatively slow in its recognition and acceptance.[362] Not until late 2015 the international community had a consolidated plan for making clean and modern energy sources available to poor households across the globe. Sustainable Development Goal 7, out of total of 17 goals adopted by the UN General Assembly in September 2015, aims at correcting the imbalance by providing universal access to affordable, reliable, and modern energy services by the year 2030. There is no universally accepted definition of 'Energy Access', but, various prominent international organizations and authorities have defined the term. The International Energy Agency has defined 'Energy Access' as " a household having reliable and affordable access to both clean cooking facilities and to electricity, which is enough to supply a basic bundle of energy services initially, and then an increasing level of electricity over time to reach the regional average".[363] Thus energy access is generally understood from the unit of an individual household in a country. The definition incorporates two basic sources of energy, i.e., (i) clean cooking facilities (ii) reliable supply of electricity. These two sources are regarded as basic components which give access to other facilities which are required for overall human development. As per the latest review of India's Energy policies by the International Energy Agency, India has indeed made significant strides towards making electricity available to most of the rural population through Pradhan Mantri Sahaj Bijli Har Ghar Yojana. Also, India's energy policies have kept a dynamic outlook in order to incorporate the ever increasing demand for energy in the country. Despite the initial success of the LPG subsidy policy initiated by the union government in 2015, there are still millions of rural households that are relying on

[362] Joy Clancy, Gender Equity in Access to and Benefits from Modern Energy and Improved Energy Technologies: World Development Report Background Paper.
[363] https://www.iea.org/articles/defining-energy-access-2019-methodology.

traditional and unclean fuel sources.[364] Apart from the major health issues, traditional fuels lack the longevity as compared to a stable grid connection.

As a result, women in rural India face the direct health consequences of usage of such traditional and primitive fuels since household management is entirely a female role in rural areas. Also, women have to spend hours walking and collecting these fuels from nearby forest areas close to their dwellings. Even though access to electricity and other vital energy sources has been legally recognized and incorporated as a facet under the wide umbrella of Article 21 of the constitution, still, there remains a huge gender gap in the access of these energy sources and how they are utilized.

Rural Electrification Framework under Electricity Act 2003

The Electricity Act 2003 is the premier legislation in India which regulates the Generation, Transmission, Distribution and usage of electricity in the country. For the purpose of this article, the most relevant provisions of the legislation can be found in Part II of the Act. Section 3 of the legislation empowers the central government to formulate National electric and Tariff policy in consultation with the state government and Central Electric Authority. Section 4 and Section 5 of the act provide that the central government shall formulate national policy for providing standalone systems in rural areas for rural electrification. Previous governments have implemented a lot of policies under the above-mentioned provisions to electrify rural areas in India, however, current government's Saubhagya scheme has found the most success. As per the latest data available with the Ministry of Power, about 84% of the Indian villages have been electrified and the scheme aims to provide electricity to the remaining households[365]. However, there is a lacuna in the method adopted by the government to record the data, which does not depict the picture in entirety.

The main issue with the 'Saubhagya' Scheme and the data depicted by the authorities is the definition of an 'electrified village'. The government deemed it unnecessary to alter the definition of 'electrified village', sticking to the problematic definition which has to be phased out. Electrified village, as per the official definition, is a village which has; (i) provision of basic infrastructure such as distribution transformers and lines in inhabited localities, (ii) provision of electricity in public places like schools, panchayat office, health centers,

[364] Jain, A., Urpelainen, J., Stevens, L., (2016), Energy Access in India, Rugby, UK: Practical Action Publishing, http://dx.doi.org/10.3362/9781780446639.

[365] Rural Electrification in India: Looking Beyond 'Connections for All' to 'Power for All', http://prayaspune.org/peg/publications/item/download/936_2c5df44488a35961e6c2542d81c795d9.html.

dispensaries, and community centers, and (iii) at least 10% of the total number of households in the village are electrified[366]. Thus, a village is considered as electrified even if 90% of the households in the village do not have electricity as long as 10% households do, as per the current definition. This inherent policy issue is one of the major reasons why access to energy for women remains at low thresholds. Lack of electricity to majority of households mean the entirety of women residing in those houses do not have any or substantial access to electricity, and, in even in the 10% electrified households, women find it very hard to gain access, enough to substantially utilize electricity for growth, due to pre-defined gender roles of the rural society.

Rights based framework for Energy Access and where it becomes inadequate

State sovereignty is a foundational principle of public international law. The principle recognizes an individual state's right to exert complete and independent control over its territorial jurisdiction. In the 17th session of the United Nations General Assembly[367] the concept of sovereignty was incorporated with respect to the natural resources found within the boundaries of a state. Furthermore, from specifically India standpoint, apex court of India in *Centre for Public Interest Litigation v Union of India*[368], expanded the concept by highlighting that common law recognizes a state's ownership and authority to protect natural resources insofar as the resources are within the interest of general public. The Supreme Court in the aforementioned case gave exclusive proprietary interest of the natural resources vested within the jurisdictional boundaries to state, in only the capacity of a trustee of such resources. Thus, as per the apex court's understanding the resources are administered by the state in the capacity of a trustee for the benefit of the general public which, by the constitution is designated as the 'owner' of such resources.

Moreover, speaking specifically about Electricity access, the Supreme Court in *Molay Kumar Acharya case*[369] declared access to Electricity as a facet under the umbrella of Article 21. Stating that electricity access has become paramount in modern times and survival without stable electricity access is inconceivable. However, the aforementioned precedent, was answered from the perspective of a tenant residing in an urban locality recognized under the

[366] "Office memorandum: Deendayal Upadhyaya Gram Jyoti Yojana", Ministry of Power, December 3, 2014, http://powermin.nic.in/rural_electrification/pdf/Deendayal_Upadhyaya_Gram_Jyoti_Yojana.pdf.
[367] https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII)
[368] 2012(1) CGBCLJ 209.
[369] Molay Kumar Acharya v. Chairman – cum – manager, W.B. State Electricity Distribution Co. Ltd., 2008 (3) CHN 27.

local development authority. Thus, the decision was from the perspective of an urban household and stated that anybody residing or in possession of a property has a right to stable electricity connection. This precedent does not talk about universal access to electricity, especially for the people residing in rural areas, as a facet of fundamental right.

Even in landmark cases like *TM Prakash*[370], where the Madras High Court put the right to have access to electricity parallel to the right to education and declared it as part of basic human right which can be enforced by way of a writ of mandamus, incorporating it as a right for people who were in position to enforce it, did not talk about universal access for those who can't call for its enforcement. The judgement was delivered in favor of people who were residing in government land and it stated that for people occupying government land a stable electricity connection can be claimed by way of a writ of mandamus. Thus, electricity access as part of Right to life is qualified by the context of an urban dwelling and lacks universal undertones. This poses a serious challenge in alleviating the conditions of the rural households, especially rural women, who despite being given basic level electricity access, post 2015, are unable to utilize that for personal growth and development due to gender gap in usage. In a recently published study, regarding gender dynamics in electricity access, 96% of the rural women suggested that access to electricity makes it easier to engage in their work and 91% reported being able to work longer into the night. Also, answering the same questionnaire, 57% of rural women in the study reported less time spent on doing household work and that electricity access allows them to focus on personal growth and leisurely activities. 70% of them reported having access to more information sources.[371]

From the aforementioned figures of the survey conducted, it becomes apparent that access to electricity drastically improves the number of opportunities for rural women to focus on personal growth. As per the figures of the Ministry of Micro, Small and Medium Enterprises, 30% of the project set up under the PMEGP[372] scheme are set up by women, thus having stable, reliant and continuous access to electricity can help foster the growth of women entrepreneurship in rural India.

Barrier's to realize women's rights to energy access

[370] T.M Prakash v The District Collector and The Superintending Engineer, Tamil Nadu Electricity Board, (2014) 1 MLJ 261.
[371] Rosenberg, M., Armanios, D.E., Aklin, M. et al. Evidence of gender inequality in energy use from a mixed-methods study in India. Nat Sustain 3, 110–118 (2020). https://doi.org/10.1038/s41893-019-0447-3.
[372] Prime Minister's Employment Generation Programme.

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Alleviation of energy poverty has been at the center of many developing countries' national energy policies. People deprived of access to basic energy services are; unable to stay healthy, do not have time to spend on learning and personal growth and are less likely to earn a living. It is a harrowing fact that women, across all the major developing economies are the worst hit from energy poverty, and they experience energy poverty differently and more severely than men.[373] Access to energy, to a substantial extent, is gendered, being determined by intra households decision making, societal roles and social position of women in rural societies.

Gender analysis in terms of energy access encompasses two criteria: (a) access and control over resources, (b) gender needs and interests. Both the criteria, reflect severe disproportions against women, it is estimated that 70% of the approximately 1.3 billion people living in poverty are women, many of whom live in female headed households in rural areas.[374] Because of the pre-defined gender roles, women and girls assume a higher proportion of the burden of unavailable energy services and inefficient energy use.[375] Women have to spend a significant amount of time in collection of inefficient fuels and are susceptible to various health hazards. As a consequence of this women lose out on time which can be utilized for income producing activities and for improving education levels.[376]

Along with societal roles, national policy decisions with respect to allocation of scarce energy resources is another barrier in achieving a gender-neutral policy. Women experience severe discrimination in energy sector which is predominantly considered as a male dominant industry.[377] Many studies have found out that electrification projects have not benefitted men and women equally, these projects have been directed to activities that are of more benefit to men, and in some cases children, rather than provision of stable modern cooking fuels and appliances.[378]

There is very less value attached to the fuel collection work done by women from an economic perspective, as a result the harmful consequences of such work are not recognized to an extent which can actually help to alleviate the conditions of women. Female contribution in the

[373] Katrine Danielsen, Gender equality, women's rights and access to energy services, Ministry of Foreign Affairs Denmark
[374] Beatrice Khamati-Njenga and Joy Clancy, Concepts and Issues in Gender and Energy (2002) 35
[375] Jyoti Parikh and Saudamini Sharma, Mainstreaming Gender in Energy Policy, Integrated Research and Action for Development.
[376] Gail V Karlsson (ed), Generating Opportunities: Case Studies on Energy and Women (United Nations Development Programme, 2001) 7
[377] Daniel Theuri, 'Access to Modern Energy Services: The Gender Face of Energy Technologies' (2007) 10(1) Energia 16.
[378] Joy Clancy and Mariëlle Feenstra, How to Engender Energy Policy (ENERGIA Technical Briefing Paper, December 2006) 7.

MSME sector is often overlooked as a result of which the end result of energy policies fails to benefit small and micro businesses managed by rural women, as a result, state economy losses out on a substantial amount which can significantly improve rural economies. Control over land and property is a big factor when it comes to utilizing energy. Women, especially in rural areas have control over household activities but that is the extent of the control exercised by women and without any substantial control over land or property, energy facilities are not being able to utilized by women in ways which can help ameliorate primitive conditions of the households and also alleviate personal growth levels.

WHAT CAN BE DONE?

In TM Prakash[379], Justice S Manikumar highlighted the importance of having access to energy with respect to poverty and development. He famously ruled that lack of electricity affects education and health and is a cause of large economic disparity, and consequently, inequality in society leading to poverty. Coverage of all households have been inculcated as an objective under the national policy and legal system, however, when it comes to talking about power as a fundamental right for all citizens, it as also about quality of power, affordability and reliability, as is mere access. Thus, in order to have the end result of access being beneficial for both men and women focus should shift to access to reliable power as fundamental right rather than mere access as a fundamental right.

Along with Jurisprudential change in the understanding of electricity access as a fundamental right, an immediate change in the definition of 'Electrified village' is quintessential so as to effectively compliment the above-mentioned rights-based changes. The definition of an electrified village, which sets the criteria to a meagre 10% households, is one of the main reasons why many rural households still are not receiving electricity. Since the Electricity Act gives ample authority to state government as it does to central, in order to govern and monitor provision of electricity in respective states, this definition creates an opening for misuse by the authority in order to save costs.

The revered Saubhagya scheme undoubtedly has achieved significant success in providing an electricity connection to millions of households in India. Due to the bar being set so low by previous governments in terms of providing electricity connection that saubhagya really feels like an attempt of redemption to alleviate the rudimentary conditions in rural India, so much so that many international organizations have recognized the scheme as being at the forefront of

[379] Supra Note 9.

ISSN: 2581-6349

upholding SDGs (Sustainable Development Goals) in the developing world. However, the goal of gender equitable access will only be truly achieved by mainstreaming gender into state policies. Gender mainstreaming is defined as;

"Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality"[380]

Gender mainstreaming is thus focused on assessing the actual impact of policies on men and women rather than just ensuring formal equality and non-discrimination. The argument in favor of gender mainstreaming in energy sector is that previously it has been successfully implemented in health and education sectors across countries and in India as well. The focus so far has been restricted to providing clean cooking access, which in itself is a positive step considering the primitive conditions existing prior to such change, however, associating women solely with the echelons of cooking and household activities reflects that our policies and programmes are still informed by historical discourses on gender roles. These identify women in rural societies primarily with reproductive and household care roles. The glaring issue with such policy outlook is that, in reality, Indian women comprise a significant portion of micro entrepreneurs. The role played by rural women in decentralized electricity is immense, wherein they undertake work like; (i) assembling circuit boards, (ii) creating solar lanterns, (iii) marketing these products in villages, (iv) post-harvest activities, preservation and packaging of farm produce. Therefore, providing an efficient and stable electricity connection to such micro entrepreneurs will have a two-fold effect, benefitting the economy by generating more money and directly benefiting rural women.

State policies are often driven by the assumption that benefits of such social welfare policies will trickle down at all levels in society, benefiting all people regardless of social, cultural or economic barriers. Majority of these policies are supply driven and do not recognize demands which are not so explicitly visible in the society, this becomes a glaring barrier when it is coupled with the lack of recognition of the entrepreneurial role played by rural women. These

[380] Report of the Economic and Social Council for 1997, UN GAOR, 52nd sess, UN Doc A/52/3/Rev.1 (18 September 1997) 24.

factors need to be taken into consideration to create a more multidimensional ecosystem to integrate gender across all spheres of policymaking.

Conclusion

Rural electrification has come a long way in a rapidly developing India, doing so much in order to achieve the targets of the Sustainable Development goals. National policies have, over the time, improved their implementation to cover as much area as possible at a rate which is considered unprecedented in terms of providing rural households with electricity connections. Nation wide policy efforts like DDUGJY and 'Saubhagya' have pushed India at the forefront of providing energy access to the poor making it the leader in the global, electrification of rural household project in rural areas. The number of households with electricity access have increased over the last few years, however, along with such increase, the benefits of such access have not reached women at a rate that they have for men.

In order to ensure that the benefits of electrification policies and other social welfare policies benefit both men and women equally, there is a need to understand the gender impact of such policies and to recognize the roles played by rural women as micro entrepreneurs rather than mere household managers. This would, subsequently help in shifting the focus from supply driven policies to more demand driven policies. Along with policy changes, primitive definitions have to be changed since they have ended up creating loopholes which are getting exploited to save up state costs. The jurisprudence behind right to electricity as a fundamental right need to be changed if the above stated policy and definitional changes are to mean anything. It is imperative for the courts to shift the understanding of electricity access from mere access to affordable, reliable and stable electricity access. In order to really empower the rural women of the country, it has become quintessential for national electricity and energy policies to inculcate gender perspective in policy decisions in order to ensure energy justice for men and women alike.

ISSN: 2581-6349

ADAPTION FROM CIVILIZED NATIONS: JULIAN J ROBINSON V. THE ATTORNEY GENERAL OF JAMAICA

- SUYASH GAUR

ABSTRACT

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 the current case, the Supreme Court of Jamaica has expressly referred to Justice DY Chandrachud's opinion in ***Justice K.S. Puttaswamy (Retd.) and Another V. Union of India and Another***[381] famously known as Aadhar Card case, to declare the National Identification and Registration Act unconstitutional which was enacted in 2017, though was not enforceable yet. The Act aimed to provide national biological data banks for the effective enforcement of law. The Keywords, which can be used for the current research paper are, Chandrachud J; Skyes CJ; National Identification and Registration Act, Jamaica; DNA; Right to Privacy.

INTERNATIONAL CONVENTIONS, COMMISSION AND CONVENANTS SURROUNDING THE CURRENT CASE

DNA Commission of the International Society for Forensic Genetics

DNA Commission of the International Society for Forensic Genetics (ISFG) lays down the responsibility of the countries to maintain DNA banks in order to identify the disaster victims. Disaster are referred to as either man made which can be terrorist attacks, wars or they can be natural disasters such as earthquakes, volcano eruptions, tsunamis, cyclones, etc. Hence, in this regard there must be a DNA bank to identify the death bodies and issue death certificates and update international records of the country.

Universal Declaration of Human Rights, 1948

Under Article 12 of the Universal Declaration of Human Rights states, *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to*

[381] (2017) 10 SCC 1

attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

International Covenant on Civil and Political Rights, 1966

Under Article 17 of the International Covenant on Civil and Political Rights states,

1. *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks."*

BACKGROUND OF THE ACT CHALLENGED

In the present case, Julian Jay Robinson, a Member of Parliament of Jamaica approaches the Supreme Court of Jamaica for the constitutionality of *National Identification and Registration Act, Jamaica*. The Act deals with a uniform system followed for maintaining the records and identification process of all the citizens in the country. This is aim to be achieved by taking the records of all the medical evidences such as biometrics, fingerprints, eye colour and DNA.

These will be maintained by all the banks, which will be maintained by the Central Government. The act also provides authority to any public or private body to ask for the National Identification number granted to a person and the individual would be bound by the law to produce the same on demand.

Hence, the act was challenged on the ground of constitutionality as it directly invades into the privacy of the individual. In Jamaica the Private Security Regulation Authority Act, 1992 was passed which provides right to every individual for privacy of his home and family life. A Private Security Regulation Authority was passed to ensure the same under the act. Further, Jamaica is also bound by the Universal Declaration of Human Rights, which is dealt in latter part of the paper.

PROVISIONS OF THE ACT CHALLENGED

The claimant who is a member of parliament and a member of the opposition party challenges the constitutional validity of the following provisions-

Section 4(2), which states, *"This Act shall not apply to persons who are entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act."*

Section 6(1) (e), which states, *"develop policies, procedures and protocols for the collection, processing, use and sharing of information contained in the database consistent with data protection best practices;"*

Section 15, which states, *"The Authority shall establish, maintain and operate in accordance with this Act, a consolidated national databank to be known as the National Civil and Identification Database for the collection and collation of identity information and demographic information regarding registrable individuals."*

Section 23, which states, *"The Authority shall, after entering an individual's identity information or demographic information in the database, assign to that individual a unique national identification number."*

Section 27(1), which states, *"A National Identification Card shall display the identity information pertaining to the individual to whom it has been issued as specified in the regulations."*

Section 30, which states, *"A National Identification Card remains the property of the Authority."*

Section 36(4), which states, *"The holder of the National Identification Card shall return his card to the authority fore with if the holder no longer falls within any of the following categories-*

a) *A citizen of Jamaica; or*
b) *A person who is ordinarily resident in Jamaica"*

Section 39, which states,

"(1) A requesting state may apply in writing to the authority requesting that the authority verify identification and the authority may grant the request but shall not disclose core biometric information of the individual.

(2) A requesting state entity shall ensure that any identity information of an individual that was obtained through its access to the database is only used for verification purposes.

(3) A requesting entity shall provide the individual submitting his identity information and demographic information to that requesting entity for verification, with the following details, namely-

a. That the requesting entity may seek to verify the information submitting by the individual by using the verification services provided by the authority; and

b. The uses to which the information received through its access to the database may be put by the requesting entity.

(4) A requesting entity that contravenes subsection (2) commits an offence and is liable to the penalty specified in relation to the offence in the fourth schedule."

Section 41, which states,

"(1) a public body shall require that a registered unsocial submit the national identification number assigned to him or the National Identification Card issued to him to facilitate the delivery to him of goods or services provided by the public body; and the registered individual shall comply with the request.

(2) A private sector entity may require that a registered individual submit the National Identification Number assigned to him or the National Identification Card issued to him to facilitate the delivery to him of goods or services provided by the private sector entity.

(3) This Section does not apply during a period of public disaster or emergency as defined in Section 20 of the Constitution of Jamaica or in any other situation that poses a threat to health or life."

Section 43(1), which states, *"The authority shall not disclose identity information stored in the database about any individual except where the identity information is disclosed-*

a) *pursuant to a request of the individual whose information is being disclosed;*
b) *to facilitate the identification of the bodies of unknown deceased persons;*
c) *to facilitate the finding or identification of missing persons;*
d) *subject to subsection (2), pursuant to an order of the court; or*
e) *where the Act authorises the disclosure."*

Section 60 (1), which states, *"The enactments specified in the first column of the Sixth Schedule are amended in the manner specified respectively in relation to them in the second column of the Sixth Schedule.*

(2) Each amendment shall be construed as one with the enactment specified in relation to the amendment."

CONTENTIONS OF THE CLAIMANT ON THE BASIS OF D.Y. CHANDRACHUD DISSENTING OPINION

The applicant while drawing the inference from the opinion of Chandrachud J, which stated-

- Once the biometric of the individual is compromised it is subject to exploitation forever as in the technological area there is not boundaries of stoppage.
- The privacy of the individual must be the first concern while passing such an act.
- During the collection the person must be informed about the procedure and rights of the individual so that there is not space of any fraudulent practice, which he may be subject to.
- Further once, the data must not be available to any third party enterprise at their disposal or if it is granted to them there must be a proper authorization if provided.
- The obtaining of biometrics is subject to hamper the dignity of the individual granted by the constitution. Technology cannot be subject to an exception to the rights granted by the constitution to every individual.
- In case of any breach or security invasion by any party, which result in misuse of the information, there is no effective punishment mechanism to set a precedent.
- Such an act imposes a potential threat to the safety of the individual.

OBSERVATIONS OF THE BENCH

Bench comprised of Skyes CJ, Batts J, Palmer Hamilton J. The Skyes CJ drew an inference from the opinion of Justice Chandrachud specifying that his lordship had clear view of all the dangers, which a citizen can be subject to if his personal information and details are put to misuse. Irrespective of the opinion taken by the other lordships of the bench, the Dr. Chandrachud J took a wider view and clearly understood the consequences, which would be followed by such a decision.

While considering and respecting the opinion of other judges, it is assumed by the Chief Justice

Skyes that except the Chandrachud everyone has failed to effective understand the implications of the decision.

Justice Batts while agreeing and referring the opinion of Chandrachud J stated that the learned judge analyzed effectively the challenged faced by the emergence of technology. Further he is able to effectively state the problems, which can occur if any private enterprise is able to access the details of the individual. The concept of commercial exploitation to gain unfair advantage and using for own benefit will provide a casualty toward the protection of individual's integrity.

Further, the bench collectively stated that the approach followed by the Hon'ble Supreme Court of India can be figured out from another case, that is, ***Modern Dental College & Research Centre v State of Madhya Pradesh,***[382] which established the following principles which could be considered while passing any act which may be challenged against right to privacy-

- The act must have a reasonable goal for the welfare of public at large.
- The measure must not have any negative impact on the right of any citizen. It must be equal and proportional.
- There must be adequate machinery for the fulfillment of the intent of the act.
- It must also protect the rights and freedom of the individual and not impose and unjustified constrains.

RATIO DECIDENDI BEHIND THE JUDGMENT

The Hon'ble Supreme Court while delivering the judgment referred to following reasons behind the judgment-

1. Insufficient safeguard and establishment of proper authority, mechanism to regulate the data collected.
2. There were no measures to prevent misuse of the data and make effective measures for preventing the same.
3. Compulsory taking of biometric data are against the will of the individual and hence against the right to privacy granted by the laws of the state.
4. There is no way to prevent any third party or outside party to a state by misusing the same as no justification or reasons are to be provided for obtaining the data.

[382] [2016] 7 SCC 353

5. Only the citizens of the state are under the obligation to provide the data to the public bodies. The foreign national are hence not bound under the act, therefore this clearly results into inequality.
6. The social scientists and all the policymakers behind the act must reconstruct the policies, which must establish the trust between the state and the citizens.

JUDGMENT

The Chief Justice declared the act unconstitutional on the ground that taking of biometric data is in violation of right to privacy. Justice Batts stated that Jamaica like India is surveillance state, which is a friend of the citizens and works for faster resolution for crimes. However such an act would be a danger to a brotherhood state. Further, Justice Hamilton stated that the act failed to provide safeguard to the citizens as the system provides no safeguards to the citizens and there is no effective regulation of such data from preventing any misuse.

Both Chief Justice Skyes and Justice Batts directly expressed their opinion based on the opinion of Chandrachud J. They clearly agreed with the shortcomings of the act and further declared it unconstitutional, void in favor and protection of the nation at large.

PERSONAL ANALYSIS OF THE CASE IN CONTEXT TO LAWS IN INDIA

The Constitution of India does not specifically express and explicitly mention the right to privacy under any of the Articles. However, it is assumed to provide right to privacy through Article 21, which can be depicted through various interpretations, and judgments passed by the courts of law. Article 21 states*," No person shall be deprived of his life or personal liberty except according to a procedure established by law."*

In ***PUCL v. Union of India,***[383] the Hon'ble Supreme Court expressly declared that Article 21 of the Constitutional includes right to privacy, as it is an essential of the personal liberty. Hence, it is deem to be enshrined and covered under the Article 21 of the Constitution by its wider interpretation. It is also the duty of the court to interpret the right to privacy of every individual as a fundamental right, which is provided to them by the supreme legislation.

[383] AIR 1997 SC 568

In ***R.M. Malkani v. State of Maharashtra,***[384] the Hon'ble Supreme Court held that where the personal telephone was tapped without authorization of the court, it was breach of privacy provided by the Article 21. Tapping a phone of an innocent person would be wrongful and the court protects the person.

Sometimes in the interest of public at large the Hon'ble Supreme Court has disregarded the right to privacy granted through interpretation as fundamental right to reach at a conclusion and punish the guilty offenders. This has served on the principle that to secure the justice, exceptions can be imposed on the fundamental rights.

In, ***Sharda v Dharampal,***[385] the Hon'ble Supreme Court observed that if everyone will start using Article 21 as a shield to avoid any medical tests where there is a high probability of the accusation, then it will be impossible to arrive at a decision.

In, **State of Bombay v. Kathi Kalu Oghad & Ors.,**[386] the Hon'ble Supreme Court stated that when a accused is made to provide his fingerprints or a signature or a specimen, he cannot be stated to provide self incriminating evidence and hence he cannot take protection under the right to privacy or protection against self incrimination provided under Article 20(3).

CONCLUSION

This is not the first time another country has directly referred to the opinion, precedent or judgment of another country. General principles of law recognized by the civilized states have been an essential for the evolution of law at international stage. They provide a fruitful guidance for the developing countries, which are still progressing to achieve impactful law and order in their country.

Article 38(1)(c) of the International Court of Justice states that the general principles of law recognized by civilized nations would be considered for the decision and guidance of the court. In the case of ***Netherlands V. Belgium***[387] popularly known as *Diversion of water from Meuse case*, the International Court of Justice applied the principle of estoppel. Further, in ***Barcelona Traction Case***[388]**,** the principle of estoppel was applied.

[384] 1973 SCC (1) 471
[385] (2003) 4 SCC 493
[386] 1961 AIR 1808
[387] [1937], P.C.I.J. (Ser. A/B) No. 70
[388] [1970] ICJ 1

ISSN: 2581-6349

Hence, to achieve the justice, equity and welfare of people at large the countries adopt the precedents and opinion, which they consider appropriate to achieve peace and justice.

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MARITAL RAPE IN INDIA- A LOST BATTLE

- **NANDINI TRIPATHY**

ABSTRACT

Both pillars of humanity i.e. Ladies and men have identical importance and function in creation and development of the humanity, but the ladies are sure to face several humiliations within the society. Despite various safeguards and protections available at the global in addition to at countrywide stage, before birth till final breath, girls are discriminated. The offences in opposition to girls are limitless as sexual harassment, dowry-dying, domestic violence, girl genital mutilation and so forth. Among different issues 'marital rape' may be very vital because it is not identified, till date, in our Indian criminal system as a criminal offense, which needs on the spot interest of the Legislature.

INTRODUCTION

Marital Rape refers to undesirable intercourse by means of a person along with his spouse obtained with the aid of pressure, chance of force, or physical violence, or while she is unable to present consent. Marital rape can be through the use of pressure best, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion with the aid of a husband in opposition to the wife where she is bodily and sexually abused.

Approximations have quoted that every 6 hours; a young married girl is burnt or beaten to dying or pushed to suicide from emotional abuse by using her husband. The UN Population Fund states that greater than 2/3rds of married women in India, elderly between 15 to 49 have been beaten, raped or compelled to offer sex. In 2005, 6787 cases were recorded of women murdered with the aid of their husbands or their husbands' families. 56% of Indian ladies believed occasional wife-beating to be justified.

Historically, "Raptus", the standard time period of rape become to suggest violent robbery, implemented to each property and individual. It turned into synonymous with abduction and a lady's abduction or sexual molestation, changed into merely the theft of a girl towards the consent of her mother or father or those with legal strength over her. The harm, satirically, was dealt with as a wrong against her father or husband, ladies being wholly owned subsidiaries.

The marital rape exemption may be traced to statements by Sir Mathew Hale, Chief Justice in England, at some stage in the 1600s. He wrote, "The husband can't be responsible of a rape committed via himself upon his lawful spouse, for by way of their mutual matrimonial consent

ISSN: 2581-6349

and agreement, the spouse hath given herself in type unto the husband, whom she cannot retract."

Not highly, therefore, married girls had been by no means the difficulty of rape legal guidelines. Laws bestowed an absolute immunity on the husband in appreciate of his wife, solely on the idea of the marital relation. The revolution commenced with women activists in America elevating their voices in the Seventies for elimination of marital rape exemption clause and extension of assure of identical protection to girls.

In the contemporary, studies suggest that between 10 and 14% of married women are raped by means of their husbands: the incidents of marital rape soars to one/third to ½ among clinical samples of battered girls. Sexual assault via one's spouse accounts for about 25% of rapes committed. Women who became high goals for marital rape are people who try to flee. Criminal fees of sexual attack may be induced through other acts, which may include genital touch with the mouth or anus or the insertion of gadgets into the vagina or the anus, all without the consent of the victim. It is a conscious manner of intimidation and assertion of the superiority of fellows over women.

Advancing nicely into the timeline, marital rape isn't an offence in India. Despite amendments, law commissions and new law, one of the most humiliating and debilitating acts isn't always an offence in India. A observe the alternatives a girl has to shield herself in a wedding, tells us that the law has been either non-existent or obscure and the entirety has simply depended on the interpretation with the aid of Courts.

Section 375, the provision of rape within the Indian Penal Code (IPC), has echoing very archaic sentiments, cited as its exception clause- "Sexual sex with the aid of guy together with his own spouse, the wife no longer being beneath 15 years of age, isn't rape." Section 376 of IPC gives punishment for rape. According to the segment, the rapist must be punished with imprisonment of either description for a time period which shall not be much less than 7 years but which may also expand to life or for a time period extending up to 10 years and shall also be at risk of first-rate until the lady raped is his personal spouse, and is not underneath 12 years of age, wherein case, he will be punished with imprisonment of both description for a time period which may additionally make bigger to two years with satisfactory or with each.

This section in handling sexual attack, in a very slim purview lays down that, an offence of rape inside marital bonds stands most effective if the spouse be less than 12 years of age, if she be among 12 to sixteen years, an offence is devoted, but, much less extreme, attracting milder punishment. Once, the age crosses sixteen, there may be no prison safety accorded to the spouse, in direct contravention of human rights rules.

ISSN: 2581-6349

How can the identical regulation offer for the felony age of consent for marriage to be 18 whilst protective form sexual abuse, only the ones up to the age of sixteen? Beyond the age of sixteen, there may be no remedy the lady has.

The wife's position has traditionally been understood as submissive, docile and that of a homemaker. Sex has been handled as obligatory in a marriage and additionally taboo. At least the discussion openly of it, hence, the notice remains dismal. Economic independence, a dream for plenty Indian women nevertheless is an undeniably important issue for being heard and respected. With the ladies being fed the bitter medication of being "suitable wives", to quietly serve and now not wash dirty linen in public, even counselling stays inaccessible.

Legislators use results of research studies as an excuse against making marital rape an offence, which shows that many survivors of marital rape, record flash again, sexual disorder, emotional ache, even years out of the violence and worse, they sometimes retain residing with the abuser. For those motives, even the modern-day record of the Law Commission has favoured to stick to its in advance opinion of non-recognition of "rape within the bounds of marriage" as one of these provisions may amount to immoderate interference with the marital relationship.

A marriage is a bond of agree with and that of affection. A husband exercising sexual superiority, by using getting it on demand and via any method viable, isn't a part of the group. Surprisingly, this isn't always, as yet, in any law e book in India.

The very definition of rape (phase 375 of IPC) needs change. The slim definition has been criticized by means of Indian and global ladies' and children corporations, who insist that inclusive of oral intercourse, sodomy and penetration through overseas items within the meaning of rape could now not had been inconsistent with nay constitutional provisions, natural justice or fairness. Even worldwide regulation now says that rape can be commonplace a s the "sexual penetration, not simply penal penetration, however also threatening, forceful, coercive use of force towards the victim, or the penetration via any item, but slight." Article 2 of the Declaration of the Elimination of Violence against Women consists of marital rape explicitly in the definition of violence in opposition to ladies. Emphasis on those provisions isn't always intended to tantalize, however, to offer the sufferer and not the criminal, the benefit of doubt.

Marital rape is unlawful in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia. Rape in any form is an act of utter humiliation, degradation and violation in preference to a previous concept of penile/vaginal penetration. Restricting a knowledge of rape reaffirms the view that rapists deal with rape as sex and not violence and as a result, condone such behaviour.

ISSN: 2581-6349

The significance of consent for every person decision cannot be over emphasized. A girl can defend her right to life and liberty, however no longer her body, within her marriage, that's simply ironical. Women so far have had recourse best to section 498-A of the IPC, dealing with cruelty, to defend themselves in opposition to "perverse sexual conduct with the aid of the husband". But, where is the standard of measure or interpretation for the courts, of 'perversion' or 'unnatural', the definitions inside intimate spousal family members? Is excessive demand for intercourse perverse? Isn't consent a sine qua non? Is marriage a license to rape? There isn't any solution, due to the fact the judiciary and the legislature were silent.

The 172nd Law Commission file had made the subsequent guidelines for significant trade inside the law with reference to rape.

1. 'Rape' must get replaced by the time period 'sexual assault'.
2. 'Sexual sex as contained in segment 375 of IPC must include all sorts of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. In the mild of Sakshi v. Union of India and Others [2004 (5) SCC 518], 'sexual attack on any part of the frame ought to be construed as rape.
4. Rape laws have to be made gender neutral as custodial rape of younger boys has been ignored via law.
5. A new offence, specifically phase 376E with the name 'unlawful sexual behaviour' need to be created.
6. Section 509 of the IPC become also sought to be amended, offering higher punishment where the offence set out in the said segment is dedicated with sexual motive.
7. Marital rape: rationalization (2) of section 375 of IPC must be deleted. Forced sexual intercourse by way of a husband along with his wife ought to be dealt with equally as an offence simply as any physical violence by a husband towards the wife is treated as an offence. On the same reasoning, section 376 A became to be deleted.
8. Under the Indian Evidence Act (IEA), while alleged that a sufferer consented to the sexual act and it's far denied, the courtroom shall presume it to be so.

A lot awaited Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has supplied civil remedies to what the supply of cruelty already gave criminal treatments, at the same time as retaining the repute of the problem of marital rape in continuing brush aside. Section three of the Domestic Violence Act, amongst different things inside the definition of home violence, has included any act inflicting harm, harm, whatever endangering health, existence, and many others., … mental, bodily, or sexual.

ISSN: 2581-6349

It condones sexual abuse in a domestic dating of marriage or a live-in, simplest if it's miles existence threatening or grievously hurtful. It isn't approximately the liberty of selection of a woman's desires. It is about the fundamental layout of the marital organization that notwithstanding being married, she keeps and character fame, wherein she doesn't need to concede to each physical overture although it is simplest be her husband. Honour and dignity stay with an person, regardless of marital repute.

Section 122 of the Indian Evidence Act prevents conversation at some stage in marriage from being disclosed in court docket besides while one married companion is being persecuted for n offence in opposition to the opposite. Since, marital rape is not an offence, the proof is inadmissible, despite the fact that applicable, unless it's miles a prosecution for battery, or a few associated physical or intellectual abuse under the supply of cruelty. Setting out to show the offence of marital rape in court docket, combining the provisions of the DVA and IPC might be an almost impossible task.

The problem is, it's been well-known that a marital relationship is almost sacrosanct. Rather than, making the wife worship the husband's every whim, in particular sexual, it is meant to thrive mutual recognize and trust. It is a lot more worrying being a victim of rape through someone regarded, a member of the family, and worse to ought to cohabit with him. How can the law forget about the sort of huge violation of an essential proper of freedom of any married woman, the right to her frame, to shield her from any abuse?

As a very last piece of argument to expose the urgent want for protection of woman, here are a few results a rape victim may should stay with, -

- Physical accidents to vaginal and anal areas, lacerations, bruising.
- Anxiety, surprise, melancholy and suicidal mind.
- Gynaecological consequences consisting of miscarriage, stillbirths, bladder infections, STDs and infertility.
- Long drawn signs and symptoms like insomnia, ingesting problems, sexual dysfunction, and terrible self-picture.

Marriage does no longer thrive on sex and the worry of frivolous litigation should not forestall safety from being provided to the ones caught in abusive traps, where they're denigrated to the repute of chattel. Apart from judicial awakening, we often require technology of focus. Men are the perpetrators of this crime. 'Educating boys and guys to view girls as precious companions in existence, in the development of society and the attainment of peace are just as crucial as taking legal steps defend women's human rights', says the UN. Men have the social,

financial, ethical, political, non-secular and social obligation to fight all sorts of gender discrimination.

Marital Rape Status in India 2019

According to Sec 375 of the Indian Penal Code Sexual sex through a man together with his wife, the spouse not being beneath fifteen years of age isn't rape. Government's reactionary stand that condemning marital attack might destabilize the established order of marriage" and will develop into a simple device to "problem spouses" in RIT Foundation versus Union of India, that is pending beneath the constant gaze of the Delhi excessive court, is disillusioning. The administration appears to have found some essential relationship for sparing the inspiration of marriage and not condemning marital rape. Such dishonourable behaviour of the Center echoes our ingrained societal misogyny, which throughout the years has precipitated similarly enslavement of the girls. It is important to present marital rape felony recognition in India due to numerous facts. As it's miles an assumed reality in India that once a marriage is solemnized between a male and a girl, there's a demand to have sex with the husband and give start. Further, the truth that women in India even within the 21st century lives with the worry of her husband or the in-laws. And as there's illiteracy nevertheless existing in India, it can be supposed that guys anticipate overpowering girls in every way they can, which makes it a necessity to legalize marital rape in India.

After the Delhi gang rape of 2012, the Justice Verma Committee changed into installation which recommends the want to get rid of the exception of marital rape.

Following had been its recommendations

1. The exception for marital rape is removed.
2. The law must specify that:

(a). A marital or other relationship between the offender and sufferer is not a valid defence towards the crimes of rape or sexual violation.

(b). The relationship between the accused and the complainant isn't applicable to the inquiry into whether or not the complainant consented to the sexual activity.

(c). The truth that the accused and victim are married or in some other intimate dating might not be seemed as a mitigating factor justifying lower sentences for rape.

In India, one in every ten women was reported facing sexual violence by their husbands at some stage in their lifetime. "35.1% of the pattern ladies pronounced to surveyors in 2005-06 (on which the UN Women 2011 figures for India are based totally) that they have got experienced bodily violence with the aid of their intimate companions of their lifetime."

ISSN: 2581-6349

The research, with the aid of social scientist Aashish Gupta, has established that simply 1% of marital rapes and 6% of rapes by means of men apart from husbands are reported to the police. The range of girls sexually assaulted by means of their husbands is 40 instances the wide variety of ladies attacked by using men they don't understand, as according to the CNN reports. The Center has additionally submitted underneath the watchful eye of the Delhi high courtroom that "what can also display up as marital rape to a person spouse, it can now not show up to be able to different people". Such contentions originate from the essential structure of crook law which recommends the same old of "sensibility" or "practical individual" as one of its foundations. In criminal law, the demonstration or oversight of the denounced is to be determined on the focal point of "sensibility" or "sensible individual", that is usually the standpoint of "a everyday, traditional individual who's an agent of the general community". Such a technique is with the aid of all accounts dangerous for marital rape exactly, due to the reliable reputation that marriage offers the spouse regular permission for intercourse.

Whereas if taken into consideration the legal guidelines of different international locations

- Poland become the earliest state to understand or criminalize marital rape.
- New York gave the recognition to marital rape after the case of People vs Liberta in which it become stated that there may be no difference among marital rape and non-marital rape. The court mentioned that "a marriage license ought to no longer be considered as a license to forcibly rape [the defendant's] spouse with impunity".
- Sweden, Denmark, England, South Korea Scotland and many greater countries have given the criminal reputation to marital rape through the 20 th century.

Is current Indian regulation promoting rape?

As lengthy because the rape survivor is married and isn't underneath the age of 15, and the rapist is none other than the husband, in keeping with the regulation it isn't taken into consideration as rape. According to the exception two to Section 375 of the Indian Penal Code (IPC), sexual sex or sexual acts with the aid of a person with his very own spouse, the wife not being below fifteen years of age, isn't rape. Basically, the Indian regulation does no longer realize the offence of marital rape and is in consistent denial of the life of the same.

Marital rape can be described as rape in which the spouse is compelled to have sexual sex with her personal husband, in opposition to her will. The idea of marital rape has emerged, to a big extent, in recent times, and many nations do recognise it as a criminal offense. But for India, it nevertheless is an unfulfilled dream because the felony sanction for the equal is yet to be made. There has been lots debate and a query of law over what exactly marital rape is, and if it even exists, and if yes, then how and why it should be taken into consideration as a crook offence.

ISSN: 2581-6349

There are voices within this trouble. The first one says that is having to be criminalised due to the fact the rights of each married and unmarried ladies are the identical, and, our Constitution recognises this equality under Article 14 which enshrines equality earlier than the regulation. They additionally say that the same have to be known and guarded by using the state in line with the doctrine of the guideline of law. On the other hand, the other institution advocates in opposition to it via bringing up the logic that criminalising marital rape would "destabilise the group of marriage ". This gives upward thrust a question that in India, the organization of marriage is given better priority than the rights of ladies. Now it's no longer a hidden truth that each men and women are equal. So why do ladies continually have to suffer? There are situations where marital rape cases come under the ambit of the domestic violence law or underneath section 498A of the IPC which talks cruelty with the aid of the husband or any relative. But I want to recognize if this is enough.

Undoubtedly, rape is a heinous crime. Of route, there are legal guidelines that recollect rape as an offence, underneath Section 375 and Section 376 which provides for punishment. But regrettably, our legal machine appears to discriminate among single and married girls. Because the regulation is being examine presently, rape within marriage is not against the law. Despite the reality that we stay in the twenty first century, we follow laws (IPC) written in 1860. It's a simple fact that the then society changed into one-of-a-kind from now, with a gap of a hundred and fifty years. But the regulation is something which have to develop with time. According to sociologists, society is a residing organism that grows and sooner or later dies as properly, and the law is something without which the life of society is impossible due to the fact each are entangled with each different. So, if society grows then the regulation of that specific land must also be changed and amended in keeping with the want of the people. In latest instances, we have visible some instances in which we will say that the rights of individuals have been promoted by means of our felony device, and one of the most notable instances become the decriminalisation of section 377 of the IPC which regarded the proper of an person to pick out their companions, irrespective of their gender and sexual orientation.

We must take such selections to hold the rule of law in our society. It is likewise noteworthy that now not recognising marital rape as against the law violates fundamental rights of someone, below Article 14 (as noted before) and Article 21 which enshrines the protection of existence and personal liberty. But one factor is obvious, that rape is rape, and consent is consent. If the man or woman has been raped, then certainly, the rapist ought to be punished. Criminalising marital rape, the need of the hour.

ISSN: 2581-6349

An Overview

The definition of rape codified in Section 375 of the Indian Penal Code ("IPC") consists of all sorts of sexual attack regarding non-consensual intercourse with a woman. However, Exception 2 to Section 375 exempts unwilling sexual sex between a husband and a wife over fifteen years of age from Section 375's definition of "rape" and as a result immunizes such acts from prosecution. As in line with current regulation, a wife is presumed to supply perpetual consent to have sex along with her husband after stepping into marital relations. While unwilling sexual contact among a husband and a wife is identified as a crime in almost every united states of the sector, India is one of the thirty-six countries that also have not criminalized marital rape. The Supreme Court of India and numerous High Courts are currently flooded with writ petitions hard the constitutionality of this exception, and in a latest landmark judgment, the Supreme Court criminalized unwilling sexual touch with a spouse between fifteen and eighteen years of age. This judgment has in flip caused an growth in other writs tough the constitutionality of Exception 2 as a whole. In mild of ongoing litigation, this Article critically analyses the constitutionality of Exception 2.

Violation of Article 14 of the Indian Constitution

Article 14 of the Indian Constitution ensures that "the State shall not deny to any individual equality earlier than the law or the identical protection of the laws in the territory of India." Although the Constitution guarantees equality to all, Indian criminal regulation discriminates in opposition to female sufferers who have been raped by means of their personal husbands.

At the time the IPC was drafted inside the 1860s, a married female changed into no longer taken into consideration an independent prison entity. Rather, she was considered to be the chattel of her husband. As an end result, she did no longer own a number of the rights now assured to her as an unbiased legal entity, inclusive of the proper to record a grievance towards some other below her very own identification. Exception 2, which essentially exempts moves perpetrated via husbands towards their other halves from being taken into consideration acts of "rape," is essentially encouraged by means of and derived from this already present doctrine of merging the girl's identification with that of her husband.

The roots of this doctrine can be traced to British colonial rule within the Victorian technology. India become a British colony in the course of the 19th century. All Indian laws enacted at the moment had been deeply motivated by way of English legal guidelines and Victorian norms. The marital exception to the IPC's definition of rape was drafted on the basis of Victorian patriarchal norms that did now not apprehend ladies and men as equals, did no longer permit

ISSN: 2581-6349

married women to very own belongings, and merged the identities of husband and wife below the "Doctrine of Coverture."

But instances have changed. Indian law now affords husbands and wives separate and independent prison identities, and plenty jurisprudence inside the modern-day technology is explicitly involved with the protection of women. This concern is clear in the plethora of statutes intended to shield girls from violence and harassment that have been exceeded since the flip of the century, along with "The Protection of Women from Domestic Violence Act" and the "Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act."

Exception 2 violates the right to equality enshrined in Article 14 insofar as it discriminates towards married women by denying them same safety from rape and sexual harassment. The Exception creates instructions of ladies based totally on their marital repute and immunizes moves perpetrated via guys against their other halves. In doing so, the Exception makes viable the victimization of married women for no cause other than their marital repute at the same time as defensive unmarried ladies from those equal acts.

Exception 2's difference between married and single ladies additionally violates Article 14 insofar as the class created has no rational relation to the underlying motive of the statute. In Budhan Choudhary v. State of Bihar and State of West Bengal v. Anwar Ali Sarkar the Supreme Court held that any category below Article 14 of the Indian Constitution is difficulty to a reasonableness test that can be exceeded best if the category has a few rational nexus to the goal that the act seeks to reap. But Exception 2 frustrates the purpose of Section 375: to shield girls and punish people who interact in the inhumane activity of rape. Exempting husbands from punishment is contradictory to that objective. Put genuinely, the results of rape are the identical whether a woman is married or unmarried. Moreover, married women may in reality find it harder to escape abusive situations at home due to the fact they are legally and financially tied to their husbands. Exception 2 encourages husbands to forcefully enter into sexual sex with their better halves, as they know that their acts are not discouraged or penalized by way of regulation. Because no rational nexus may be deciphered between the class created with the aid of the Exception and the underlying goal of the Act, it does no longer satisfy the test of reasonableness, and for that reason violates Article 14 of the Indian Constitution.

Violation of Article 21

Exception 2 is likewise a violation of Article 21 of the Indian Constitution. Article 21 states that "no man or woman will be denied of his existence and personal liberty besides in keeping

ISSN: 2581-6349

with the technique hooked up with the aid of regulation." The Supreme Court has interpreted this clause in various judgments to extend beyond the only literal assure to life and liberty. Instead, it has held that the rights enshrined in Article 21 consist of the rights to health, privateness, dignity, safe living conditions, and secure environment, among others.

In current years, courts have began to acknowledge a proper to abstain from sexual intercourse and to be freed from undesirable sexual interest enshrined in these broader rights to existence and private liberty. In the State of Karnataka v. Krishnappa, the Supreme Court held that "sexual violence apart from being a dehumanizing act is an illegal intrusion of the proper to privacy and sanctity of a woman." In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence. Later, in Suchita Srivastava v. Chandigarh Administration, the Supreme Court equated the proper to make selections related to sexual hobby with rights to personal liberty, privacy, dignity, and physical integrity beneath Article 21 of the Constitution.

Most these days, the Supreme Court has explicitly diagnosed in Article 21 a right to make choices concerning intimate family members. In Justice K.S. Puttuswamy (Retd.) v. Union of India, the Supreme Court recognized the right to privateness as an essential proper of all residents and held that the right to privacy consists of "decisional privateness pondered by using an ability to make intimate selections on the whole consisting of 1's sexual or procreative nature and choices in recognize of intimate family members." Forced sexual cohabitation is a violation of that fundamental right. The above rulings do not distinguish between the rights of married ladies and unmarried women and there may be no contrary ruling pointing out that the person's proper to a privateness is misplaced through marital affiliation. Thus, the Supreme Court has recognized the right to abstain from sexual pastime for all ladies, regardless of their marital popularity, as an essential proper conferred through Article 21 of the Constitution.

Additionally, Exception 2 violates Article 21's proper to live a wholesome and dignified existence. As cited above, it's miles nicely settled that the "proper to life" envisaged in Article 21 isn't always simply a right to exist. For example, there can be no dispute that every citizen of India has the proper to receive healthcare or that the kingdom is needed to offer for the health of its components. In this vein, the courts have again and again held that the "right to life" includes a proper to stay with human dignity. Yet the very life of Exception 2, which fails to deter husbands from undertaking acts of compelled sexual contact with their other halves, adversely affects the physical and mental fitness of women and undermines their capacity to live with dignity.

ISSN: 2581-6349

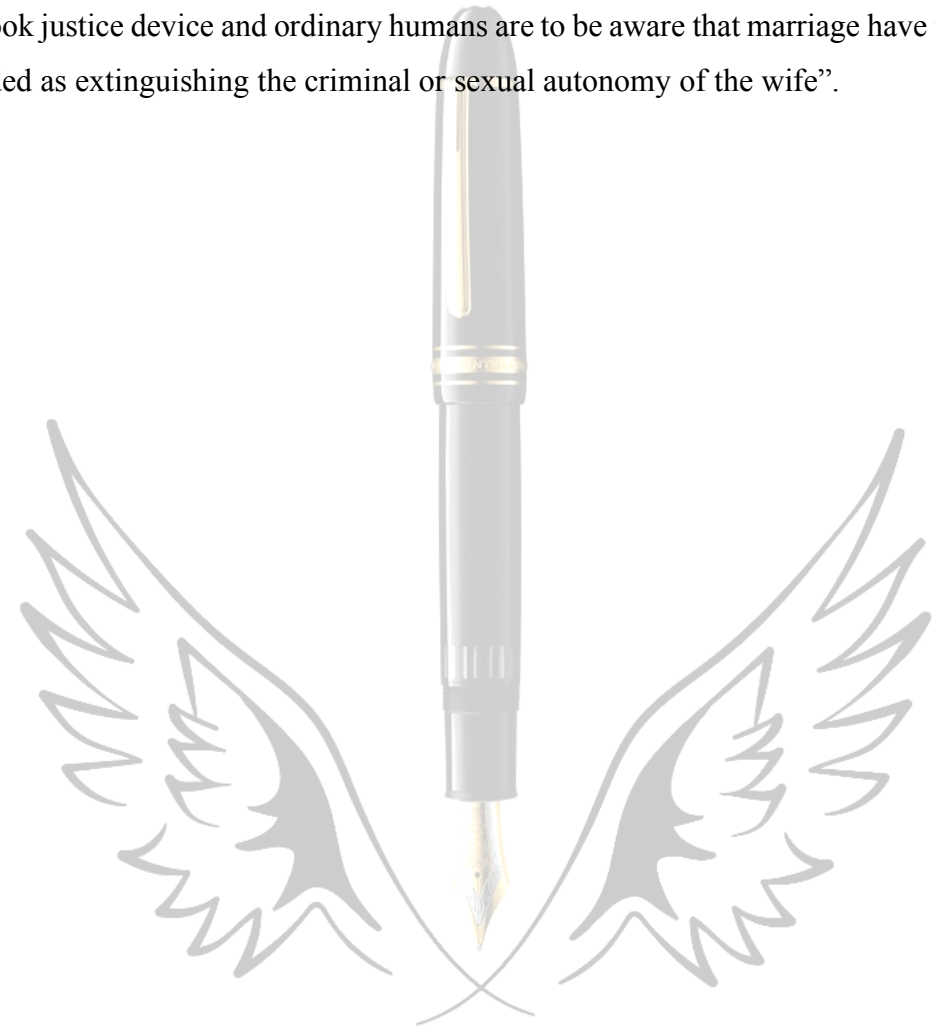
Role of Judiciary in India

The need for a new law on sexual assault was felt. The earlier law which prevailed did now not outline and mirror the diverse sorts of sexual attack. In Sakshi v. Union of India, the Supreme Court had recognized the inadequacies regarding the regulation regarding rape and had suggested that the legislature need to result in changes in the law. After passing the criminal regulation modification bill, 2013 rape turned into redefined because the most awful activities where the parliament through an change tried to enlarge the ambit of rape and the notion by means of making oral and anal acts as amounting to rape. The Domestic Violence Act, 2005 has supplied various civil treatments and numerous provisions along with the cruelty and different subjects are dealt under. There is a big wide variety of victims beneath the marital rape situation is being accelerated but the legislature is ignorant to criminalize such an offense. The girls are blind to what the actual situation is and the legal guidelines which might be winning inside the Indian penal code for them. The Judicial selection of Queen Empress v. Haree Mythee, it become held that the spouse over the age is of 15, and then the rape law does now not follow in that situation. In this case, the husband was punished due to the fact the spouse become of 11 years handiest. In the Kerala High Court, Sree Kumar v. Pearly Karun, it changed into discovered that the spouse does now not live one by one with the husband under the Judicial separation and being subject to sexual intercourse with out her will the act does now not amount to a rape. Hence, it changed into said that the husband turned into no longer observed to be responsible of raping his wife though he was de facto guilty of doing or committing the act. As consistent with the Constitution of India, each law that is passed ought to be in conformation with the concepts and thoughts that are enshrined inside the charter. Any law which has been made didn't meet its required standards are taken into consideration to be extremely vires and it could be struck down or to be declared unconstitutional. Here, the exemption of Section 375 withdraws the safety of married ladies on foundation of her marital repute.

CONCLUSION

However, it's miles necessary to criminalize this atrocious act in India due to the fact a observe shows they're 10 to 14% of ladies who're raped by way of their husbands. As the Indian government has understood and identified the Domestic Violence towards women and gave them the strength to elevate their voice it would not be incorrect to be optimistic about the Indian Government to criminalize marital rape with the growth of this wrongful act. Further, it might no longer be honest enough to burden the government with the entire responsibility, it's

far the humans who have to undergo a alternate and further it'd be justified to cite what Prof. Sandra Fredman of the University of Oxford, has submitted to the Justice Verma Committee "education and awareness programmes have to be furnished to make sure that every one levels of the crook justice device and ordinary humans are to be aware that marriage have to no longer be regarded as extinguishing the criminal or sexual autonomy of the wife".



ISSN: 2581-6349

MEDICAL NEGLIGENCE AND LAW IN INDIA – AN ANALYSIS

- **NANDINI TRIPATHY**

Medical Negligence is part of Medical Law in addition to the Health Law. In the case of Btyth v. Birmingham Water Works Company, Baron Anderson defines Negligence as breach of obligation through a person which results in harm to the complainant. Breach of responsibility manner doing, or no longer doing something which a reasonable man could do, or not do given a set of instances.

For every breach of a prison proper, there may be a corresponding remedy. This is derived from the maxim, "ubi jus ibi remedium".According to Kiran Gupta, "Medical Negligence is the failure of a medical practitioner to provide proper care and attention and exercise those competencies which a prudent, certified man or woman could do under comparable circumstances. It is a commission or omission of an act with the aid of a clinical expert which deviates from the generic requirements of exercise of the scientific network, leading to an injury to the patient. It may be described as a lack of affordable care and skill at the a part of a clinical professional with admire to the affected person, be it his records taking, scientific examination, research, diagnosis, and remedy that has led to harm, loss of life, or an damaging outcome. Failure to behave according to the medical standards in trend and failure to exercising due care and diligence are normally deemed to represent clinical negligence."

The components of Medical Negligence as stated by using Winfield are-

- Existence of a criminal responsibility
- Breach of that legal duty
- Damage because of that breach

EXISTANCE OF LEGAL DUTY

A person processes some different character trusting his abilities and specialised know-how. So, it's miles the criminal responsibility of that man or woman to workout diligence as tons as anticipated from his contemporaries. In the case of Parmanand Kataria vs. Union of India, Supreme Court held that, "each physician, at the governmental medical institution or elsewhere, has an expert responsibility to increase his offerings with due information for protecting existence"

ISSN: 2581-6349

BREACH OF THAT LEGAL DUTY

It is said to be a breach of criminal duty if someone does now not perform his legal duties as his contemporaries could have performed within the given conditions and circumstances. In the case of Laxman vs. Trimback, Supreme Court interpreted the responsibility of Doctor toward patients via pronouncing, "bring to his assignment an affordable diploma of talent and expertise" and to workout "a reasonable diploma of care"

DAMAGES CAUSED BY THAT BREACH

The damages and accidents incurred are at risk of be compensated. The repayment offered have to be simply, honest and affordable and according with the statistics and situations of the case.

CONSEQUENCES OF MEDICAL NEGLIGENCE

The outcomes of clinical negligence may be classified into 3 categories-

CRIMINAL LIABILITY

Section 304A of the Indian Penal Code of 1860 states that "whoever causes the loss of life of a person with the aid of a rash or negligent act no longer amounting to culpable murder will be punished with imprisonment for a term of two years, or with a first-rate or with both." This way that if someone causes death of some other man or woman due to his negligent or rash behaviour, he will be answerable for punishment. If an affected person dies because of gross negligence or malicious cause of the medical doctor, the doctor could be criminally accountable. A Doctor will also be vicariously responsible for the negligence of his employees or servants.

Exceptions to Criminal Liability

Sections eighty and 88 of the Indian Penal Code consists of defences for docs accused of criminal legal responsibility. Under Section eighty (Accident in doing a lawful act), "not anything is an offense this is finished through coincidence or misfortune and with none crook intention or understanding inside the doing of a lawful act in a lawful way by using lawful way and with proper care and warning." According to Section 88, "a person cannot be accused of an offense if she/ he plays an act in proper faith for the alternative's benefit, does no longer intend to reason damage despite the fact that there may be a chance, and the affected person has explicitly or implicitly given consent."

MONETARY LIABILITY

ISSN: 2581-6349

In the case of the State of Haryana v. Smt Santra, the Supreme Court held that each doctor "has a responsibility to act with an inexpensive diploma of care and skill." However, "seeing that no human is perfect and even the maximum famed professional can commit a mistake in diagnosing a disorder, a doctor can be held responsible for negligence only if you'll show that she/ he's responsible of a failure that no health practitioner with regular talents might be responsible of if acting with reasonable care." "A blunder of judgment constitutes negligence best if a reasonably capable expert with the standard competencies that the defendant professes to have, and appearing with regular care, might now not have made the same blunders."

To distinguish civil liability from a criminal one, the Supreme Court in the case of Kurban Hussein v. The State of Maharashtra concerning Section 304 (A) of I.P.C., 1860, it became stated that- "To impose crook legal responsibility below Section 304-A, it's far essential that the demise must were the direct end result of rash and negligent act of the accused, without different character's intervention."

DISCIPLINARY ACTION

Another consequence of medical negligence can be inside the form of imposition of consequences pursuant to disciplinary action. Indian Medical Council (IMC) (Professional Conduct, Etiquette, and Ethics) Regulations, 2002, made beneath IMC Act, 1956 governs the professional misconduct of medical practitioners. Medical Council of India (MCI) and the ideal State Medical Councils can take disciplinary movement through removing the name of the practitioner or suspending him.

LANDMARK CASES ON MEDICAL NEGLIGENCE IN INDIA

There are many critical cases on Medical Negligence in India. Some of them are the landmark ones that have been the turning factors in the jurisprudence of the same.

In the case of Jacob Mathew v. State of Punjab & anr, the Supreme Court while dealing with the case of negligence with the aid of specialists gave instance of scientific and legal career and observed as beneath:

"In the regulation of negligence, professionals together with lawyers, doctors, architects and others are protected in the class of persons professing some special skill or skilled men and women usually. Any task that's required to be accomplished with a special ability would typically be admitted or undertaken to be accomplished simplest if the man or woman possesses the needful ability for performing that challenge. Any reasonable guy stepping into a career which calls for a specific stage of getting to know to be referred to as a professional of that department, impliedly assures the man or woman coping with him that the ability which he

ISSN: 2581-6349

professes to own will be exercised and exercised with reasonable degree of care and warning. He does now not assure his client of the end result. A legal professional does not inform his patron that the patron shall win the case in all circumstances. A medical doctor would no longer assure the affected person of complete healing in each case. A health practitioner cannot and does not assure that the result of surgical treatment would perpetually be useful, a lot less to the extent of 100% for the man or woman operated on. The most effective guarantee which one of these expert can give or can be understood to have given by way of implication is that he's possessed of the considered necessary talent in that department of career which he is practising and even as venture the performance of the challenge entrusted to him he would be exercise his talent with affordable competence. This is all what the character drawing closes the professional can expect. Judged through this preferred, a professional may be held liable for negligence on one in all two findings: either he turned into now not possessed of the considered necessary talent which he professed to have possessed, or, he did now not exercising, with reasonable competence within the given case, the ability which he did possess. The wellknown to be implemented for judging, whether or not the man or woman charged has been negligent or not, could be that of an everyday ready individual exercising regular skill in that career. It is not important for every expert to own the highest level of knowledge in that department which he practises."

In the case of V. Krishna Rao v. Nikhil Super Specialty Hospital, Krishna Rao become an officer in malaria department. His spouse was treated negligently through the clinic. He filed a case in opposition to this negligence of the sanatorium. His wife changed into laid low with malaria however become wrongly dealt with Typhoid and consequently wrong medicinal drug turned into given to her. Finally, the case changed into decided and Krishna Rao turned into presented a reimbursement amounting to Rs 2 lakhs. In this situation, the principle of res ipsa loquitor (prison principle for a 'component speak for itself') was implemented, and the repayment become given to the plaintiff

Supreme Court enumerated the following concepts to be followed at the same time as determining whether scientific professional is guilty of medical negligence:

I. Negligence is the breach of a duty exercised through omission to do something which an affordable guy, guided by using the ones considerations which typically alter the conduct of human affairs, could do, or doing something which a prudent and reasonable man could now not do.

II. Negligence is a critical element of the offence. The negligence to be hooked up with the aid of the prosecution have to be culpable or gross and now not the negligence simply based totally upon an mistake of judgment.

III. The medical expert is expected to deliver an affordable diploma of skill and understanding and must exercise an affordable diploma of care. Neither the very highest nor a very low degree of care and competence judged inside the light of the particular instances of every case is what the regulation calls for.

IV. A clinical practitioner would be in charge most effective where his conduct fell under that of the requirements of a reasonably competent practitioner in his area.

V. In the area of diagnosis and treatment there is scope for true distinction of opinion and one expert doctor is without a doubt now not negligent merely because his end differs from that of every other professional health practitioner.

VI. The clinical expert is regularly referred to as upon to undertake a technique which entails higher element of risk, but which he certainly believes as supplying greater chances of achievement for the affected person in preference to a technique involving lesser risk but higher chances of failure. Just because a expert looking to the gravity of illness has taken better element of hazard to redeem the patient out of his/her struggling which did no longer yield the desired result may not amount to negligence.

VII. Negligence can't be attributed to a medical doctor as long as he performs his responsibilities with affordable ability and competence. Merely because the health practitioner chooses one path of movement in desire to the other one available, he might not be in charge if the direction of action chosen with the aid of him was appropriate to the clinical profession.

VIII. It could not be conducive to the efficiency of the clinical career if no Doctor may want to administer medicinal drug without a halter round his neck.

IX. It is our bounden responsibility and responsibility of the civil society to ensure that the medical professionals aren't pointless stressed or humiliated a good way to carry out their expert obligations without worry and apprehension.

X. The scientific practitioners at times also have to be saved from any such elegance of complainants who use criminal manner as a device for pressurizing the clinical specialists/hospitals particularly personal hospitals or clinics for extracting uncalled for reimbursement. Such malicious proceedings deserve to be discarded against the clinical practitioners.

XI. The clinical experts are entitled to get safety so long as they carry out their responsibilities with affordable ability and competence and within the hobby of the sufferers. The interest and welfare of the patients must be paramount for the medical experts.

Medical negligence is seen to be a recurrent mission within the area of clinical practice. Negligence as defined by means of the court in Jacob Mathew v. State of Punjab, is the breach of duty which one birthday celebration owes to another. The obligation may be within the form of an act or omission and it's far called the responsibility of care and due to the negligence of which it causes a damage to the man or woman. In the case of clinical negligence, it's far the failure of medical practitioners to exercising certain acts or omission while discharging their responsibilities with recognize to their patients. Generally, it's been discovered that in maximum of the negligence instances the weight of proof lies with the plaintiff however for the duration of medical negligence, it becomes difficult for the plaintiff to prove the negligence due to the defendant to him. The medical field is considered to be complex to be understood with the aid of a median patient and frequently the sufferers are subconscious while the act accomplished causes damage. Therefore, to show that the damage is brought on to him due to malpractice performed by way of the doctor turns into tough.

This gives upward push to the idea of Res Ipsa Loquitur. It is a Latin phrase which means that the matters talk for itself. It acts as an evidentiary rule in non-public damage regulation. Through the doctrine of Res Ipsa Loquitur, the plaintiff most effective has to give certain circumstantial proof or statistics with the intention to shift the weight of proof at the defendant to show that the act finished via him/ her became not the act of negligence. Circumstantial proof entails certain facts in order to point out the negligence at a part of the defendant as the logical conclusion and it want no longer should be supplied or demonstrated in front of the courtroom. This doctrine has been explained in Halsbury's Laws of England. It has been taken into consideration to be an exception to the general rule. The preferred rule says that it's miles the duty of the plaintiff to show that the harm or damage induced to him/her by means of the defendant was because of the negligence on the defendant's element. The doctrine of Res Ipsa Loquitur shifts the load of evidence from the plaintiff to the defendant where now the defendant has to prove that the act that is considered as negligence via the plaintiff can fairly take place and without him being negligent. This doctrine which is used as an exception isn't the guideline of regulation however a rule of evidence which offers the top hand to the plaintiff and remove him/her from the responsibility of proving the negligence.

Elements of Medical Negligence

The affected person maintaining medicinal negligence should, for the maximum element, reveal four components to make out an effective case of malpractice. These components consist of:

- The presence of a felony responsibility with admire to the medical doctor to offer care or remedy to the affected person.
- Failure to stick to the tips through the doctor at the same time as treating the patient ultimately resulting within the breach of duty.
- Connection between negligence and harm to the patient
- The presence of harms that move from the damage to such an volume that the prison system can supply review.

The factors of medical negligence communicate approximately the prison duty of medical doctor present towards the patient; this duty will become probably the most crucial issue at something factor a dating is constructed up among the affected person and health practitioner. The widespread thought of a lawful duty is that during socialized society, every character owes a duty of affordable attention to other humans. Based on this duty, in which a health practitioner offers management to a patient, the doctor owes a responsibility of care toward the patient. An affected person cannot make a medical doctor responsible for the breach of his responsibility if there's no relationship among them. When a relationship is built up, for example, masking sufferers for his co-employee, being part of the hospital where needy sufferers are dealt with, or giving clinical help to a mishap injured character by using the roadside, an duty of affordable care pursues. The courtroom considers sure actions of the physician to be an exception to the primary element of scientific negligence. Those movements can be health practitioner performing nonprofessional and spot the patient outdoor the health facility and medical institution, as in those instances there is no substantial dating between health practitioner and affected person. The patient can use the idea of standard of care as a witness to prove that there was a breach of responsibility. The fashionable of care refers to the care which normally the sufferers receives from the health care professionals. To prove this detail, the reports are essential to be comprised of the professional in front of the court docket. A therapeutic negligence guarantee by and massive closes with an estimation of harms.

Elements of Res Ipsa Loquitur

The doctrine of Res Ipsa Loquitur has three factors:

1. The damage that had passed off under the instances need to be express and may simplest occur due to a person's negligence and it can't arise in the regular situations
2. The injury as a result of the defendant to the plaintiff should have been done with the usage of a few device which turned into completely below the control of the defendant.
3. The harm induced to the plaintiff need to be below the scope of the defendant's duty and it ought to no longer be due to the voluntary act or the contribution from the plaintiff's sid.

The first condition of the doctrine is happy if there's a reasonable prospect that the occasion that had happened could no longer have passed off if there was no negligence on the defendant's element. This is the hard detail to show because plaintiff being the layman in respect to scientific science can't show the scientific negligence based on his/her common understanding. To cope with such conditions, the Washington courtroom has supplied three incidents wherein the primary detail of the doctrine may be justified: leaving foreign objects like scissors, sponges or this kind of objects inside the body of the patients will be taken into consideration as an act executed due to negligence accordingly inflicting an harm to the patient the result brought about need to now not be the exclusion of negligence while the end result is supplied via the experts who paintings in the clinical area which is sufficient to attract an inference that the incident that had triggered an damage to the plaintiff was due to the negligence

This can further be understood with an instance. In Jasbir Kaur v. State of Punjab, because of the negligence of the team of workers, the newly born child turned into carried away with the aid of the cat which become later to be observed bleeding in the toilet. The Court held the clinic government to be guilty because of breaching the responsibility of care and being negligent of their part which resulted inside the purpose of this uncommon incident. In Pederson v. Domouchel, the court dominated that the plaintiff may be allowed the applicability of the doctrine res ipsa loquitur. Here, the plaintiff had gone via mind harm and during the surgery, he became given anesthesia from which he awoke after a month which indicates clinical negligence.

Similarly, in Horner v. Northern Pacific Beneficial Association Hospitals, Inc.[x] the outcomes from the medical examiners had been produced inside the courtroom which proved that the injury to the brachial-plexus nerve came about because of the overdosage of anesthesia which changed into enough to offer the plaintiff the advantage of the doctrine res ipsa loquitur. Due to the excessive anesthesia, the plaintiff woke with the paralysis in her right arm. It became now not required for her to bring the evidence or actual purpose for the harm. The medical expert's reports were sufficient to give her the benefit of the doctrine which translates to that

the things talk for itself. The 2nd standards of the doctrine can handiest be fulfilled by way of the presence of any instrument or item which become completely under the control of the defendant and it changed into that object or device which precipitated the damage to the plaintiff. The plaintiff has to show within the court that he/she turned into in this type of function that once the harm or harm became executed to him/her, he/she was now not in the situation to keep away from it or forestall it. This 2d criterion is cited due to the fact, at some stage in the scientific treatment, the plaintiff is within the unconscious kingdom wherein he/she isn't capable of recognize the surgery finished to him/her via the defendant is inflicting harm or injury to him/her. The plaintiff isn't within the kingdom to apprehend medical negligence.

The Exception to The Applicability of The Doctrine

There has been an exception where the court docket has denied the plaintiff's plea because of the lack of clinical proof via the professionals. In Swanson v. Brigham case, [xvi] the court docket denied the plea of the plaintiff on the idea of Res Ipsa Loquitur. In the stated case, there has been a death of the fifteen-year-old plaintiff at some point of the treatment of infectious mononucleosis because of asphyxiation. Due to the shortage of scientific testimony by the expert, the court docket denied the doctrine and dominated that since the first standards of the doctrine of res ipsa loquitur aren't satisfied, it's going to no longer be applicable. There have been cases which may be held as an exception to this doctrine. In McLean v. Weir, Goff and Royal Inland Hospital, the plaintiff wanted to sue the doctor for his struggling primarily based on the doctrine however does no longer want to call an professional. The defendant referred to as an expert and it became proved that something injury took place to the plaintiff was no longer due to the negligence. The motives are furnished by means of Kennedy and Grubb and is the reason why the doctrine of res ipsa loquitur need to no longer be made to be had to the plaintiff in medical negligence instances.

CONCLUSION

Mahatma Gandhi as soon as said, “It is health that could be a character’s real wealth and no longer portions of gold and silver”. Patients see God in docs. Kevin Alan Lee said, “Being in this sort of career in which unwell, ill and patients are your clients who look upon you because the almighty, an absolute amount of care is expected.”

Justices Chandramauli K.R. Prasad and V. Gopala Gowda of their selection inside the Anuradha Saha case observed that, "The patients, regardless of their social, cultural and monetary heritage, are entitled to be dealt with with dignity, which now not most effective bureaucracy their fundamental right however additionally their human right,” It is the duty of

medical doctors to deal with their sufferers with due care and diligence without any malpractices.

There are some criticisms staring inside the face of the Indian laws on clinical negligence. The fundamental is the precept of 'Burden of Proof'. The burden of proof is at the plaintiff. So, if an affected person alleges malpractice in clinical, the law would require a better popular of evidence to guide it. Here, for an everyday human or a affected person, it will become very tough to decide the precise harm and the causal relation among the damage and the fault of the health practitioner. Resultantly, the patient isn't capable of prove doctor's fault beyond an affordable doubt, in view that, the sphere of medication is unexpected and unpredictable and every time something can manifest in a human body and so, it reverts to the plaintiff. Therefore, it is excessive time that the laws dictating upon the clinical negligence get modified so as to match sufferers first. And the patients need to be sensitized regarding their rights against medical malpractices through civil societies via a right schooling channel.

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THE GRAND FALLACY: HOW COVID-19 HAS EXPANDED PUBLIC HEALTH LAW CONCERNS FOR INDIA

- **MAHIMA MEHRA**

INTRODUCTION

On March 16, 2020; when India was just waking up to the extent and reality of the spread of Sars-Cov2 (or the novel corona virus), Governments and Supreme Courts were discussing pertinent questions related to the lawfulness of lockdown and the moral bases of curbing liberties in the Indian Constitution. The questions raised by the media, civil societies and the general masses were health related – on how to save the common man from this widely growing pandemic which had reached the Indian borders after weeks of protection against it.

Public health services are an essential part of a country's development infrastructure. In the developed world and East Asia, systematic public health efforts raised labour productivity and life expectancies well before modern curative technologies became widely available, and helped set the stage for rapid economic growth and poverty reduction.

But public funds for healthcare in India have been largely focused on medical services and public health services have been largely neglected from the very beginning. An evidence of the consequences of these appalling public health conditions in India can be seen in the many outbreaks of emerging and re-emerging infectious diseases that India has witnessed in the recent past.

The outbreak of a cholera epidemic due to the O139 strain in 1992, that of plague in Surat in 1994, the large-scale spread of Chikungunya and dengue fever, and that of avian influenza (H5N1) and pandemic H1N1 influenza were some which caused widespread havoc. Diseases with the potential for international spread like the Zika virus disease and Ebola virus disease claimed several lives in India because of the poor response and inadequate resources of public health in India.

However, I look at the question of healthcare, especially prevention of Covid-19 as essentially a public health law question. Public health laws in India are archaic and have been in effect since the colonial times with no amendments and modification; necessary to combat the invisible enemy in today's era of changed public health priorities.

Currently, India is traversing its way through another pandemic of the lethal Coronavirus which has caused a galloping inflation in the number of active infected cases and the mortality rates globally.

In India, from the eyes of anyone who studies public health, India's response to the lethal coronavirus is also a catastrophe that has been in the making for decades, perhaps since as far back as Independence. This can be attributed to our faulty healthcare system and to the glaring gaps in India's domestic laws. With the absence of a rationally structured legislation to fall back on, the Union government in March advised states to invoke the Epidemic Diseases Act of 1897 to tackle the pandemic in their jurisdictions which is a 123-year-old colonial law, and does not even define what a disease is, let alone an epidemic or a pandemic.

LITERATURE REVIEW

The paper ***"Public Health Law In India" By S.Hazarika, A.Yadav, K.S.Reddy***[389] commences by defining a public health law which focuses on the nexus between law, public health and the legal tools applicable to public health issues. The article also talks about an established correlation between right to health, which is a fundamental right guaranteed by the constitution if India and right to healthcare which is progressive realization of the right to health through declared constitutional and legal rights, in particular, through public health law. The legislation of public health laws is the responsibility of the states however; very few states in India have crafted public health legislations. At present, an archaic 112 year old Epidemic Diseases Act 1897 exists at national level which presents the scenario of the nature of the laws dealing with public health emergencies in our country. Therefore, there is a need of laws with strong comprehensive foundation and preservation of public health through enforcement of appropriate laws to protect the health of the population. After the section of "The Scope of Public Health Law" the article introduces to us a checklist of imperative indicators to assess whether public health legislations would be an effective form of intervention to bring about the desired social change. 'Magnitude of risk factors' is one of the indicators which assesses whether a risk is confined to a small section of society or a large community and thus determines the need of legal interventions in the latter case. 'Public Health Risks', 'Indirect Adverse Consequences', 'monitoring and evaluation' etc. are some other indicators that the article briefly explains about. The authors stress the use of public health laws as one of several

[389] (HAZARIKA et al., 2009)

tools for the attainment of public health goals and also emphasizing their use to strengthen communities against public health risks.

The article ***"Public Health of India: An Overview" by Monica Das Gupta***[390] primarily tells about the evolution of the public health services from the period of colonial rule to the present independent India. Public health services, which reduce a population's exposure to disease through such measures as sanitation and vector control, are an essential part of a country's development infrastructure. The need for effective public health services was triggered partly by military concerns, since army casualties from disease were far higher than from battle. Even though health measures and environmental sanitation was accessible only to the privileged sections of the society yet the colonial authorities built impressive capacity for delivering public health services like institutions for public health training and research were constructed, public health legislations and policies were constructed systematically and sanitary departments came into place. But diseases such as malaria and gastro-enteric infections continued to take heavy tolls due to lack of sanitary services in most part of the country. The article states several reasons because of which the capacity to prevent outbreaks from occurring atrophied by 1950. The policies of the newly-independent government were reflected in the withering away of public health services, in a variety of ways, including the negligence in updating and rationalizing the public health services since colonial era. The government funds were diverted from public health services to other essential programs and inadequate inter-sector coordination which further wastes resources. Although India has exceptional capacity to deliver services yet its inattention to public health is taking a large toll on its economy, as well as on the lives of its citizens, and it is time to recognize that public health is a key part of its development infrastructure.

The article by ***Lawrence Gostin on 'Legal foundations of public health law and its role in meeting future challenges'***[391] initially gives the definition of a public health law as the study of the legal powers and duties of the state, in collaboration with its partners (e.g., health care, business, the community, the media, and academe), to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or

[390] (Gupta, 2006)
[391] (Gostin, 2006)

other legally protected interests of individuals for the common good and further the remainder of the article offers a justification as well as an expansion of the ideas presented. Several themes emerge from this definition of a public health law are stated in the article, for instance, the public health focuses on an entire population and the cause of ill health unlike medicine which focuses on sick individuals. Also, the field of public health is often understood to emphasize the prevention of injury and disease, as opposed to their amelioration or cure and social justice is a core value of public health which assures public health and justice to all without any prejudices and stereotypes. The article further states the legal tools available to government and private citizens to advance the public's health and elaborates on them. The government can alter the informational environment and encourage people to make more healthful choices about diet, exercise, cigarette smoking, and other behaviors yet, health communication campaigns are sometimes highly contested and some courts protect advertising as a form of free expression. Other tools like the power to alter the built environment, direct regulation of persons, professionals, and businesses; the power to tax and spend; the power to alter the socio-economic environment etc are stated and elaborated in the article. This article provides a fuller understanding of the varied roles of law in advancing the public's health and clearly states that public health law is not a scientifically neutral field, but is inextricably bound to politics and society.

The article about ***Public Health Legislations in India by Durgesh Prasad Sahoo and Vikas Bhatia***[392] gives an overview about the objectives of the public health legislations and cites various acts and rules currently prevailing in the healthcare arena. The article stands true in stating that the right to health is a fundamental right which is often compromised by the outcomes of human behavior. Though this can be managed by changing the health behavior through by one of the approaches of health education but sometimes regulatory approach is also required. Laws are an obligation on the part of society imposed by the competent authority which have been instrumental in controlling such public health issues and hence referred to as public health legislations. The state which is concerned with the legal power of public health legislations is also obligated to improve the health of the general population and as stated by the authors, to strengthen the healthcare system, a focused legislator approach is pre requisite. Suggesting certain objectives of public health legislations like protection and promotion of health of the population, sustaining health policies and fighting communicable diseases, the

[392] ((Sahoo & Bhatia, 2019)

article highlights the importance of these legislations. Our government has formulated certain laws, as stated in this article, for achieving these objectives, for instance The Epidemic Diseases Act, 1897 which aims to prevent the spread of the epidemic diseases. Concluding the article, the authors' state that public health legislations improve the public health standard of the country and in a country like India, effective implementation is required to improve the deteriorating health standards.

The study reported by the ***Task Force on Public Health***[393] published on 25 July 2012 talks about the public health laws in India. Starting from the section of "The constitutional design of a public health law" this approach paper tells us that public health matters are authorized by the state government, except in cases of national emergencies and so the state government is obligated by the constitution of India to guarantee the protection and fulfillment of the right to health to all without any discrimination as a fundamental right. The study is organized around an overview of the public health legislations in India and the need to draft new legislations within stipulated timeframe. The approach to the legislation of a law should be such that it empowers an individual or a community enabling them to negotiate and demand their service. At the same time an approach that allows justifiability to be ensured upon legal issues concerning the law should be used. Fundamentally a public health law should be established with a vision of ensuring good health for all and should contribute to the legal tools to assure a healthy condition. The study concludes stating that a social change and a legal reform are interdependent, both of which are needed for a society to flourish.

The book ***Health Care Case Law in India, edited by Desai and Mahabal***[394] has been a major contributor to this research. It is a compilation of essays by renowned lawyers and social researchers like Ravi Duggal, Mihir Desai, Dipti Chand, Vijay Hiremath and others. It asserts that India's legal framework is dualist (as against monist). This Reader mainly looks at the Constitutional recognition and judicial pronouncements. These case laws form the foundation of the right to health care and can support any further public interest litigations on various other areas of public health. The attempt has also been to demystify the laws and make the information accessible to common people, so that the judgments can be used as an effective tool for demanding the right to health care. An awareness of these judgments does not mean

[393] (Dr. Subhas et al., 2012)
[394] (Desai & Bali Mahabal, 2007)

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that they will be implemented easily, but it is certainly important for further action and the evolving of future strategies, legal or otherwise, towards realizing the right to health. International laws related to rights cannot be transformed and applied in the country unless there is appropriate domestic legislation.

EPIDEMICS & IMPLICATIONS ON INDIAN LAW

India is endemic to many diseases such as malaria, kala azar, and tuberculosis, which erupt in epidemic form when conditions are favourable for their spread. The legal inadequacy to tackle disease outbreaks was known for long, baby steps were taken, but at the end of the day, the country was not ready when it encountered another pandemic — arguably the severest since the 1918 influenza pandemic that killed around seven million people in the country.

Behind the urgency to detect and quarantine suspected Covid-19 patients and the clarion call for social distancing lies a stark reality: that the Central government can do little on the ground to actually contain the spread of Epidemics. Because after all, health is a state subject, and even then not all States of India have a public health bill in place. Union government's role could, at best, be advisory and coordinating in nature – which it is doing at the moment.

One may argue that no one could have calculated the severity and extend of Covid-19 and tackled the pace at which it has spread across the globe. But India had its own past experiences, way after 1897 which were a waking call for India's law-making bodies; but India never woke up to them.

WHY IS COVID-19 DIFFERENT FROM ALL OF THE PREVIOUSLY ENCOUNTERED EPIDEMICS?

Firstly, COVID-19 has no vaccine or certain treatment. It is a virus which spreads faster than anything the world health community and governments have ever handled before.

Secondly, Collective ownership – the magical formula of Indian law for controlling epidemics has failed drastically.

Lastly, Covid-19 had been declared as a pandemic long before it even reached India. Soon after the first case of the corona virus arrived in India in late January, India responded with restrictions on flights and screenings at its airports. Yet the country had more than 80,000 arrivals every day, mostly from Europe and the Gulf States, where the virus had spread. And

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across the country, millions of people live in proximity, in densely populated slums where access to health care is poor.

The government‘s decision to impose the lockdown was necessary to mitigate the inevitable spread of the disease. Even when PM Modi announced the lockdown, the cases in India had already touched 1000. All of these problems combined with India‘s age old laws put India in a tenacious state to tackle SARS-CoV-2.

LEGISLATIVE PERSPECTIVE OF COVID-19

The legislative perspective and the legal response to Covid-19 involve multiple levels of the government and multiple institutional actors. Nonetheless, legal frameworks are important during emergency situations as they can delineate the scope of the government's responses to public health emergencies and also, the duties and rights of citizens. The legal framework of the response to Covid-19 can be understood from five fronts.

Whenever an epidemic disease strikes India, the Epidemic Diseases Act of 1897 has been invoked to force persons to be segregated and get them treated. This historical joke of an Act has not yet been revised even after over seven decades of democratic independence.

The **Epidemic Diseases Act 1897** is currently invoked viz.

- To restrict the movement of suspected coronavirus patients, and to prevent further spread of the disease
- To prohibit cruise ships, crew, or passengers from coronavirus-hit nations to come to India
- Starting from 13 March 2020, all existing visas, except diplomatic, social, UN/International Organizations, employment, project visas, stand suspended until May 2020 and have been predicted to extend further.

Second, the **National Disaster Management Act 2005**[395] has been imposed on the pretext of an emergency due to natural causes. Section 10 of the NDMA authorizes the National Disaster Management Authority to issue binding directions and guidelines to the several state governments, for the purposes of addressing a disaster. However, the language of the Act does

[395] (Faiyaz, 2020)

not refer to a public health emergency but a natural disaster, which makes the very imposition of the act suspicious in this case.

India's Code of Criminal Procedure[396] authorizes senior police officers, operating within the jurisdictional limits of their districts, to pass orders restricting individual movement where there is an anticipated danger to human "life, health, or safety." This right has been extended to a situation of absolute authority, even though State of Emergency under Article 352 has not been announced.

Section 144 of the IPC has also been imposed, which prohibits gathering of people.

I want to stress here that The IPC was itself a visionary Code as such a law was not in existence in England at that time. Section 188, 269, 270, and 271 of IPC and Section 133 CrPC, assumes pivotal significance in the present scenario of the COVID-19 pandemic and lock-down orders[397].

Lastly, State-specific Public Health Acts have been put into motion. However, as our earlier findings observe not all States of India have PHA's in place. A national-wide lockdown has been imposed to prohibit movement and activities. Again, the meaning of 'lockdown' remains undefined and so does the legal basis of the same.

In the **Containment Plan for Covid-19**[398] issued by the Ministry of Health & Family Welfare only four of these have been mentioned in point 6.1 and the CrPC has not been discussed at all.

LIMITATIONS OF INDIA'S LEGAL RESPONSE

Covid-19 may have caused unfathomable damage to health and economy for several months, maybe years to come but it has shattered the grand fallacy of Indian law as to where the question of healthcare stands. India's legal response, though prompt in some sense, is not without limitations.

The Epidemic Act places too much emphasis on isolation or quarantine measures and ultimately silences other scientific methods of outbreak prevention and control, such as vaccination, surveillance and organized public health response. This is also meant near-complete autonomy of the State to impose lockdown and deprived the public of any tools to challenge this autonomy.

[396] (Bhatia, 2020)
[397] (Bhatia, 2020)
[398] (Ministry of Health and Family Welfare & Government of India, 2020)

The Act emphasizes only the powers of the central and state governments during the epidemic, but it does not describe the government's duties in preventing and controlling the epidemic, nor does it explicitly state the rights of the citizens during the event of a significant disease outbreak.

Another limitation is that EDA contains no provisions on the sequestering and the sequencing required for dissemination of drugs/vaccines, and the quarantine measures and other preventive steps that need to be taken and there is no underlying delineation of the fundamental principles of human rights that need to be observed during the implementation of emergency measures in an epidemic. The Union Ministry of Health & Family Welfare had drafted a Public Health (Prevention, Control and Management of epidemics, bio-terrorism, and disasters) Bill in 2017 to bridge the gaps but the bill was not tabled in the parliament.

The EDA does not take into consideration increasing rates of international travel, more extensive use of air travel compared to sea travel, greater migration within states for the sake of earning a livelihood, the transition from agrarian to industrial societies, increased urbanization, grossly increased density of populations in certain areas, increasing intensity of contact with animals and birds, man-made ecological changes, changing climatic conditions, technologies of mass food production, breakdown of public health measures and biosafety lapses.

The Act is also silent on the ethical aspects or human rights principles that come into play during the response to an epidemic.

State-wise Public Health Acts have also done little to help. Most public health Acts in the states are "policing" Acts, intended to control epidemics, and do not deal with coordinated and scientific responses to prevent and tackle outbreaks. The lack of uniformity between the various acts followed in different states has also been a grave concern.

CONCLUSION & RECOMMENDATIONS

The corona virus response has highlighted the out datedness and erroneous methodology of India's law response towards epidemics. The vulnerable communities are especially at risk, including prisoners swamped together in dilapidated and congested prisons.

India is in dire need of a National Public Health Bill, several of which drafted over the years have failed to convert into Laws. There is a need for an integrated, comprehensive, actionable and relevant legal provision for the control of disease outbreaks in India. This should be articulated in a rights-based, people-focused and public health-oriented manner. The National Health Bill could act as one such proposed legislation.

Uncoordinated State Public Health Acts should also be looked into. Public health should be shifted to the Union list from the State list, and special provisions should be made for UTs and States with lesser health amenities.

A good law does not just dictate responsibilities of the government, but leaves scope for the citizens to question them. The draconian EDA, aimed at providing absolute autonomy to the British, should be revoked and in place a transparent yet stringent policy should come about.

There is a need for integrating relevant laws related to disaster management, food and nutrition security and environment in relation to health. In the context of disaster management, many health hazards arise due to natural disasters, which also need to be addressed.

With systematic inclusion of lawyers, public health experts, sociologists and law makers into legislative bodies, and with a firm direction public health laws can be developed, improved and implemented in the country. There is also need to look at laws outside of the scope of politics and look at the law-building process as a confluence of socio-economic and health indicators. Excluding basic healthcare rights from institutions is not just the failure of a State, but of the basics of human civilization itself.

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ROLE OF CIVIC SOCITIES & NGOs IN ACHIEVING WOMEN EMPOWERMENT IN INDIA

- S. SANKAR GANESH & A. TAMILARASI

1. INTRODUCTION

"To call women the weaker sex is libel; it is man's injustice to women. If by strength is meant brute strength, then, indeed, is women less brute than man. If by strength is meant moral power, then women are immeasurably man's superior. Has she got greater intuition, is she not more self-sacrificing, has she got greater powers of endurance, has he not greater courage? Without her, man could not be. If nonviolence is the law of our being, the future is with women. Who can make a more effective appeal to the heart than women?"

__Mahatma Gandhi

Is the woman treated in India equally? Are they co equal? This question may annoy us and even we may find nothing important in these questions. But its not so. The status of women in India has changed into various forms and even the Judiciary system followed erstwhile has treated them as an object. It is to be believed that the women have been treated equally during the Vedic period and their status changed drastically and they were treated as an object after 500BC, the situation worsened with invasion of Mughals and later by European invaders. India is a patriarchal society which is the most severe social injustice that has given rise to gender inequality that subjects to various forms of male domination and discrimination.

Though our constitution enshrines the equality status to women and no discrimination whatsoever in any form is encouraged, still the offences against women is excruciating and intolerable. This injustice and inequality has made the social welfare organisations and the society at large to raise their voice and to protect the women from these kind of indifferences. The role of NGOs are significant and they are fighting for the rights enshrined in the constitution. The rights are natural rights, fundamental rights, human rights and so on, which has been debarred, deprived, decreased and so on to the women at large unconstitutionally. To eradicate this and to empower women, various advancement techniques have been used by

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NGO's and CSO's. Women's civil society plays a significant role in advancing gender equality and women's empowerment (GEEW)

The State by means of enacting a law and by means of meagre execution has ended its role but the third pillar and the most vital pillar of our Constitution, the judicial system plays a vital role. The social responsibility and to create the social awareness, leads and makes the NGOs and Civic Societies to fight for their rights and for the rights of deprived at large.

2. HISTORY OF WOMEN EMPOWERMENT

In olden days, they were treated as a reproductive mechanism body and they were never ever treated as a human. The education and wellbeing were not available to them and they were forced to live inside the house. They were shed inside the houses to do services to the man and their child. The welfare services were covered for the needs of widows, destitute and old women by means of providing homes, limited resources, literacy classes, constrained medical services. This covered very few women only.

In the seventies and eighties, a movement led by women activists resulted in several legal, economic and organizational steps for women development. This paved the way for women to enter the society at large and this has helped them to improve them in educational and social activities. They came out successfully in education and they venture out into social welfare mechanisms, which resulted in the high growth of family and the state at large.

The Government of India made empowerment of women as one of the principal objectives of the Ninth Five Year plan (1997-2002) and also declared 2001 as the year of „Women Empowerment" These issues of gender equality were discussed in World Conference, National and International Conferences, etc. Our Constitution has conferred and guaranteed equality before law, universal adult franchise and equal opportunities for men and women as fundamental rights. The launching of Rashtriya Mahila Kosh, Indira Mahila Yojana, Mahila Kosh, Indira Mahila Yojana, Mahila Samridhi Yojana, reserving of one third of the number of seats in Panchayats and the local bodies are programmes launched with a view to improve and empower women socially, economically and in political level.

Women empowerment is a concept from the beginning of this nature. The biological difference and her softness made her to run for her deprived rights. The crime rate as reported in NCRB[399] signifies the treatment of women at large in India. As reported, "As many as 3,59,849 cases of crime against women were registered across the country in 2017, continuing the upward trend for the third consecutive year, the latest National Crime Records Bureau (NCRB) data released". Year by year the rate of crime against women is the worrying factor.

The law makers and the legislative assembly are shedding their efforts in curtailing the crime against women by means of enacting powerful acts with various kind of treatments/punishments. But the crime rates is in increasing trend year by year.

Women empowerment, in concept and practice, is complex due to various dimensions involved in it. However, it is generally accepted that women empowerment incorporates certain key factors like rights, awareness, capacity building, decision-making, improving social status, autonomy, self-reliance, independent, equity, recognition, security and in achieving certain level of power.

3. WOMEN EMPOWERMENT

The term empowerment covers a vast landscape of meanings, interpretations, definitions, and disciplines ranging from psychology and philosophy to the highly commercialized self-help industry and motivational sciences.

NGO's has placed their presence in every roots of the human civilization. They are working together with Government Agencies and providing their extended services to reach out the destitute and needy. The deprived people through NGO's are asserting their rights conferred.

By realising the importance of NGOs and for the rapid development in Rural and Urban areas, Government of India acknowledged the role of non-government organizations in the fields of education, health and social services while drafting five years plan (1980-85), identified new areas in which NGOs participation was envisaged.

399 https://www.outlookindia.com/website/story/india-news-crimes-against-women-in-india-continue-to-rise-up-most-unsafe/340881

The Government of India identified the thrust areas for the development in society to mainly shed their focus by NGOs that includes Health, Water Management, Social Conservation, Minimum Needs Programme, Disaster Preparedness, Optimum utilization and development of renewable source of energy, Family Welfare, Health and Nutrition, Ecology Promotion, Tribal Development, Environmental protection and Education.

For the first time, the role of voluntary agencies came into picture during 1985 – 1990s while drafting five-year plan. The Government focussed on the utilisation of local bodies, local financial sources effectively and enrich the society at large. The Government also entrusted the importance by means of identifying the people in poorer and vulnerable occupations, upgrading their skills and to make them economically sufficient.

Women empowerment is a process whereby a woman helps herself, to nurture herself, to mould herself and to make herself fit to compete in this world, to enrich her knowledge, emphasize her importance in this society. It is a process nurturing her inborn talents, shaping her to focus boldly and to manage her resources, handle the issues efficiently and facing the challenges. The objective of the empowerment is to override her thoughts on inequality, gender in differences. This empowerment will shape her and mould her to face the challenges.

Five levels of Women Empowerment framed by UNICEF (United Nations International Children‟s Emergency Fund) 1993 are as follows:

- ✓ Welfare
- ✓ Access
- ✓ Conscientisation
- ✓ Participation
- ✓ Control

4. ROLE AND RESPONSIBILITIES OF NGOs IN EMPOWERING WOMEN

Women targeted by the men for the reproduction system and for creating the wealth through various sources including dowry system in the olden days. The Women’s disenfranchisement

ISSN: 2581-6349

mostly begins with the lack of access to wealth, income generation opportunities, and managing household finances.

In the earlier days, NGO's emerged at large were focussing on these issues. They tried hard to promote self sufficient and self-economic reliant for women. They addressed their economic indifferences. This helped the women at large to place their importance in the society. NGOs also helped them to promote self-help groups and to promote themselves NGOs.

Then the focus of NGO's shifted to literacy rate of women. NGO's paved the roadmap of education to women. They inculcated the importance of education and they imprinted the educational advantages. NGO's helped women at large to achieve professional careers and participate in political process.

Self Help Groups (SHG) were formed in MYRADA in 1984-85 and were initially called Credit Management Groups. In 1987 NABARD sanctioned a grant to MYRADA for the institutional capacity building of the SHGs and to match the group savings. In fact, several NGOs notably PRADHAN, working in Rajasthan and Tamil Nadu realized that the Integrated Rural Development Programme (IRDP) system of provision of credit to the poor was ruining the banks as well as the poor. They experimented with lending to groups and persuaded banks to lend to such groups.

This nurtured the growth of feminism in different manner for groups. They raised their voice to spurn social, cultural, religious thresholds for the development of women. The freedom of women and the education system made them to express more their views, excel them in various political and other movements.

SHGs are defined as small, voluntary groups of 10–20 women, formed by people related by an affinity for a specific purpose, who provide support for each other. Numerous types of SHGs with women coming together for objectives that include economic, legal, health-related, and cultural reasons. These groups are created with the underlying assumption that when individuals come together to act towards overcoming obstacles and attaining social change, the result can be individual and/or collective empowerment.[400]

400 https://www.3ieimpact.org/sites/default/files/2019-09/SRS11-SHGs-report.pdf

These SHGs has shaped and moulded the lives of women and paved a wonderful path to lead their life. It includes enriching the wealth of the women and made herself sufficient and self-reliant economically. This has entrusted her confidence. This enriched her performance, and this made her to live happily.

The educational system and education enriched her to compete in this fast and developing world. This education made her to equip herself and to meet out the requirements. The women augmented her knowledge and shined in all her activities.

The SHGs and NGO's helped women to achieve social empowerment. The fast decision making and the responsibilities and the role of women in the society made her to pride herself for this achievement. This helped the women to fight against the violence, control by the opposite sex. This helped her to improve the psychological issues and created mindfulness.

The NGOs and Civic Societies played a predominant role in shaping the lives of women. They nurtured the growth of women and they shaped them for self-reliant and self-dependent in nature. This increased the confidence level of women.

- ✓ Promoting Women's Cooperative Societies and Banks
- ✓ Leadership Importance
- ✓ Health Oriented Activities
- ✓ Child Welfare and Care Agencies
- ✓ Counselling Services
- ✓ Educational Support Activities
- ✓ Open Function Literacy Classes
- ✓ Demystification of Technology

5. NGO ENGAGEMENT WITH GOVERNMENTS TO ADDRESS WOMEN'S RIGHTS

The principle of gender equality is enshrined in the Indian constitution in its preamble, fundamental rights, fundamental duties and directive principles. The constitution not only grants equality to women, but also empowers the state to adopt measures of positive

discrimination in favour of women. Women's rights groups have been instrumental in various parliamentary Acts that protect and promote women's constitutional and legal rights.

Major Acts that protect women's rights are:

- ✓ The Dowry Prohibition Act of 1961
- ✓ The Medical Termination of Pregnancy Act of 1971
- ✓ The Bonded Labour System Abolition Act of 1976
- ✓ The Family Courts Act of 1984
- ✓ The Indecent Representation of Women Prohibition Act of 1986
- ✓ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- ✓ The Protection of Women from Domestic Violence Act of 2005.

NGOs continue to play vital roles in increasing awareness about these Acts and their provisions. They also initiate legal proceedings based on these and other Acts to address women victims. Among the most significant policy development that women rights NGOs were able to achieve include:

- ✓ The establishment of National Commission on Women
- ✓ The 1994 Constitutional Amendment Act that increased women representation in the political (and thus policy) decision-making process through the introduction of 33 per cent reservation for women in local and village-level elections,

5.1 NGO's WORKING FOR WOMEN'S EMPOWERMENT

a. SEWA

The self-employed women's association was started in Gujarat in 1972. The aim of this NGO is to strengthen women by giving identity as informal workers.

b. Snehalaya

It was formed in 1989, the NGO works for women and children and LGBT communities affected by poverty.

c. North east network (NEN)

It was started in 1995, the vision of this NGO is uploading gender justice, equality of statue.

d. Azad Foundation

This NGO especially works for the poor women living in urban India, which aims to provide them with a life of dignity and make them independent.

e. CREA

It was founded in 2000 in new Delhi, it is a feminist human rights organization which provides programmes to increase self-confidence, awareness about sexuality and build leadership qualities in women.

f. Centre for social Research (CSR)

It was formed in 1983 in New Delhi by group of social scientists and this aims to create a violence-free, gender-just society through social research, capacity building and advocacy.

g. Vimochana

It is a Bangalore-based NGO founded in 1979, this provides a forum for women's right.

h. JAnOdaya

This NGO is working for the socio-economic development of women and it aims to improve the conditions of destitute and former prisoners.

i. Swaniti

It bridges the gap between the local realities and elected systems.

j. MAKAM

It works for the socio-economic development of the women

6. JUDICIAL RESPONSE AND WOMEN EMPOWERMENT

The courts have handled their swords very wildly on the offences / crimes against women. The Judges have delivered speaking orders to counterattack the terrorism on woman. The judicial precedents and the legal interpretation have overruled the misjudgements, oversights, and the

ISSN: 2581-6349

traditional barriers over the years. The court bells have heard the voices of miserable woman and on their own have taken up their cases Suo motto and has rendered their justice to the women.

In **Dileep Singh v. State of Bihar**[401] the honourable Supreme Court observed that the will or consent of the party is not at all a matter when the intention is malafide. Further the court observed that "the will and consent often interlace, and an act done against the will of the person can be said to be an act done without consent"

The Apex Court held in **State of UP v. Chottey Lal**[402]- that " It is imperative that the criminal cases relating to offences against the State, corruption, dowry death, domestic violence, sexual assault, financial fraud and cybercrimes are fast tracked and decided in a fixed time frame, preferably, of three years including the appeal provisions. It is high time that immediate and urgent steps are taken in amending the procedural and other laws to achieve the above objectives.

The Supreme Court in **Koppula Venkatrao v. State of AP** [403] held that "The sine qua non of the offence of rape is penetration, and not ejaculation". It has opened the wider scope of observation and interpretation of scientific terms which helped to find the crime and to observe the case.

In another landmark judgment, the Apex Court in **Bantu v. State of U.P** [404] exhaustive the term "rape". This definition was taken as reference in many cases and this showed the pathway for the crime against woman.

In a remarkable judgement as observed in **Pushpanjali Sahu v. State of Orissa**[405]**,** it was held that rape is a crime against whole Society.

In **Delhi Domestic Working Women's Forum v Union of India and Others**[406], the issue concerned six women who were sexually assaulted and raped on a commuter train. The Court set out new requirements for police dealing with rape victims, including that victims be provided with legal representation, informing the victim of all her rights before questioning her, and protecting her anonymity during trial. The Court came out with a standard operating

[401] Dileep Singh v. State of Bihar, November 3, 2004
[402] State of UP v. Chottey Lal, 14th January, 2011
[403]Koppula Venkatrao v. State of AP, 10th march, 2004
[404] Bantu v. State of U.P, 23rd July, 2008
[405] Pushpanjali Sahu v. State of Orissa, 18th September, 2012
[406] Delhi Domestic Working Women's Forum v Union of India and Others, 1995 SCC (1) 14, JT 1994 (7) 183

ISSN: 2581-6349

procedure for treating the rape victim and providing the necessary requirements to the oppressed.

In an another milestone to the development of the protection of women rights and to safeguard the woman dignity and her life certainty, the Court observed that it cannot disgrace the character of a victim and she cannot be treated as an accomplice in **State of Punjab v. Gurmit Singh**[407]

In **Delhi Gang Rape case (Nirbhaya Case)**[408] Judge Yogesh Khanna, pronouncing the death sentence has observed that "These are the times when gruesome crimes against women have become rampant and courts cannot turn a blind eye to the need to send a strong deterrent message to the perpetrators of such crimes"

In **Pushpanjali Sahu v. State of Orissa**[409] the Supreme Court held that sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour.

In **Kuldeep K. Mahto v. State of Bihar** [410] the apex court observed that "as per the prosecution, the accused forced the prosecutrix in a tempo to the point of dagger and took her away and committed rape on her against her will. The court observed the position of the woman and her severity of pain because of the point of dagger, she was helpless and her inability, fear was all taken as granted.

In **N.V. Satyanandam v. Public Prosecutor, AP High Court** [411] it was observed by the court, in the dowry death cases, it is hard to find the evidence, it is hard to trace out the truth. In most of the cases, lack of evidence, even the hard facts were not able to justify the truth and happened to be relied on circumstantial evidence

In **1965 case of Ranjit Udeshi**[412] the Supreme Court upheld the constitutional validity of the obscenity law on the grounds that it constitutes a reasonable restriction on the right to freedom of expression, which is incorporated in Article 19 (2)(d) of the Constitution.

In **Bharwada Bhonginbhai Hirjibhai v. State of Gujarat**[413]**,** the rape is an attempt or a cruel attack to ruin the modest of a woman and to defame her. Though the intention is not required but the contention of the accused has resulted in slandering her modesty and to outrage her.

[407] State of Punjab v. Gurmit Singh, 1996 AIR 1393, 1996 SCC (2) 384
[408] Delhi Gang Rape case 5th May, 2017
[409]Pushpanjali Sahu v. State of Orissa, 18th September, 2012
[410] Kuldeep K. Mahto v. State of Bihar, 6th August, 1998
[411] N.V. Satyanandam v. Public Prosecutor, AP High Court, 24th February, 2004
[412] Ranjit Udeshi v. state of Maharashtra, 1965 AIR 881, 1965 SCR (1) 65
[413] Bharwada Bhonginbhai Hirjibhai v. State of Gujarat, 1983 AIR 753, 1983 SCR (3) 280

The rehabilitation may survive her, but her story will be pain fully true at large and she must undergo a changee to live in this society after accusing a person for rape.

In **Khadil-Ur-rehman case** [414] it was held that "the expression „against her will" connotes that the act was done not only without consent of the woman but in spite of her opposition to the doing of it."

In **Dhananjay Chatterjee v State of West Bengal**[415] it was held that a violence against girl cannot be tolerated and the court upheld the judgment of lower court. The sentence of death was confirmed.

In **Shimbu & Anr v State of Haryana** [416] the Supreme court held that there cannot be any compromise in rape case and said the crime against women is a crime against the society and confirmed the punishments sentenced by the lower court.

In **Mukesh & another v State for NCT of Delhi** [417] the Supreme court expressed their shocks remarks about the society and the mentality of humans. They confirmed the death punishment for the accused who were indulged in the activity of gang rape.

In **Vishaka v State of Rajasthan**[418] the Supreme court observed the importance of safety environment to women in the society, in the workplace. The Court relied on CEDAW, 1979 and delivered the judgment including the guidelines for the implementation by the Employers and the Government.

In **D. Velusamy v D Patchaiammal**[419] the Supreme court observed the importance of The Domestic Violence Act, 2005 and the status of live-in relationship.

In **Saraswathy v Babu**[420] the Supreme court invoking the provisions enshrined in The Domestic Violence Act, 2005, ordered for the compensation for injuries, mental torture and emotional distress.

In **Laxmi v Union of India**[421] the Supreme court while delivering the judgement for the PIL filed by a NGO regarding the acid attack victims, for a free medical assistance to the victims and also paved the way for stoppage of sale of acids in the markets.

In **Parivartan Kendra v Union of India**[422] the Supreme court while delivering the judgement for the PIL filed by a NGO regarding the acid attack victims, the court directed all authorities

[414] Khadil-Ur-rehman case
[415] Dhananjay Chatterjee v The State of West Bengal, (1994), 2 SCC 220
[416] Shimbu & Anr v State of Haryana MANU/SC/0871/2013
[417] Mukesh & Another v State for NCT of Delhi, Criminal Appeal No. 607-608 of 2017
[418] Vishaka v State of Rajasthan AIR 1997 SC 301
[419] D Velusamy v D Patchaiammal, (2010) 10 SCC 469
[420] Saraswathy v Babu (2014) 3 SCC 712
[421] Laxmi V Union of India AIR 2015 SCC 3662
[422] Parivartan Kendra v Union of India, 2015 (13) Scale 325

to implement the stoppage in sale of acids in the market and also insisted for higher compensation to the victims.

In **Sabu Mathew George v Union of India**[423] the Supreme court while delivering the judgement for the PIL filed by a social activist regarding the prenatal diagnostic techniques, the court gave directions for auto blocking the results related to sex discriminations.

The courts shut the doors of escape and closed all the shunts in the cases pertaining to the offences against women. The court has observed in all the judgements carefully in the persons who have been alleged / accused in the rape charges. In the recent judgement for anticipatory bail, the Karnataka High Court single judge bench observed that ""Unbecoming of an Indian woman" to sleep after being ravished, not how our women react: Karnataka HC while granting bail to rape accused[424]. The courts have taken the light of lamp and passed judgments after carefully verifying the facts and findings.

In the recent development, it is hard to digest and hard to say, a court staff has allegedly raped a woman inside the court complex[425].

7. Social Empowerment of Women

a. Empowerment in Social Life
b. Empowerment in Family Life
c. Economic Empowerment
d. Savings
e. Economic Networking
f. Political Empowerment
g. Political Rights
h. Cultural Empowerment
i. Gender Equity and Equality
j. Legal Empowerment
k. Legal Awareness and Involvement
l. Personality Empowerment

[423] Sabu Mathew George v Union of India, 2016 (12) Scale 75
[424] https://www.barandbench.com/news/litigation/unbecoming-of-an-indian-woman-to-sleep-after-being-ravished-not-how-our-women-react-karnataka-hc-while-granting-bail-to-rape-accused
[425] https://www.barandbench.com/news/court-staff-allegedly-rapes-woman-in-rouse-avenue-district-court-complex-report

m. Empowering Leadership

8. Way Forward

NGO's role is extremely limited. NGOs can help the Governments to implement their ideas and plans. The NGO's can ensure that all Government Plans reaches the citizens and help the citizens to make use of the Government Schemes and Policies. The Governments have to come out with the strategic plan in empowering women more effectively and efficiently.

Governments should come with a strategy of improving the functionalities of NGO's and to provide them more assistance in all scopes for smoother functioning. Governments should frame out an economic policy and an outlook for the smoother functioning of NGOs. The Government should lay out an easier pathway for implementation of its projects by NGOs.

Government should encourage in creating more NGO's for the upliftment of society and empowerment of women. Especially in the field of education and economic upliftment, Government should focus at large and to pave a way for the improvement of the women.

Governments should promote more schemes for rural development and involving women at large for the development. NGOs can easily reach them because of their presence in the streets of India.

9. CONCLUSION

NGO's role in empowering is considerable and highly significant. Empowering a man is the growth of his family alone but empowering a woman is the growth of the society at large. NGO's should continue their work in empowering the women and to shape them, mould them and to nurture them. NGO's because of their omni presence in each corner of the society, they can easily reach the public at large and can promote the schemes and enlighten the women of their importance and their fundamental rights.

Furthermore, for promoting the welfare schemes and to reach the people at large, the support of NGO's is required more. If more people are exposed to feminism, gender equality, equity ideology, more may take action in the form of starting NGOs or by supporting the entrepreneurs

that run the NGO. It must be ensured that those involved in social work and in volunteering should be able to receive publicly available resources to support the formation of organizations. These include training programs and mentoring services to facilitate the formation of NGOs. Thus, the role of NGOs towards empowerment of women is very crucial in the Indian scenario.

As said by "**There is no tool for development more effective than the empowerment of women**" - Shri Kofi Annan, without empowering a woman a society cannot develop and cannot shine.

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LEGALIZING MERCY KILLING IN INDIA: PROS AND CONS

- **KAVLEEN KAUR KHURANA**

ABSTRACT

Euthanasia or 'Mercy Killing' is the undeviating deliberate killing of a patient with either their consent or without their consent when unfeasible or without consent but not looked for. Several patients are in extensive suffering and are led to choose death due to the affirmation by these 'doctors', friends or relatives. The accountability for the patient, in these cases may get minimised, but, this act of killing can never be rationalized. These patients, whether having an untreatable disease, being old, or suffering and tolerating in other ways, are crying out for help and affection. "Euthanasia is a functioning which aims at taking the life of someone at his own discretion. It validates an action of which death is the motive and the conclusion." This constraint applies only to voluntary euthanasia and eliminate the non voluntary or involuntary euthanasia, the killing and taking life of a patient without the patient's will, knowledge or consent. Some define this "life-terminating treatment."

KEY WORDS: *Mercy Killing, Euthanasia, Indian Penal Code.*

INTRODUCTION

Mercy Killing in other words is known as Euthanasia, which in Greek simply means, "good death". It is a practice of ending someone's life intentionally in order to relieve suffering and pain. There is a public controversy in many countries over the ethical, legal and moral issues of mercy killing or euthanasia.

There are different ways to categorize Euthanasia, which comprises of voluntary, non-voluntary or involuntary ways. The two important classifications of the same are Active and Passive Euthanasia.

ISSN: 2581-6349

Voluntary Euthanasia is conducted with the consent of the patient and is legal in some countries such as in Netherlands, Belgium, Luxembourg and Colombia. Euthanasia conducted where the consent of the patient is unavailable is termed as non-voluntary euthanasia. This kind of euthanasia is illegal in all the countries. Instances include child euthanasia, which is illegal worldwide but decriminalised under certain specific circumstances in the Netherlands under the Groningen Protocol. Involuntary Euthanasia is conducted against the will of the patient and is usually considered murder.

Euthanasias such as Voluntary, non-voluntary and involuntary euthanasia are divided into passive or active forms. Passive euthanasia involves the repressal of common treatments, such as antibiotics which are essentail for the continuance of life. Whereas, Active euthanasia involves the use of fatal and deadly substances or forces, such as directing a lethal injection, to kill and is the most disputed means.

We cannot always recognize the answer as a living entity and due to that, it is unfair for us to decide about the death of another human being, God has not given any of us this authority. We must also question ourselves concerning euthanasia; where will it resolve? If we allow the old or untreatable people to be supported with suicide, what other groups will be given this right. Will the handicapped or people with an unsound mind be next? Will teenagers, who are the foremost age group of suicide, also have this 'right to die'?

The solution stands in our hands. If we continue to disregard human life and its composer, God, then we will ruin ourselves. A right is a moral and legitimate claim and since we do not have a claim on death, which on its own has a claim on us, we cannot take action for the right we don't have. Perhaps Mother Teresa was fair when she said that "if a mother can kill her own child, what is there to stop you and me from killing each other?"

ARGUMENTS IN FAVOUR OF MERCY KILLING

Historically, the euthanasia debate has inclined to concentrate on variety of key concerns. In line with euthanasia opponent Ezekiel Emanuel, proponents of euthanasia have presented four main arguments:

1. That people have a right to self-determination, and thus should be allowed to decide on their own fate;

2. Assisting a topic to die can be a more robust choice than requiring that they still suffer;

3. The distinction between passive euthanasia, which is commonly permitted, and active euthanasia, which isn't substantive (or that the underlying principle–the doctrine of double effect–is unreasonable or unsound);

4. Permitting euthanasia won't necessarily result in unacceptable consequences. Pro-euthanasia activists often point to countries just like the Netherlands and Belgium, and states like Oregon, where euthanasia has been legalized, to argue that it's mostly unproblematic.

5. Other arguments include:

Constitution of India: 'Right to life' may be a natural right embodied in Article 21 but euthanasia/suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'. It's the duty of the State to guard life and therefore the physician's duty to produce care and to not harm patients. The Supreme Court in Gian Kaur Case 1996 has held that the right to life under Article 21 doesn't include the liberty to die.

6. Caregivers' burden: Right-to-die' supporters argue that individuals who have an incurable, degenerative, disabling or debilitating condition should be allowed to die in dignity. This argument is further defended for those, who have chronic debilitating illness while it's not terminal like severe mental disease. The preponderance of such petitions are filed by the sufferers or members of the family or their caretakers. The caregiver's burden is extensive and cuts across various domains like financial, emotional, time, physical, mental and social.

7. Refusing care: Right to refuse medical treatment is well recognised in law, including medical treatment that sustains or prolongs life. For instance, a patient plagued by blood cancer can refuse treatment or deny feeds through a nasogastric tube. Recognition of the liberty to refuse treatment gives the simplest way for passive euthanasia.

8. Encouraging the organ transplantation: Euthanasia in terminally ill patients provides a chance to advocate for organ donation. This, in turn, will help many patients with organ failure anticipating transplantation. Not only euthanasia gives 'Right to die' for the terminally ill, but also 'Right to life' for the organ needy patients.

ARGUMENTS AGAINST MERCY KILLING

Emanuel witnessed that there are four important arguments presented by the antagonists of euthanasia:

1. Not all deaths are painful;

2. Alternatives, like cessation of active treatment, combined with the utilization of effective pain relief, are available;

3. The difference between active and passive euthanasia is reasonably significant; and

4. Legalising euthanasia will place society on a slippery slope, which can result in unacceptable consequences.

5. Other Arguments include:
    a. Euthanasia deteriorates society's respect for the sanctity of life.
    b. Euthanasia may not be in an exceedingly person's best interests, for instance, getting old aged parents killed for property will.
    c. Belief in God's miracle of curing the terminally ill.
    d. Prospect of a discovery of the available treatment for the disease in near future.

6. Practical arguments:
    a. Proper palliative care makes euthanasia unnecessary.
    b. There is no way of properly regulating euthanasia.
    c. Allowing euthanasia will result in less excellent care for the terminally ill.
    d. Allowing euthanasia undermines the commitment of doctors and nurses to saving lives.
    e. Euthanasia may become an economical approach to treat the terminally ill.

f. Allowing euthanasia will demotivate the rummage around for new treatments, cures and coverings for the terminally. ill.
g. Euthanasia gives an excessive amount of power to doctors.

MERCY KILLING IN INDIA AND CASES INVOLVED

In March 2018, the Supreme Court in a landmark case passed a judgement with respect to the case of *Common Cause (A Regd. Society) v. Union of India*[426], recognized right to die with nobility as a fundamental right. The Bench has hence recognized the concepts of passive euthanasia and living will in India.

In the case of *Aruna Shaunbaug*[427], the Plaintiff was in a permanent vegetative state (PVS) for 37 long years. In the case, the Two-Judge Bench of the Supreme Court granted the use of passive euthanasia with respect to certain conditions and subject to the approval of the High Court after processing the due procedure as laid down by the Court in the case.

In *Maruti Shi Pati Dubal case*[428], the Supreme Court held Section 309 of Indian Penal Code (this makes an effort to commit suicide a punishable offence in India) as infringing provisions of Articles 14 and 21 of the Constitution of India.

In *P. Rathinam case*[429], The Supreme Court held that the "right to die" is a right incorporated under Article 21 of the Constitution and therefore Section 309 of Indian Penal Code was unconstitutional.

In *Gian Kaur case*[430], the Supreme Court held that both euthanasia and assisted suicide were not lawfully legalised in India.

[426] Common Cause (A Regd. Society) vs. Union of India & Anr.(2018) 5 SCC.
[427] Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454.
[428] Maruti Shripati Dubal vs State Of Maharashtra 1987 (1) BomCR 499.
[429] P.Rathinam vs Union Of India 1994 AIR 1844.
[430] Smt. Gian Kaur v. The State Of Punjab 1996 AIR 946.

In the case of the *State of Himachal Pradesh and Anr. V. Umed Ram Sharma*[431], The Apex Court observed that the right to life comprehends not only physical existence but also the quality of life as acknowledged in its richness and fullness within the ambit of the Constitution.

CONCLUSION

The Constitution Bench, however noted a difference between cases in which a physician decides not to assist or continue to assist for treatment and care, which could or might prolong his life and those in which he decides to administer a fatal drug even though with the object of alleviating the patient from pain and suffering.

The law of the land as enduring today is that no one is allowed to cause the death of another person including a physician by administering any fatal or destructive drug if the aim is to mitigate the patient from pain and suffering.

It is thus of the opinion that the right not to take a lifesaving treatment by a person, who is proficient to acknowledge and take an informed verdict is not covered by the concept of euthanasia as it is commonly understood but a decision to terminate the lifesaving treatment by a patient who is competent to take decision as well as with respect to a patient who is not competent to take decision can be defined as passive euthanasia, which is lawfully and legally acceptable in this country.

[431] State Of Himachal Pradesh & Anr. vs Umed Ram Sharma & Ors, 1986 AIR 847.

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CASTE-BASED VIOLENCE: PREDICAMENT OF LAWS OR EXECUTION

- **HARSHIT JAIN**

ABSTRACT

In this paper the author has dealt with the instances of the forms of violence based on the caste. There has been an attempt to figure out the reasons for rampant caste-based violence and highlight the statistics of caste-based violence. With citing few incidents of mass caste-based violence there is an attempt to show how it leads to the development of long run enmity between the communities which lead bloodshed and loss of life and property. The existing laws to protect the lower castes from caste-based violence are scrutinised with their broader interpretation through the judicial pronouncements. The important discussion on the difference framing of legislations and executing them on the ground level and the accountability of different organs has taken some space in the paper. Further, how far the conversions are instrumental to curb the menace of caste-based violence is discussed in brief incorporating few acts and judgements. The author has also tried to emphasise on the discrimination faced by Dalit Muslims and Christians due to their non-inclusion in the category of Scheduled Castes and Scheduled Tribes. In this paper, the author has attempted to showcase the failed execution of laws and also put forth the proposal to increase the scope of 'Creamy Layer' principle in order to benefit the larger number of Dalits. The Author further commented on the abolition of the notion of Upper Caste and Lower Caste through education and sensitisation.

Oxford Dictionary defines 'Dalit' as a member of the lower caste or class.[432] In India, the lower castes or classes have been broadly classified into the Scheduled Castes or SCs, Scheduled Tribes or STs and the Other Backwards Classes or OBCs. The Constitution of India defines Scheduled Castes and Schedule Tribes in Article 366. While Backward Classes are defined by Ministry of Social Justice as "Backward Classes means such backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the Central Government in the lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes

[432] Oxford Online Learner's Dictionary, Meaning of Dalit, https://www.oxfordlearnersdictionaries.com/definition/english/dalit?q=Dalit last seen on 10.05.2020

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of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India."[433]

One might have come across the matrimonial advertisements while flipping the pages of newspaper, and in bold it is written 'Upper Caste' girl or boy wanted. This is enough to understand the gravity of menace of casteism becoming part of the normal life.

Caste based violence had been rampant in India, across the nation. They formed various operative wings in the forms of Honour killings, Khap Panchayats, etc. other than the traditional incarceration and attacks. There's a long list of the highlighting incidents which involve caste-based violence. Traditionally, the Hindu religion involved 4 varnas, where Brahmans were regarded as the top most, Kshatriyas being next in line, Vaishyas being the third and Shudras being the last. The money and land were traditionally unequally distributed, the land reforms brought some changes but not that significant. Even today, the Dalit population is the least educated and poor in terms of other classes.[434]

In this paper, I'm highlighting certain aspects related to caste-based violence in India along with the existing laws and the shortcoming of those law. In addition to that, exclusion of Dalit Muslims and Christians is also dealt in the paper and Conversion with only objective to evade casteism is discussed.

I. INCIDENTS OF CASTE BASED VIOLENCE

Caste based violence in India has been very rampant, which ranges from social exclusion to massacres. It was reported by National Crimes Record Bureau (NCRB) in 2016 a separate highlight of offences against the Dalits. The report states that each day in India, 2 Dalits are killed and 3 Dalit women raped on an average.[435] A large portion of the cases remain unreported as well.

In a country where land is its principal asset, the vast majority of Dalits are landless. They still live in different, generally deprived areas of the villages. To them the streets are dangerous. The lack of electricity, sanitation facilities, and water pumps, present only in the upper caste section, reinforces their segregation. Dalits are not given access either to common wells or

[433] Welfare of the Backward Classes, Ministry of Social Justice and Empowerment, http://socialjustice.nic.in/UserView/index?mid=31548 last seen on 15.05.2020
[434] NFHS Survey, 2018
[435] Crime in India, National Crime Records Bureau, Ministry of Home Affairs, 2016

ISSN: 2581-6349

burial grounds. Dalit School kids typically sit separately, in classrooms at the back. Separate glasses continue to be used in many villages to serve Dalits in tea stalls[436], Dalits are also prohibited from entering temples, barbers refuse to cut hair to them. Women are often assaulted and sexually abused, and are traditionally perceived as bare properties. Dalit children have to work from a very early age to pay age old debts which generally end in phase of bonded labour. It is still common practice, especially in the south, to pay off generation-old debts and devadasi custom[437], forced prostitution of a girl dedicated to the temple god and eventually auctioned into a brothel.

Bandit Queen or Phoolan Devi, a dacoit turned politician is one prime example of the caste-based violence, which can later on lead to a rivalry between two communities. Phoolan Devi belonged to lower caste Mallah community and was kidnapped by gang of dacoits involving mostly upper caste Thakur men. She was raped for three weeks in Behmai village in Uttar Pradesh before she fled and formed a gang of dacoits of Mallahs. She decided to take revenge from Thakur Community, following this, on 14th February, 1981, Devi and her gang massacred 22 Thakur men in Behmai. This led to the conflict between the two communities and later on she was assassinated by Sher Singh Rana, a member of Thakur community as revenge of Behmai Massacre of Thakurs.[438]

It's only one of such incidents, caste-based violence in India holds a long list of events involving large bloodshed and torture.

The violence against Dalits in Mirchpur village in Haryana in 2011, where Dalit houses were set ablaze on a large scale by 300-400 members of Jat community and resulted in death of few Dalits and injured several. This led to the exodus of 200 Dalit families from the village.[439]

In southern part of country in Tamil Nadu, approximately 268 dwellings – huts, tiled-roof and one or two-room concrete houses of Adi Dravida group Dalits near Naikkankottai in western Tamil Nadu district Dharmapuri were torched by the Vanniyar higher-caste in December 2012. The victims have alleged that there has been 'systematic degradation' of their assets and livelihood services.[440]

[436] Arumugam Servai v. State of T.N., (2011) 6 SCC 405
[437] Shingal, Ankur (2015), THE DEVADASI SYSTEM: Temple Prostitution in India, UCLA Women's Law Journal, 22(1)
[438] Phoolan Devi: Champion of the poor ". BBC News. 2001-07-25. Retrieved 2006-12-1
[439] Administrator, HRLN. "Mirchpur Case: A Landmark Judgement for Dalit". www.hrln.org. Retrieved 2018-08-26.
[440] R. Arivanantham (2012-11-08). "3 Dalit colonies face mob fury in Dharmapuri". The Hindu.

There's a long list of these instances including the recent Badaun Rape Case, Saharanpur violence[441] in 2018, Bant Singh case[442] in Punjab and many more. These cases reflect the direct caste inflicted violence on the lower castes. There's a wider picture to this violence, it merely doesn't stop at the direct infliction of violence but has taken forms such as Honour Killings. The violence does not merely restrict to the physical violence but the mental violence as well which has been normalised with the time. The social exclusion and calling with slurs like *chamars, bhangis, etc.* are in itself a form of mental violence inflicted to the lower caste people. Honour Killings, as the name suggests, it is the killing done to save the honour of the family. The caste-based violence has taken a new route through Honour Killings. There have instances where a person and the lover are killed by the family as they decided to marry belonging to the different castes. Nitish Katara murder case[443] is a high-profile case of Honour killing where Nitish Katara was killed by Vikas Yadav and Vishal Yadav, as he fell in love with Bharti sister of Yadavs, Bharti Yadav. The Supreme Court punished them with 25 years of imprisonment stating "Nitish's murder was "committed in a planned and cold-blooded manner with the motive that has emanated due to feeling of some kind of uncalled for and unwarranted superiority based on caste. Neither the family members nor the members of the collective have any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour."[444]The NCRB registered 288 cases of Honour Killing in a period of 2014-2016.

The Khap Panchayats played an instrumental role in the execution of Honour Killings in North India. Khap panchayat is the traditional local judicial body active in north-western states like Haryana, northern Rajasthan, rural belt of Delhi and western Uttar Pradesh. These panchayats are a part of the rural social set-up and have their roots intruded deep into the past, expected to be in the existence from fourteenth century.[445] It consists of elders of a community and work as Kangaroo Courts.

The Hon'ble Apex Court propounded "This is wholly illegal and has to be ruthlessly stamped out. There is nothing honorable in honor killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of the personal lives of the people committed by brutal, feudal minded persons deserve harsh punishments. Only this way can we

[441] PTI. "Saharanpur: Thakurs and Dalits clash over loud music, 25 houses torched, 1 killed"
[442] Praveen Swami, (2008-05-18) "Down and out in Punjab"
[443] Vikas Yadav v. State of U.P. CRIMINAL APPEAL NOS. 1531-1533 OF 2015
[444] Ibid
[445] Singh, Vineet. (2015). Khap Panchayats: Honour Killings in India

stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts which are wholly illegal."[446]

The Supreme Court in the landmark judgement on Honour Killing, **Shakti Vahini vs. Union of India**[447] came down heavily on Khap Panchayats and gave strict guidelines on assembling and promoting honour killing. The guidelines issued were preventive, remedial and even punitive in nature. The Court also opined against the honour killings that "the act of honour killing puts the rule of law in a catastrophic crisis it is the duty of the government to protect the life and dignity of those harassed by the assemblies. No individual or group has the right to interfere in a consensual and legal relationship between two adults, the court asserted."[448] The Honour Killings violate Article 21 as well as Article 19(1)(a) of the Indian Constitution which provides for a dignified way of life through freedom of speech and liberty.

II. PREVAILING LAWS ENOUGH TO DEAL WITH CASTE VIOLENCE?

In India, there are specific acts to deal with the caste related violence of any type in addition to the Provisions of Constitution of India which marks Right to Equality[449], abolition of Untouchability[450], Right against Exploitation[451] as Fundamental Rights which shall not be deprived to any citizen. India is a member to United Nations Committee on the Elimination of Racial Discrimination (CERD) and signatory to the International convention on the elimination of all forms of racial discrimination. The position has been reaffirmed by CERD General Recommendation XXIX (2002), adding that discrimination based on the 'descent' also includes "discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights"[452]Therefore, it is the duty of the Indian Government to enact laws which protect the interests of the Dalits.

The Indian legislature has successfully passed the legislations which were required to battle the Caste based violence of different forms. These acts include Protection of Civil Rights Act

[446] Arumugam Servai v. State of T.N., (2011) 6 SCC 405
[447] (2018) 7 SCC 192
[448] ibid
[449] Article 14 and 15, Constitution of India, 1950
[450] Article 17, Constitution of India, 1950
[451] Article 23, Constitution of India, 1950
[452] Committee on the Elimination of Racial Discrimination: India, Committee on the Elimination of Racial Discrimination (CERD/C/304/Add.13), September 17, 1996, and General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), CERD, A/57/18 (2002) 111

ISSN: 2581-6349

(1955), the Bonded Labour System (Abolition) Act (1976), the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (1989) and the Employment of Manual Scavenging and Construction of Dry Latrines (Prohibition) Act (1993). There are adequate laws to protect the rights of Dalits and lower castes but still their effect to curb violence related to caste has been painfully low. If we delve deeper into the legislation and its impact, we'll find that the provisions are adequate to counter the violence and achieve the aims of the act but the execution of these laws through the authorities and agencies responsible for the implementation. The enforcement is the major obstacle in achievement of the aim and especially in the Rural areas where the most of the Dalit population is residing.[453]

Section 3 clause 1 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (1989) provides punishment for offences against members of Scheduled Castes and Scheduled Tribes divided into 29 categories of offences and punishment ranges from 6 months to 5 years, in addition to that clause 2 of the same section of the Act where certain categories of violence against the SC/ST members are to be punished in accordance with Indian Penal Code, 1860. Further, Section 4 of the SC/ST Act[454] provides for the punishment for the Public Servant who fails to perform the duties mentioned in the Act. It is one of the special acts which provides for criminal punishment to Public Servant for not performing their duties. Moreover, the act provides for extreme stringent provisions for Protection of Dalits, the act in section 8 provides that if a person is reasonably suspected of committing offence under the Act, shall be continued to presume to have committed the offence by the Special Court till the time contrary is proved, this straight away states that the burden of proof is on the accused to prove that he/she is not guilty. This proves that the law is strong enough to protect the interests of the members belonging SC/ST community. Also, it further contains various provisions which can be taken advantage and misuse of the Act for the false implication and incarceration of the person against the person not belonging to SC/ST community. This was realised by the Supreme Court in a 2018 case, wherein the Supreme Court held that the provisions of SC/ST Act lead to the misuse and blackmailing, therefore, the Hon'ble Court opined in the case of **Subhash Mahajan v. State of Maharashtra**[455] that provision for anticipatory bail shall be there in SC/ST Act and a 'preliminary inquiry' shall be done before the arrest to prevent the misuse of the provisions of the Act. This decision of the Apex Court led to widespread protest across India. This was curbed by inserting section 18A in the SC/ST Act which states that

[453] Dr. Giuseppe Scuto (2007-2008), Caste Violence in Contemporary India,
[454] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (1989)
[455] (2018) 6 SCC 454

Anticipatory Bail shall not be available to the accused under the act, overruling the decision of the Supreme Court in the Subhash Mahajan case.[456] A leading case on the act, expanded the scope of Section 3 (1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 by taking the punitive action against the person who call a person by his caste but is also used for derogatory remark like 'Chamaar' in North India. The Supreme Court in paragraph 8, 9 and 10 of the judgement in the case of **Arumugam Servai v. State of Tamil Nadu**[457] stated "The word `pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word `chamar' denotes a specific caste, but it is also used in a derogatory sense to insult someone). Even calling a person a `pallan', if used with intent to insult a member of the Scheduled Caste, is, in our opinion, an offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 (hereinafter referred to as the `SC/ST Act'). To call a person as a `pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence. Similarly, in Tamilnadu there is a caste called `parayan' but the word `parayan' is also used in a derogatory sense. The word `paraparayan' is even more derogatory. In our opinion uses of the words `pallan', `pallapayal' `parayan' or `paraparayan' with intent to insult is highly objectionable and is also an offence under the SC/ST Act. It is just unacceptable in the modern age, just as the words `Nigger' or `Negro' are unacceptable for African-Americans today (even if they were acceptable 50 years ago)."[458]

Other than the SC/ST Act, other acts mentioned above provide for provisions to counter the subjugation and violence against the Dalits. The Protection of Civil Liberties Act, 1955 provides for abolition of Untouchability and contains punishment provisions for practicing untouchability in temples and religious places(section 3), for enforcing social disabilities(section 4), for refusing to admit to hospitals(section 5), for refusing to sell goods and rendering services(section 6) and other offences evolving out of practice of untouchability. Similarly, in the Bonded Labour System (Abolition) Act (1976), section 4 provides for Abolition of Practice of Bonded Labour in extension to Article 23 of the Constitution. Further, Section 6 of the Act provides for Extinguishment of Liability to repay the bonded debt, Section 16 and 17 mentions of Punishment for enforcement of Bonded Labour and Advancement of Bonded Debt respectively. Thus, it is true that the existing legislations are moreover adequate to protect the Dalits from caste-based violence and the major problem lies with the

[456] Ibid
[457] (2011) 6 SCC 405
[458] Ibid

implementation and execution of these laws, which has been extremely tempered and gives out the various violent instances mentioned above.

III. CONVERSION: ONLY WAY TO ESCAPE THE CLAWS OF CASTEISM?

Religious Conversion has been adopted as a major tool by Dalits to evade the violence and persecution based on caste. In India, the Constitution of India guarantees that every person has the Right to practice, propagate and profess the Religion of his/her choice,[459] and thus, this Religious Freedom allows to practice and follow any religion or no religion at all. But the issue of Religious Conversion is not that simple it seems to be and there are various social facets attached to it. There is a huge outcry related to the mass religious conversions especially in the case of Hindus converting to other religions as there develop high chances of the Dalits and lower castes to fall prey to the motives of other religious groups. Other significant reasons for conversion have been to practice Polygamy which is permissible in Islam and to get reservation benefits. Christian Missionaries are alleged to have been aggressive in their approach of conversion of Dalits in the states of Madhya Pradesh, Chhattisgarh and Jharkhand. The most drastic incident happened when after the disaster of Tsunami in December, 2004, the Christian Missionaries who visited the Tsunami hit areas offered relief after converting the affected persons to Christianity. The irony is that most of the fishermen whom they tried to convert were already Christian. This Conversion practice of termed as taking advantage of the condition of poor Dalits, and Anti Conversion law were in place in states of Madhya Pradesh and Orissa in 1960s. There was a challenge to constitutional validity of the said Act in Madhya Pradesh, but in the case of **Rev Stainslaus v. State of Madhya Pradesh**[460] upheld the validity of the Madhya Pradesh's Dharma Swantantratya Adhiniyam, 1968 and propounded that Freedom to propagate own religion does not warrant to convert the other person to your own religion. Such conversion only promotes the interests of religious organisations and the real benefit of Dalits is side lined. Therefore, conversion is not the correct form to curb the effects of casteism or violence related to it. The stigma attached with the person will have no impact and the cycle of social exclusion will continue to operate. The financial or social upgradation which is the basic motive of reservation policies cannot be achieved through conversion. Propagation of Education, providing employment and creating an environment to provide

[459] Article 25-28, Constitution of India, 1950
[460] AIR 1977 SC 908

certain better opportunities to the members of the Dalit community, and strictly following the policy of 'Creamy Layer' as highlighted by the Supreme Court in Indira Sawhney's case[461] and further expanding the scope of Creamy layer principle so that the benefit could reach to the real needy to upgrade their social and economic conditions.

IV. EXCLUSION OF DALIT MUSLIMS AND CHRISTIANS FROM LISTING IN SCHEDULE CASTE AND SCHEDULE TRIBES

Apart from all the violence and persecution Dalits face, the Dalit Muslims and Christians have been facing exclusion from being categorised as Scheduled Castes and Scheduled Tribes. Due to this, they have been prevented from the various benefits which are in place for the upgradation and improvement of the condition of Dalits and also to prevent any abuse or violence against them. Initially other religions such as Sikhs and Buddhists, also were not included as Scheduled Castes and Tribes but subsequent in 1950s only, they were inserted through a Constitutional Order. One of the major disadvantages due to this exclusion is they don't get the protection of the SC/ST Act, also it violates Article 15 of the Indian Constitution, as the Dalits belonging to 2 religions are being excluded from the benefits and protection they're entitled to. Along with that it prevents the equal representation of Muslim and Christian Dalits in electoral politics as they cannot contest in reserved constituencies for SCs and STs. In the recent Supreme Court Order in the case of National Council of Dalit Christians v. Union of India[462] that the exclusion of Dalits on the basis of Religion needs review. The petition filed prays for Scheduled Castes to be made Religion Neutral and states that non-inclusion of Christians in Paragraph (3) of the Constitution (Scheduled Castes) Order, 1950 along with Hinduism, Sikhism, and Buddhism, is discriminatory and in violative of Articles 14, 15, 16, and 25 of the Constitution of India.[463] This is a clear form of injustice and discrimination towards the Dalits belonging to two communities.

V. CONCLUSION

Protection of Dalits from any kind of caste-based violence is utmost important for social stability and overall development of a nation. Such violence leads to enmity between different communities and can even lead to riots. The only key to resolve this entire social evil of caste

[461] Indira Sawhney v. Union of India AIR 1993 SC 477
[462] W.P.(C) No. 1454/2019
[463] Ibid

violence is to reject the concept of hierarchy in the castes altogether. It is the whole caste system which must be questioned. And it's like the notion of caste as that which should be dismissed. It's time to forget the morally and concretely prohibiting its meaning and its practices, confining it once and for all to history books, as it belongs to any unjustifiable form of tyranny.

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MAJORITARIAN DEMOCRACY- THE DEMON FOR HUMAN RIGHTS

- **KRISHA KAMAL**

Whenever we talk about human rights, it is obvious that the topic of democracy always comes in the discussion. Since, human rights and democracy goes hand to hand, it's not an easy task to govern a state smoothly without either of them.

But in today's time there are as many types of democracies exist as the number of democratic nations. Participatory, pluralist, elite, majoritarian etc., are few examples of the models of democracy.

In this article the major focus has been given to the majoritarian model of democracy and the concerns of human rights on the same. This article consist meaning, scope, history and features of majoritarian democracy in order to find out the imperfections within the same. In this article we'll see how there is violation of human rights done and still this form of governance is considered as democracy.

MAJORITARIAN DEMOCRACY- MEANING AND SCOPE

The idea that the numerical majority of a population should have the final say in determining the outcome of a decision is referred as majoritarian democracy[464]. The idea that majoritarian democracy is the moral core of democracy does not hold up to critical scrutiny. Majoritarian democracy is not a uniquely authoritative or legitimate decision rule in conditions of disagreement among political equals. It has the virtue of simplicity, and it is decisive when there are two options. However, majoritarian democracy as an ideology is a simplistic and morally unattractive solution to the problem of collective self-rule amidst the great diversity and disagreement of modern mass societies. It is not a promising way of taking seriously the principle of fair treatment that we should also want our politics to represent. As Dworkin says, it should not be fetishized, as it too often is[465].

Majoritarian democracy refers to democracy based upon majority rule of a society's citizens. Majoritarian democracy is the conventional form of democracy used as a political system in

[464]Nicholas Capaldi, *Majoritarianism Government,* Sage Encyclopaedia of Governance (2006) Vol. 2,(August 5th,2018), https://www.britannica.com/topic/majoritarianism
[465]Dworkin, Supra Note 3, (manuscript at 246)

many countries such as Canada, United States of America, etc. Though common, majoritarian democracy is not universally accepted majoritarian democracy was famously criticized as having the inherent danger of becoming a "tyranny of the majority"[466] whereby the majority in society could oppress or exclude minority groups. In contrast to majoritarian democracy and the perceived danger of a tyranny of the majority, consensus democracy was developed in response that emphasizes rule by as many people as possible to make government inclusive, with a majority of support from society merely being a minimal threshold.

"According to majority rule, the loss for the few is justified by the fact that the winners are greater in number. But the question here is why should the minority accept this way of looking at it? Perhaps under a system of "minorities rule" in which all groups have their turns to rule in shifting and unstable governing coalitions, the (distributive) fairness criterion is satisfied since theoretically, everyone gets a fair turn to be in the majority. In actual politics, there can be consistent losers – "discrete and insular minorities" –who are entitled to the protections afforded by basic rights. One of the major requirements for fairness is that the vulnerable perspective of minorities should be spoken by the institutions and not simply lump them in with everyone else. Fairness requires that we look at the justifiability of a political system distributive and not merely aggregative."[467]

"The majoritarian model of democracy underlines the capacity of the polity to take decisions quickly on the basis of the preferences of a majority among the voters. What is emphasized is the expression of majority will in the electorate. The majority should be articulated as clearly as possible and there should as few hindrances to its manifestation as possible, given a respect for the Rule of Law. Majoritarian democracy endorses the referendum, majoritarian election techniques, and a unitary state."[468]

"Majoritarian democracy, a form of government in which decisions are taken according to the principle of majority rule, is identified as the institutional context where the populist-patriotic drift can degenerate, pulverizing itself into self-destruction. Moreover, because the nation-state has been an instrument of persistent policies of cultural homogenization, the latter concept

[466]Freebase Dictionary, Meaning of majoritarian democracy, https://www.definition.net/definition/majooritarian+democracy
[467]Jeremy Waldron, The Plight of the Poor in the Midst of Plenty, LONDON REV. BOOKS, (July 15, 1999)
[468]Jan Eik-Lan, Democracy in Comparative Perspective, Estudio/Working Paper 25/2004, Pg. 09

should be incorporated in the study of the complex relationship between democracy and diversity."[469]

HISTORY

There are relatively few instances of large-scale majority rule in recorded history, most notably the majoritarian system of Athenian democracy and other ancient Greek city-states.

However, it is also believed that due to exclusion of women, non-landowners, and slaves from decision making process, none of the Greek city-states were falling truly under the majority democracy. Majoritarian democracy was constantly opposed by many famous ancient philosophers as they considered the decisions based on the will of the uneducated and uninformed set of majority people are not essentially wise and just. Plato is a prime example with his Republic, which describes a societal model based on a tripartite class structure.

Anarchist anthropologist David Graeber offers a reason as to why majority democratic government is so scarce in the historical record. According to him, majority democracy can only emerge when following factors coincide:

1. A feeling that people should have equal say in making group decisions, and
2. A coercive apparatus capable of enforcing those decisions[470].

Majoritarian democracy has often been used as a pretext by sizable or aggressive minorities to politically oppress other smaller minorities, or even sometimes a civically inactive majority[471]. "This agenda is most frequently encountered in the realm of religion: In essentially all Western nations, for instance, Christmas Day—and in some countries, other important dates in the Christian calendar as well—are recognized as legal holidays; plus a particular denomination may be designated as the state religion and receive financial backing from the government. Virtually all countries also have one or more official languages, often to the exclusion of some minority group or groups within that country who do not speak the language or languages so designated. In most cases, those decisions have not been made using a majoritarian referendum, and even in the rare case when a referendum has been used, a new majority is not allowed to emerge at any time and repeal it."

[469]Daniele Conversi, Majoritarian Democracy and Globalization versus Ethnic Diversity, https://www.researchgate.net/publication/231537062_Majoritarian_democracy_and_globalization_versus_ethnic_diversity

[470]Graeber, David, Fragments of an Anarchist Anthropology ,the Wayback Machine (2004), November 18th, 2008, Page No. 89

[471] Richard Nixon, Silent Majority

FEATURES OF MAJORITARIAN DEMOCRACY

Just like every other form of democracy, majoritarian democracy also comes up with features of both favourable and unfavourable nature. Majoritarian democracy has certain advantages and disadvantages. Below are few of the features of the majoritarian democracy.

It is considered that majoritarian democracy maximizes self-determination as it capitalizes the personal autonomy in a society of conflicting interests[472]. In case of clash of interests, it's the majority that gets their way and not the people who are lesser in number. It could also be considered as a not so worthy solution as it cheats with a community i.e. the minorities.

From the above point it is quite clear that majoritarian democracy does not necessarily protects the rights of minority. The idea behind rights is that there are certain interests that we consider 'overriding demands'.[473] These are attributed to individuals in a society out of respect for their position as citizens, and their status as human beings. These rights are a constraint on society's use of political power. However, majoritarian democracy can deprive minorities of these rights.

Majoritarian democracy doesn't encourages welfare of the society as the decision making is based on an assumption that a political unit exists for making decision and there is no definite way of defining that unit. It is just a numerical figure which gives the unit the authority to make such decisions.

Majoritarian democracy often leads to disproportionate outcomes. Since, the whole concept of this form of democracy is relied on numerical figures, sometimes it leads to uneven outcome just because of difference of very few figures. And the solution is mostly preferable to the set of people who hold a position of majority and that apparently ends up into a scenario where the minorities are deprived of the benefits.

Majoritarian democracy reduces the scope of deliberation and compromise[474]. This is because this form of democracy, those in the minority does not take part in decision making processes which apparently leads no scope of discussion and negotiation by any sense for anything. The sole authority to decision making lies with political unit that consists of the majorities and the minorities are bound to accept the decisions coming from them.

Majoritarian democracy is basically the model of democracy where the opportunities for the participation of minority set of people is less. The power of decision making lies in the hands

[472]Rio Hoe, Pros and Cons of Majority Rule, https://consensusg.com/2017/06/06/pros-and-cons-of-majority-rule-explained-in-5-minutes/
[473]Rio Hoe, Pros and Cons of Majority Rule, https://consensusg.com/2017/06/06/pros-and-cons-of-majority-rule-explained-in-5-minutes/
[474]Rio Hoe, Pros and Cons of Majority Rule, https://consensusg.com/2017/06/06/pros-and-cons-of-majority-rule-explained-in-5-minutes/

of the majority which often ends up in an unequal result. The scope of majoritarian model of democracy is not so wide as compared to any other form of democracy.

MAJORITARIAN DEMOCRACY AND HUMAN RIGHTS

Human rights are set of concrete legal rights which lie in the hands of every human being by virtue of being born as homo-sapiens. These are the rights which are supposed to be protected by the government of every state.

While defining democracy, we can easily find in every text book or in any public domain that it is the form of democracy which is of the people, by the people and for the people.[475]

As mentioned above, majoritarian democracy is the model of democracy where the people who hold the position of majority in the society have the power to form the government. The minorities are set aside when it comes to any decision making process. The benefits of minorities are overlooked just because they are lesser in number. Most of the policies are made by considering the welfare of the majority.

Karl Popper has said that human rights is one of the major requirement of an open society and for implementation of human rights in a society, it is very much needed to have democracy, where people have freedom to exchange insights and knowledge[476]. In case either of the two is missing, then the functioning of an open society would be quite difficult.

In a democratic state, the right to vote, freedom of speech and expression, freedom of association and assembly are guaranteed by the government and these rights have also been included in Universal Declaration of Human Rights as well as European Convention on Human Rights and many other states' documents of human rights.

IMPACT OF MAJORITARIAN DEMOCRACY ON HUMAN RIGHTS

Many modern constitutions proclaim that sovereignty is ultimately vested on the people. In that case, the power of the people must also be divided if liberty is to endure. Democracy can therefore not be defined as the rule by majority vote. Neither does it imply that the vote of the majority is "an authoritative expression of what is right"[477]. Fundamental to our living under a democratic constitution is that we accept the result of votes because we want our free

[475]Abraham Lincoln, (1809-1865), 16th President of United States, https://kansaspress.ku.edu/subjects/political-science-theory-and-philosophy/978-0-7006-2216-0.html

[476]Popper, Karl R. (1957): The Open Society and its enemies, Volume I, The Spell of Plato. Routledge and Kegan Paul.

[477]Popper, Karl R. (1957): The Open Society and its enemies, volume I The Spell of Plato. Routledge and Kegan Paul, London, chapter 7, pg. 125

institutions to function in their own limited way, even though we may not agree with this or that decision.

UDHR is considered to be one of the most important documents where the set of all important human rights are listed. Many nations have adopted the principles laid down by the UDHR and has implemented the same n their respective nations.

The preamble of UDHR itself says that, "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective

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recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[478]

Therefore, the preamble also covers the aspect where it shows hoe important it is to have a democratic nation for implementation of human rights.

Collective choices are subject to fundamental imperfections that are not actively present in market choices as the goods bought, sold, or hired in the economic market can be divided and they are two dimensions of the same. They acquisition of these goods have to be done in large bundles and their effects are mostly reduced to the people using them. On the other hand, political goods are indivisible in both dimensions: citizens have to acquire them in bulk and political choices have huge external effects on third parties. Pedro Schzwartz very beautifully explained this concept with an example. He said, "In case people are supposed to choose all the goods they may want to consume for the next four years in one go on the date of the general or the presidential election such as food, housing, entertainment, holidays, education, health, whatnot, in one huge shopping cart; and that our choice should be fundamentally conditioned by that of all other consumers. This is what we inevitably must do in elections at the political market. The only reason for our participating in such awkward decisions is that some goods that we find indispensable, such as defence or justice, are by their very nature indivisible or too costly to divide."[479]

It's not necessary that all the decision taken democratically where the majority leads will always be correct and fair. In the majoritarian model of democracy minorities don't get their decisions or policy approved if they don't get support of the majority which again brings the control in the hands of majority.

Allowing majorities to target minorities is one thing; allowing minorities to substitute their policies for those of majorities is another. And apparently this is a violation of human rights of minorities. Certainly, human rights are priorities in every state and because of this reason the law sets out to afford some protection to the same.

But in a country that practices majoritarian democracy somewhere lacks in the protection of the human rights.

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[478] United Nations, Universal Declaration of Human Rights. Preamble, https://www.un.org/en/universal-declaration-human-rights/

[479] Pedro Schwartz, The Dangers of Majoritarian Democracy, December 5th, 2013, https://www.econlib.org/library/Columns/y2013/Schwartzmajoritarian.html

CONCLUSION

In light of this article it can be concluded that human rights and democracy runs parallel. The execution of both is quite challenging without the presence of any of them.

Democracy is the form of government which is totally for the benefit of the people and the views of the people are being considered unlike that of dictatorship.

And the implementation of human rights it's very important for any state to be democratic. The responsibility to protect the human rights lies on the states.

From the Magna Carta to UDHR, human rights documents have evolved a lot and participation of citizens in the formation of government has been considered as one of the important human rights.

There are multiple models of democracies and one common objective of all the democracies is the protection of human rights.

When it comes about the majoritarian democracy, it maximises self-determination as in case of any clash of interests of majority and minority, it's the majority who gets the benefit. The minority communities do not get their way in such situations. This means the outcome in this form of democracy is proportionally incorrect.

As per the principles followed by majoritarian models of democracy, the minorities don't even get the opportunity for negotiation also. They just have to follow the instructions and accept the policies and decisions taken by the majority. Thus, the scope of majoritarian democracy is limited and it just revolves around the majority. The minorities don't get the equal or for that matter even similar benefits are also not provided to them. And if we closely observe then we can find that how close majoritarian democracy is to the practice of dictatorship.

Therefore, it could be said that in majoritarian democracy there are certain practices which clearly violates of human rights. The minorities don't get similar number of opportunities to play role in the government as compared to the majorities. The majority gets the role in decision and policy making of the state whereas the minorities don't get to enjoy any such power. And this is clear violation of Article 21 of the UDHR.

Thus majoritarian democracy is less protective of human rights compared to the protection of the same by other models of democracy.

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PRODUCT LIABILITY OF MEDICAL DEVICES IN INDIA

- SHUBHADA SONWALKER & MUSKAAN GARG

ABSTRACT

This paper aims to evaluate the healthcare laws within the country starting from their origin all the way to their present status. It analyses the evolution and impact of each change due to advances in technology.

Every industry is affected by advances in technology including artificial intelligence, robotics, and the Internet of Things. The medical and healthcare sectors are no exception, and digital health innovation is progressing at a rapid pace. They have been subject to product liability litigation for many years. Yet, there is no consolidated/unified law on product safety in India. Instead, there are various general and sector-specific legislations regulating the same. Thereby, this paper aims to analyze and comprehend various studies and theories in order to gain a better insight into the topic.

INTRODUCTION

Medical care in modern times relies heavily on medical devices. These devices can range from a simple surgical needle to sophisticated and complex machinery. All surgical procedures require the use of medical devices. Over the years, there have been many cases where the patient has suffered due to faulty devices or doctor's negligence. However, the major dilemma lies in fixing the liability for the suffering of the patient. A surgically-implanted medical device often passes through several hands before ultimately reaching the patient. There are a number of parties besides the manufacturer who may have to bear some responsibility for the patient's injuries.[480]Before being implanted in the patient, the devices are first acquired by a physician or hospital from a distributor or manufacturer. As the device passes through a number of hands, liability towards the patient is divided amongst various people apart from the manufacturer. Innovation in medical devices is a necessity. Whenever new technologies are applied in treatment, the doctor is not fully aware of the constraints this raises ambiguity and makes it tough to fix liability. Indian law is not equipped to deal with problems of the patients, for starters it still considers medical devices as drugs. Patients have suffered immensely due to the lack of well-defined laws. When understanding product liability with regards to medical

[480] N.K Chakrabarti and Shreya Chatterjee, Regulating Health Related Technologies and Medical Devices: With Special Reference to India,Vol.No. 56, Journal of Law ILI, No.2 (April-June) pp- 216-235,p- 217 (2014)

devices in India, it is important to examine judgments, existing laws, and the gaps/lacunes in them to get a holistic perspective on this topic.

RESEARCH METHODOLOGY

This research paper uses the doctrinal methodology of research wherein the data is derived from a comprehensive analysis of various studies, theories, and thesis. In order to maintain a clear perspective on the topic, we have initialized it by looking into the origin and impact of healthcare laws and have then progressed towards the present status it has acquired. We also assess the gaps and loopholes existing and the legal measures which could bridge them. The entire study takes into account various major instances which led to structural changes and also the embedded, important case laws thereby aiding the theory with the practical aspect of the topic. It lastly provides an analysis of all legal provisions and their implementations with the drawbacks that could be refurbished.

LITERATURE REVIEW-

PRODUCT LIABILITY AND THE ECONOMICS OF MEDICAL DEVICES, BY STEVEN GARBER[481]

This research analyzed the economic effects of product liability on drug-producing companies and medical devices. The study was based on empirical evidence from a wide range of sources, simulations, and interviews with three major pharmaceutical companies to analyze the effect of liability on product availability, safety, effectiveness, and innovation. The study found that the liability system enhances the economic contributions of these industries in some ways — for example, encouraging them to invest in safer designs for medical devices; trying to undermine them in some — for example, causing companies to withdraw products that the medical community generally believes is beneficial; and has a mixed effect.

MANAGING PRODUCT LIABILITY TO MEET HIGHWAY INNOVATION BY G. L. GITTINGS, JOHN W. BAGBY[482]

[481] Dr. Steven Garbar, Product Liability and the economics of medical devices(1st edition, Rand, Institute of civil justice, 1993)

[482] G. L. Gittings, John W. Bagby, Managing Product Liability to meet highway innovations, Edition -6, Transportation Research Board, pp 36-40. (2012)

It's 6th edition discusses product liability at length in various countries around the world. The chapter on India has been written by Vivek Bajaj and Sonakshi Sharma from A.Z.B Partners. It deals with the practical effects of lacunas in regulation on medical devices.

The book has 6 chapters, chapter 1 discusses the need, origin, and background of product liability in relation to medical devices. In the following chapters regulations and their effectiveness has been discussed in a country-specific manner to derive the best practices. It also discusses the litigation procedures and dilemmas in litigation. Judges in most countries rely on documentary evidence and expert opinion which in new innovation is hard to find and ascertain. It ponders on the question of on whom should the liability be placed in the case of new products and new technologies? It also discusses the policy framework and differences in the rights of patients and healthcare professionals in various nations.

RESEARCH QUESTIONS

- What is the status of healthcare in Indian law?
- What is the status of its implementation and impact?
- What are the drawbacks and loopholes which need to be resolved?
- What can be done further to make it legally efficient?

STATEMENT OF PROBLEM

The paper analyses the lacunas in product liability for healthcare devices in India and its implications. It has been observed that except India most countries have specific laws related to

Medical Devices. India is still in the process of developing legislation specific to medical devices.

PART II- FINDINGS-

ORIGIN OF REGULATIONS ON HEALTHCARE IN INDIA

Since India is common law country liability in medical negligence originated in common law principles which stated that only the persons to whom the defendant owes a duty of care and the types of harm to which the duty extends have been considered. With the passage of time, common law has taken a wider perspective. Today's duty of care is concerned with whether or

not a legal obligation to take care arises between persons. The logical progression from the duty of care to standard of care was established through a series of judicial decisions[483].The evolution in the liability under tort law began with the landmark case of Donoghue v. Stevenson[484] and it has since been expanded to include those involved in the life-cycle of products, including assemblers, repairers, testers, and other manufacturers. Therefore actions are available from the purchaser of goods to users and bystanders. The classical common law stance towards faulty or useless goods was that of a caveat emptor, but in compliance with the UN Guidelines, in most countries, including India, protection of the rights of purchasers of goods emerged.

In India, it was first enforced by the Sale of Goods Act, 1930, and the Consumer Protection Act. Thus, Product Liability has evolved from a fault-based liability to strict liability for faulty products and finally into a statutory liability. The statutory liability governs the present issue of professional negligence or manufacturer's negligence of products reaching to ultimate users or ultimate consumers. The question of medical devices and liability arising out of them is discussed through three enactments apart from others.

1. Liability under common law
2. Liability under the Consumer Protection Act, 1986
3. Liability under the Drugs and Cosmetics Act
4. Product Liability

LIABILITY UNDER COMMON LAW

In the landmark case of Donoghue v. Stevenson, Lord Atkin laid the basis of liability of the manufacturer and developed the neighbor's principal.

'A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty'. This principle was established in Donoghue v. Stevenson and has been

[483] N.K Chakrabarti and Shreya Chatterjee, Regulating Health Related Technologies and Medical Devices: With Special Reference to India,Vol.No. 56, Journal of Law ILI, No.2 (April-June) pp- 216-235,p- 217 (2014)

[484] Donoghue v. Stevenson [1932] 1 All ER.

extended in Andrews v. Hopkins[485] from manufacturers to include repairers[486], fitters[487] and assemblers[488].

In the dicta of Caroll v. Fearson[489] Mc Nair J held that the manufacturer is guilty of not making necessary examinations or failing to inform the plaintiff about it. The manufacturer can also be made liable for any fault in the product, found only after the product has entered circulation, he is liable to take steps to reduce damage thereof as well.[490] When examinations have not been conducted and damage is caused due to it, distributors can be made liable for oversight.[491]

Problems arise when limitation clauses are added under the sale agreements. Usually, before a surgery is conducted either the hospital asks for blanket consent or puts a cap on the amount which can be asked as damages. This makes the ascertaining of damages even more complex.

Liability under the consumer protection act

If a product or any of its component parts are defective its manufacturer may be liable for damage under the Consumer Protection Act (CPA). This act introduced statutory liability for defective products alongside negligence. In cases where CPA claims would not be available, a common law claim may also succeed. The Act imposes strict liability on manufacturers for any defect in the product and the damage caused thereby. The imposition of strict liability means that the suit can be filed without having to prove negligence on the side of the manufacturer. The damage caused by the product is in itself enough reason to sue. Though it is necessary to prove that the product was defective and the damage caused to the patient was a direct consequence of the defect in the product. The CPA extends the scope of law to include sales of products between businesses rather than just sales to consumers. A claim can be brought under this act even if the person has not directly purchased the product. However, no claim can be brought in case of loss of or any further damage to the defective product itself.

The supreme court has explained the objective of CPA in the landmark case of Lucknow Development Authority v. M.K. Gupta[492]. The court said that the implementation of the act has

[485] [1957] 1 QB 229.
[486] Stennett v. Hancock [1939] 2 All E.R
[487] Brown v. Cotterill [1934] 51 T.L.R.21
[488] Howard v. Furness-Houlder Argentine Unes Ltd [1936] 2 All ER
[489] 1998] P.I.Q.R. P.416
[490] .Hobbs v. Boxenden Chemical Co [1 992] 1 Lyod's Rep.54; Hamble Fisheries Ltd v Gardner [1 999] 2 Lyod's Rep.l; Hollis v. Dow Corning (1996) 129 D.L.R.(4th) 609. See also Carroll v Fearon [1998] P.I.Q.R.P416.
[491] Chaudhury v. Prabhakar [1 989] 1 W.L.R.29 (gratuitous agent inspecting property liable to the principal, though a duty of care was conceded
[492] Lucknow Development Authority v. M.K. Gupta (1993) 1 CTJ 929 (SC).

filled in the longing necessity of protecting the consumer from such wrong for which the common law does not provide any efficient remedy. The act attempts to provide a strong foundation to the consumer in case of any damage and injury caused.

The liability of the act also extends to goods and services. Redressal under CPA can be only claimed by the aggrieved parties who satisfy the statutory definition of a consumer. According to the act, a consumer is any person who purchases a good or hires any service for which he has partially or completely paid or promised to pay. The important part here is that the consumer should have paid for the goods or services to be able to claim damage under CPA. Any act without consideration that is done gratuitously will not be rendered as a service and thus will not be acceptable for a claim. Such a remedy is also available in case of commercial transactions ie. It is to be proved that money was transferred for the procedure[493].

In the year 1995, the Supreme Court of India in the case of Indian Medical Association v. V.P. Shantha[494] held that if any service was provided by a medical professional or a hospital in exchange for consideration then said service would be covered under the purview of the Consumer Protection Act, 1986 thereby allowing the patient to seek redress as a consumer. If the act done was gratuitous in nature the remedy is not clear.

Liability under the Drugs and Cosmetics Act

The drugs and cosmetics act, 1940 regulates the sale, manufacture, import, and export of drugs, medicines, and cosmetics in India. This act also regulates medical devices by addressing them under the definition of drugs as provided by the act. The drugs and cosmetics amendment bill, 2007 recommended various suggestions like central licensing with regard to medical devices. While the drugs and cosmetics amendment bill, 2013 kept forth an initiative, from the government, to differentiate medical devices from the category of drugs thereby placing them in a new category and providing updated regulations accordingly. It also revised the approach of central licensing with regard to seventeen categories of critical drugs and regulations for the purpose of sale, manufacture, import, distribution, and export of medical devices. This act, after this amendment, became the first legislation to define medical devices and it's manufacturer. Yet, the scope of DCA was only restricted to the medical devices which were notified as 'drugs' by the government from time to time.

[493] https://www.pinsentmasons.com/out-law/guides/product-liability-under-the-consumer-protection-act
[494] (1995) SCC (6) 651

The **Medical Device Rules, 2017** were framed by the DCA which now regulate the standards of quality and safety of medical devices. These rules encircle all the requirements to be followed by manufacturers, importers, marketers, and sellers of the listed medical devices. MDR ensures the satisfaction of quality and safety benchmarks, at all levels of the supply chain, by enforcing a mandatory licensing requirement from the appropriate authority before undertaking any trade in the field. The license holders are supposed to adhere to certain conditions including recall of devices that do not meet specified standards. Breaching the rules under MDR may lead to fines and imprisonment of the license holder and revocation of the license granted.

Recently, the government has notified an amendment in MDR, the Medical Device (Amendment) Rules under which all medical devices sold in India will be regulated by MDR and will also require registration and licensing. The procedure of registration and licensing will make it mandatory for the person to strictly conform to its documented quality management system, failure of which may lead to revocation of license granted[495].

PRODUCT LIABILITY

The term Product Liability is a fairly new term in the history of law of torts. In fact, it has not been defined in any statute in India. Although through the evolving jurisprudence and recent judgments in other common law countries involving product liability claims, it is understood in India, To include the liability of any or all parties that form a part of the manufacturing and supply chain of the product arising from any defect in the product and the consequent loss caused by the use of such a product.

There is surprisingly no specific law or set of guidelines regarding product liability in India. There exist certain general and sector-specific laws that form part of the legal framework governing product liability in India. Which in certain cases may seem to overlap and in others is not present altogether. These are dependent on the sector and the facts of the case. To claim damages under product liability under tort law, the aggrieved party has to prove all the elements.

1. Presence of defect in the product.
2. Breach of Warranty or conditions applied.
3. Breach of Duty of care

[495] https://arogyalegal.com/2020/article/all-medical-devices-in-india-to-be-regulated-as-drugs-medical-devices-amendment-rules-2020/

It is only in the rarest of cases that the court was inclined to declare the existence of a defect in the product implied negligence, one such case being the Johnson and Johnson company's faulty hip replacement case.

JOHNSON AND JOHNSON COMPANY CASE

With regards to medical devices though standards like BIS[496] and provisions under Sale of Goods Act[497], Consumer Protection Act[498]and Indian Contract Act is present. They are fairly general in nature and are not fit to address the grievances of patients. As seen in the Johnson and Johnson hip replacement case[499]4,500 patients were not able to get proper compensation because the onus of proof of damage rested on them. Also, the expert opinion of practicing doctors was required to substantiate their claims. As in Bolam v. Fiend Hospital Management Committee[500]The doctors employed by the foundation gave testimonies and evidence in favour of the company and the patients were left without a remedy. The problem can be better understood if one looks into the remedy given to the patients in the USA, where Johnson & Johnson company had agreed to pay $ 2.5 billion (over Rs 15,000 crore) as compensation to around 8,000 U.S citizens who had sued the company after being fitted with its faulty hip implants.[501] It was revealed that the implant metals cobalt and chromium were leaving debris in the body which led to fluid accumulation in joints and muscles causing pain or discomfort and heightening chances of metal poisoning[502]. However, the scenario in the US is a huge contrast with India. In India, about 4,500 patients had received the implant and there is only one reported case against the company in consumer court. The patients were ignorant and have remained in the dark about the dangers the implant poses and the global outcry against it. A large number of patients have remained under pain or have gone for further surgeries unaware of the effects of the implant. This is the present scenario with regard to liability for medical devices. While a US litigant stands to gain an average compensation of Rs 15.6 crore under the plan besides the legal fees, the compensation issue has not even arisen in India. The company

[496]Sale of Goods Act, 1930
[497] Consumer Protection Act ,1986
[498] Bureau of Indian Standards Act, 2016
[499]Editorial, "J&J to pay $ 2.5b for faulty hip implants" The Times of India, Dec. 4, 2013.
[500]BOLAM *v.* FRIERN HOSPITAL MANAGEMENT COMMITTEE[1957] 1 WLR 582
[501] Re DePuy Orthopedics Inc. Pinnacle Hip Implant Products Liability Litigation, 11-md-2244, US District Court, Northern District of Texas (Dallas).
[502] These are metal on metal implants, with cobalt, chromium, and molybdenum as constituent components. Called A.S.R (Articular Surface Replacement) XL Acetabular Systems and ASR Hip Resurfacing Systems, these were being manufactured and sold for many years by Deputy International Ltd.(DePuy)U.K, a subsidiary of Johnson and Johnson Co.

has only referred to bear costs of testing and treatment for reasons related to the recall, including revision surgery. The Maharashtra Food and Drug Administration (FDA) had later written to the CBI to take over the case. But, no substantial remedy could be sought as the patients had already signed the informed consent forms. Which said that they already knew of the damage which could ensue. Also, when in 2017 DGCI did make a committee to address the issue[503]. It did not take the testimonials of the patients. The Acetabular Surface Replacement (A.S.R)[504] Hip replacement case was a one of a kind mass tort action under product liability. Due to a lack of proper framework and late response by stakeholders, it lead to an irrational settlement.

Aggarwal Committee Report

After the massive blowup of the case, The Ministry of Health and Family Welfare set up a committee to investigate this matter. The committee was set up under the chairmanship of Dr. A.K. Aggarwal. The report indicated that Johnsons and Johnsons had suppressed key facts regarding the 'faulty' hip replacement systems withdrawn globally, complications of which required many patients to undergo revision surgeries.[505]Due to faulty implants, many patients developed anomalies like fatigue or local tissues with pseudotumors, pain walking,metallosis[506]cysts in the kidney and Asthenozoospermia[507] . Some patients have also reported permanent disabilities.

Specific Recommendation

The committee recommended that the company must be made at least liable to pay 20 lakhs per patient.

General Recommendations[508]

The report had to face a lot of backlash as the compensation of just 20 lakhs was not enough to cover the physical and mental damage done due to the surgery. In the case filed in the Delhi

[503] The Agarwal Committee had looked into the technical issues related to faulty implants while the R K Arya Committee decided on the quantum of the compensation.

[504]\https://www.downtoearth.org.in/news/health/delhi-high-court-orders-j-j-to-pay-67-hip-implant-patients-rs-25-lakh-each-64845

[505] https://cdsco.gov.in/opencms/opencms/en/Committees/ASR-Committee/

[506] Increased levels of cobalt and chromium in the body

[507] Reduced Sperm Motility.

[508]https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/common_download.jsp?num_id_pk=ODQ0

HC, the ministry agreed to a settlement of 25 lakhs per patient which when contrasted with the damages given in the USA or Australia seems meagre.

- This was because of the lack of specific standards and laws regarding product liability in India.

The committee recognized the loophole and provided additional general recommendations which include:-

- **Establishment of independent registry for tracking usage of high-risk medical devices by MoH&FW, Govt. of India**
- **Strengthening of Materiovigilance Programme of India**
- **Guidance of Recall of faulty medical devices to be made by CDSCO**
- **Inclusion of provision of compensation in Medical Devices Rules. 2017**

Issue of Liability for using medical devices

Medical devices are used for protection, correction, and rehabilitation from diseases. As new technology usually has uncertainties related to its use and side-effects, it faces a lot of resistance before being accepted. It is also to be noted that innovations in medical devices are usually made by doctors. Tortious liability, product liability, and medical malpractice usually deal with medical device innovation and can be a hindrance in the development of new technologies. While the patient can sue the manufacturer when existing technology is used under practice-pathway or research- pathway,[509] in cases of new technologies, the liability seems to fall virtually on the doctor only.

Though the duty of all legislations on this topic should be to prevent all kinds of medical negligence and malpractice such legislation also has to be conducive to innovation.

Drugs and Cosmetics Act, 1940. The basic framework of the legislation with regard to medical devices is very similar. One of the essential criteria for medical devices is the classification of medical devices. The classification is usually made according to the risk which is associated with the medical device, the intended purpose for the device by the manufacturer, and the device's indications for use.

It has also been observed by the authors that the United States has the most efficient mechanism to regulate medical devices. The US Food and Drug Administration's Centre for Devices for

[509] Anna C. Mastroianni, "Liability, Regulation And Policy In Surgical Innovation: The Cutting Edge Of Research And Therapy" 16:2 Journal

Radiological Health (USFDA/CDRH)[510] governs the regulatory regime of medical devices in the United States. With an efficient regulatory mechanism in the United States, it is much easier to bring an action against a manufacturer or doctor in case a patient suffers as a result of a defective device. Whereas, the typical claim in the UK involves an injured party pursuing a medical device manufacturer, usually under the Consumer Protection Act 1987 (CPA) which implements the Product Liability Directive and imposes 'strict liability' on the producer of defective products for damage caused by the defect[511]. India needs to develop a robust regulatory system that is both accommodative yet effective.

CONCLUSION

One of the major similarities between law and medicine is that no one can predict with certainty its outcome. With the commercialization of the medical profession, patients have been conferred with various rights. The link between medical law and medical ethics leads to a lot of legal issues and dilemmas. The doctors have various moral obligations towards a patient, however, a breach of it wouldn't make him liable. A doctor may breach a contract for not treating a private patient, but there might be a purely ethical reason for such breach. However, the court while dealing with such controversial issues has to give a significant role to the ethical issues.

[510] N.K Chakrabarti and Shreya Chatterjee, Regulating Health Related Technologies and Medical Devices: With Special Reference to India,Vol.No. 56, Journal of Law ILI, No.2 (April-June) pp- 216-235,p- 217 (2014)

[511] https://www.lexology.com/library/detail.aspx?g=c128db74-5615-4887-a8b8-eb3dae253091

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THE LONG WALK TO DECRIMINALIZATION OF HOMOSEXUALITY IN INDIA AND LGBTQ+ RIGHTS UNDER THE DIMENSION OF ARTICLE 21

- BANDANA SAIKIA & HARSHITA JAIN

ABSTRACT

The concept of Gender has changed a lot over the years from being defined as one of the binary sexes assigned at birth; it has changed to adopt the diversities in the human bodies and thus acknowledging the rainbow term "LGBTQ+". But this view has not been accepted by the society at large and thus faces discrimination for not being fitted in the binary gender. The society is dynamic and thus the law is meant to alter from time to time molding every new aspect of the society inside it. The fundamental rights that are endorsed in Article 21 are still far from reaching the non-binary gender groups and face clutches in their lives at every point of time on the basis of their gender identity.This research paper takes the problem and traces the rights of the LGBTQ+ community in India with a special reference to the rights that have evolved under Article 21 of the Indian Constitution since post-Maneka Gandhi Era and how these rights can help becoming more gender neutral in the future course of time acknowledging the non-binary gender groups with their personal liberty and dignity and the paper also suggests probable solutions in bringing about equality among the non-binary gender groups. Keywords: Gender neutral rights, Article 21, LGBTQ+ rights, right to health, right to reputation, right against sexual harassment at workplace, right to education.

INTRODUCTION

Right to life and personal liberty under Article 21 has evolved its ambit from time to time, bringing about the true nature of our Constitution i.e., Justice and Equality which implies that– "*No person shall be deprived of his life or personal liberty except according to procedure established by law".*[512]

Under Article 21, many rights have found space and recognition. The Supreme Court of India in the matter of *Maneka Gandhi v. Union of India*, the Apex Court gave a contemporaryfacet to this article and decided that right to live is not purely a physical right but also covers the right to live with dignity.

[512] Article 21, The Constitution of India.

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"*The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self."*[513]

Prior to the *Maneka Gandhi* case, the literal meaning of the word "personal liberty" came up for deliberation of the Supreme Court for the first time in the case of *A.K. Gopalan*.[514]The limited interpretation of the expression 'personal liberty' in *Gopalan's* case was not followed by the Apex Court in its decision in *Kharak Singh v. State of U.P.*, where the Supreme Court of India considered that 'personal liberty' is not restricted to bodily restraint but is used as a succinct term which includes within itself all the varied rights which go to frame the personal liberty of a man other than those dealt within the ambit of Article 19(1).[515]

The Right to dignified life is considered to be a major right in the lives of LGBTQ+ which comes into judicial conflict a lot of times and hence, leaves the judicial activism in question every time. Are the rights that are secured by the Constitution covers LGBTQ+ in them? Is the right to dignified life being made accessible to this community in practical life? Is solely enacting an act without any proper survey of the suffering community is enough? Most importantly, does merely abrogating a provision that criminalized homosexuality is enough for them to lead a dignified life? Solutions to such questions are the provisions under Article 21 of the Indian Constitution that can actually bring about dignity to the lives of the LGBTQ+ community.

THE ONEROUS PATH TOWARDSDECRIMINALIZATION OF HOMOSEXUALITY IN INDIA

The most astonishing victory of the legal identity of one of the groups of the LGBTQ+ community was Homosexuality which fought a long war for their rights. The movement to repeal Sec 377 of the IPC is a history which started years back in the early 90s by AIDS *Bhedbhav Virodhi Andolan*in 1991. The case prolonged for years which was finally revived by the Naz Foundation Trust which filed a Public Interest Litigation (PIL) in the Delhi High Court in 2001. The Supreme Court and High Court across India from time to time have tried to transit

[513]Maneka Gandhi v. Union of India, 1978 AIR 597, 1978 SCR (2) 621.
[514] A.K. Gopalan v. Union of India, AIR 1950 SC 27.
[515]Kharak Singh v. State of U.P., AIR 1963 SC 1295.

themselves in matters relating to unnatural offences under sec.377 of the Indian Penal Code. The issue of homosexuality has evoked a mixed response even before 1990's. On one hand there were demands to abolish section377 of Indian Penal Code while on the other hand, there was a strong fear persisting in some sections of the society. Few of them fear that legislation and increasing awareness of homosexuality may have a devastating effect. In the matter of *Fazal Rab v. State of Bihar*[516], the SC dealt with a case where a man had homosexual relations with a boy where the accused didn't apply force on the victim. The Supreme Court did punish him under sec.377 of IPC but they reduced the sentence from 3 years imprisonment to six-month imprisonment. The Court further observed:

"The offence is under Sec.377 which implies sexual perversity. No force appears to have been used. Neither the notions of the permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking. However in judging the depravity of the action for determining quantum of sentence, all aspects of the matter must be kept in the mind."[517]

The Indian Supreme Court in the case of State of Maharashtra v. Chandrabhan held that, the right to life which is enshrined in Article 21 implies more than just mere survival.[518] It includes the right to live with dignity which makes a man's life meaning and worth living.[519] Despite such safeguards guaranteed to every person by the Indian Constitution, homosexuals in India were unable to enjoy this right to life even partially. Many activists started questioning the criminalizing of homosexuality against the true spirit of Article 21 with reasoning that the State was depriving a human being from leading a complete and meaningful life.

The Naz Foundation (India) is a New Delhi based NGO who have always been in the forefront of the campaign to decriminalize homosexuality.Naz India's strong efforts have always sensitized the Government to different issues relating to the gender rights and health related concerns. The Naz Foundation of India filed a Public Interest Litigation in the Delhi High Court in 2001 fighting for the legalization of homosexual intercourse between consenting adults. The Delhi High Court refused the stay of the petition in 2003 and stated that the petitioners had no *locus standi* in the matter. The Naz Foundation of India appealed to the Apex Court against the decision passed by the Delhi High Court dismissing the petition on *locus standi*grounds. The

[516]Fazal Rab v. State of Bihar, AIR 1983 (SC) 323.
[517]Robert Wintemute, Mads Andenas, Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law.
[518] State of Maharashtra v. Chandrabhan (1983) 3 SCC 387 : AIR 1983 SC 803.
[519]Maneka Gandhi v. Union of India, 1978 AIR 597, 1978 SCR (2) 621.

Supreme Court dismissed the decision of the Delhi High Court and held that the Naz Foundation had the standing to file a PIL in this matter and sent the case back to the Delhi High Court. In the case of *NazFoudation vs. Government of NCT of Delhi &ors*, the Delhi High Court overturned the 150 years old section decriminalizing homosexuality on the grounds that Sec 377 was in full violation of Article 14, 15 and 21.The Indian Constitution safeguards the right to live with dignity and the right to privacy as dimensions of Article 21 and Section 377 of the IPC denies a person's dignity and criminalizes his or her core identity solely on the basis of sexuality and thus violates the core depth of Article 21.[520] The Delhi High Court in this case also took into consideration of the exploitation the eunuchs who are subjected to cruelty and extreme humiliation. The court in this mattertook the reference of the case of *Jayalakshmi v. State of Tamil Nadu*, where a eunuch committed suicide since the harassment and torture at the hands of the police officers on the allegation of involvement in a case of theft left him in a shook and the mental torture became unbearable for him which is totally against the personal life and liberty under Article 21.[521]

This judgement was overruled in the case of*Suresh Kumar Koushal and another v. Naz Foundation and others,* where the two-judge bench of the Supreme Court overruled the Delhi High Court's judgement. The court held that there was no such necessity to challenge this section because the LGBTQ community constitutes minority in India.[522] The Court further held that the Delhi High Court's decision was not at all justified in striking down section 377 of the IPC on the grounds of violation of Articles 14,15, and 21 of the Constitution and the matter should have been left to the Parliament to decide as to what constituted moral and immoral.

The Privacy concern which was taken up before the court in the case of *NazFoudation vs. Government of NCT of Delhi &ors*, was further discussed in the case of *K.S. Puttaswamy vs. Union of India*, which is popularly known as the Right to Privacy case which declared that the right to privacy is a fundamental right under the scope of Article 21 of the Indian Constitution. The Apex Court was of the view that privacy cannot be denied even if it is meant for the minority population and respected the principle that the protection of sexual orientation and the right to privacy is the core of the fundamental rights under Article 14,15 and 21 and Section

[520]NazFoudation vs. Government of NCT of Delhi &ors, 2009 SCC OnLine Del 1762.
[521]Jayalakshmi v. State of Tamil Nadu, (2007) 4 MLJ 849.
[522]Suresh Kumar Koushal&Anothwr vs. Naz Foundation & others (2014) 1 SCC 1.

ISSN: 2581-6349

377 violated both the Human Dignity which includes the violation of right to privacy and choice of the citizens.[523]

The Supreme Court on 6th September 2018 decriminalized all consensual sex among adults in private, including homosexual sex. The court overturned the 2013 ruling in *Suresh Kumar Koushal case*.[524] This judgement only scrapped down the portions relating to homosexuality under Section 377 of the IPC, but the remaining portion of the provision remains the same. This judgement made it crystal clear that the judiciary does work in the favor of the minor groups and that the judiciary is evolving itself from the British laid laws. But, although India today has repealed Section 377, harassment and police blackmail is a daily routine for India's gay population even today and most of the crucial rights under Article 21 are still not reaching this population in India and it is of a grave concern.

EXTENDED VIEW OF RIGHTSUNDER ARTICLE 21 ANDUPLIFTMENT OF LGBTQ+ RIGHTS

Since Maneka Gandhi, Art.21 has proved to be multi-dimensional. The development in the Indian Constitutional Jurisprudence extending the dimension under Article 21 by the Supreme Court post Maneka Gandhi case is noteworthy. In *UnniKrishnan v. State of Andhra Pradesh*[525], the Apex Court of Indiaheld that Article 21 is the heart of the Fundamental Rights covering every natural human rights of a human being. The Apex Court further took the view that in order to treat a right as a fundamental right, it is not obligatory that a right should be expressly stated as a Fundamental Right. Being considered to be the heart of the fundamental rights by the apex court itself, the LGBTQ+ community is still deprived of the rights under the large ambit of Article 21. The Supreme Court in the case of *National Legal Services Authority v. Union of India*, expressed their concern about the unfairness of the members of Transgender Community who seek legal declaration of their gender identity. The Court believed that the non-recognition of their gender was in violation of Article 14 and 21 of the Constitution. The Apex Court took due consideration of the matter in their hands and accepted their claim of legal status as a third gender with all legal and constitutional protection.[526]The right to choose one's gender is integral to lead a life with dignity which is undoubtedly guaranteed by Article

[523]K.S. Puttaswamy vs. Union of India, (2017) 10 SCC.
[524]Navtej Singh Johar&ors vs. UOI, Ministry of Law and Justice, (2018) 10 SCC 1.
[525]Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2718.
[526]National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

21 of the Indian Constitution. Article 21 was engulfed in the Constitution of India to safeguard the rights of every individual and it cannot stand as a mere spectator when those integral rights are violated. It is the utmost duty of a constitutional Court to provide safeguard to those rights taking into consideration of the honour and feelings of that community though they constitute a minority in an era where their rights have gained universal recognition and acceptance[527].

Right to Health

According to the World Health Organization, "*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*."[528] So, it means that a healthy person is the one who is not only free of any kind of diseases but is in a condition of welfare from physical, mental and social state. Also, according to Article 25(1) of the Universal Declaration of Human Rights (UDHR),

"*Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing, 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 circumstance beyond his control.*"[529]

Article 21 does not expressly state Right to Health as a fundamental right but the Supreme Court has declared it as a constitutional right while respecting and taking into consideration of the accepted international laws and regulations with regards to health being a fundamental right of every human being. The ambit of Article 21 has increased from time to time taking into consideration of the growing transition in the society. The Directive Principles of State Policy has provisions in relation to Right to health i.e. Article 42 and 47 of the Indian Constitution. Right to health means that a person shall have basic civic amenities of safe water, sanitation, food, maternal and child health care, housing, medical assistance and better working. The meaning of medical assistance in true sense means that doctors, hospitals, medical services should be available and accessible to every individual at any place and time. The state is responsible to provide proper efficient medical infrastructure to its citizen. The correct healthcare is the one in which the disease is treated, prevented and managed effectively. In the case of CESC Ltd. v. Subhash, the Apex Court of India recognized the right to health as a fundamental right and medical facilities are a part of social security. Right to livelihood springs from the right to life guaranteed under Article 21.[530]

[527]Ibid.. p.15.
[528]World Health Organisation, https://www.who.int/about/who-we-are/frequently-asked-questions or Preamble to the constitution of WHO as adopted by international Health conference, no. 2 pg 10
[529]The Universal Declaration of Human Rights, Art 25(1) pg 52, 1948
[530]CESC Ltd. v. Subash Chandra Bose, AIR 1992 SC 573.

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Harassment against the LGBTQ+ community has resulted in a significant impact on the health and well-being of the people who fall under this community. For example, the conversion therapy is used to change the person's sexual orientation and according to medical science, conversion therapy generally leads the person to suffer from high rates of depression, suicidal tendencies and substance use. The constitution or the legal precedents nowhere mentions that LGBTQ+ community can't be given the right to life because the constitution always mentions 'person' or any pronoun that is inclusive of other various genders and this shows that constitution has never discriminated the LGBTQ+ community. So, who are we to go against the basic essence of the constitution?

Adding another dimension to the issue of Right to Health is the sanitation of the LGBTQ+. It is a well-known fact that sanitation is required for any and everyone. The lack of sanitation can produce a lot of harmful diseases. The issue that is to be raised here is about the construction of separate toilets for the LGBTQ+ community. Many developed nations are trying to achieve the goal of Gender-neutral toilets like the USA, but developing nations like India is still facing criticism towards this concept. The LGBTQ+ community still faces the issue to access basic necessity of access to washrooms at public places. If the third gender goes to a men's washroom then there are chances of harassment and abuse while if a lady's washroom is used by them then they are yelled at, ridiculed and humiliated. In order to avoid such situations, they tend to hold in or delay the process of going to the washroom which further affects their health in a bad way. Some people also think that making of a separate washroom for the community may isolate them further. AkkaiPadmashali, a significant LGBTQ+ activist from India was humiliated and the irony in this incident is that the government which had honored her had humiliated her because a member working in that government building's woman washroom had verbally insulted her.

An Article titled "*Bathroom Battlegrounds and Penis Panics*"[531], stems from the ordinance passed by Gainesville "prohibiting discrimination on the basis of 'gender identity and gender expression' in employment and public accommodations (such as public restrooms and locker rooms)". The author recognizes the fact that the Transgenders' rights debate is at its peak and very prevalent across the nations. But the dichotomy in the situation lies in the fact as to where be Transgenders accepted and at which all places the society doesn't want them. The rebuttal that the opposition brings into the debate is the privacy of women and the protection of the "weaker section of the society- children and cis-women". The debate is generally restricted to

[531] "Bathroom Battlegrounds and Penis Panics", Kristen Schilt, Laurel Westbrook.

the women spaces and especially washrooms. Thus, the author challenges the seeing of bill only limited to bathrooms and neglecting all the basic rights it provides for, that an individual must possess irrespective of gender. The author has beautifully de-codified the opposition's arguments. Their demand only restraining to entry of Transgenders (Trans-women) into the ladies' restrooms bring forth the real premonition their argument is based on. They aren't afraid of Transgenders using the ladies restroom but all they are afraid of are human bodies having penis because they relate that to a man. A man for them stands as a symbol of oppressor who always thinks of having sexual affairs and is thus ready to defy the morals of the society and engage in acts of "sexual-predators and rapists". This argument has two underlying assumptions-

- All Trans-women have male characteristics and have a penis attached to their bodies.
- All sexual predators and rapists are men i.e. those who have penis.

Thus, the opponents' identifications of gender are in terms of the genitals a body possesses and is determined at the time of very birth. Opponents also call to maintain *status quo* just because it has been going on for quite some time. The authors challenge this by presenting the fact that before Victorian era there used to be gender neutral restrooms and not gender segregated. Thus, the segregation is only a socially mandated phenomenon and not otherwise at present. A lot of colleges and also in France places are having gender-neutral restrooms. If gender-integrated washrooms are brought in place then the Transgender people will not have to align as per the sexual organs but as per their gender identity that they choose to commit to. Then as stated in the article "a Transgender man with a beard would not be legally required to use the women's restroom simply because he had been assigned female at birth".

It has been approximately 6 years since the Supreme Court of India recognized the third gender. But, there is no stringent ways in which the government has adapted any measure to uplift better health conditions of the LGBTQ+ community. The Union Ministry of Drinking Water and Sanitation issued directions in the Swacch Bharat Mission to allow the community to use the washrooms they are most comfortable with. Although the central government has ensured that the third gender can use their choice of toilet but it doesn't ensure the safety inside the four walls. At the time when the current government is promoting Swach Bharat Abhiyaan so fiercely, the Third gender restroom awareness and infrastructure should also bethe highlight of the mission. Currently in India only three cities namely *Mysore, Bhopal and Bangalore* provide third gender washrooms and that too aren't available everywhere or are less in number. The idea is in the mind of the people but is not being implemented properly. There is an urgent

need to privatize this campaign because when privatized, the implementation time will get reduced and people involved will come up with innovative ideas to make third gender washrooms a success. Even if the gender-neutral washrooms aren't a successful idea then at least we should start from a third gender washroom and then gradually change the mindset of people as they will adapt to it well.

Right to Reputation

Reputation is a view or an opinion about a person as a whole or the character. In the Indian society the concept of reputation traces back to the ancient times. It is often associated with the person's image in the eyes of others. It controls a person's social status and position in the society.

The Article 21 of the Indian Constitution ensures the right to life and personal liberty simultaneously. The meaning of right to life doesn't merely define an animal like existence but to lead a life with dignity and respect. This means that a person's honor and right to reputation cannot be renounced by the other person's right to freedom of speech and expression. There should be a balance mechanism between both because once a person's reputation is tarnished; no amount of damages can restore the lost reputation. This is because once your image is ruined in front of another person then reversing that change in mentality is very difficult. In the matter of *Smt. Kiran Bedi v. Committee of Inquiry*[532], the Apex Court observed that,

"*good reputation is an element of personal security and is protected by the Constitution, equally with the right to the enjoyment of life, liberty, and property. The court affirmed that the right to enjoyment of private reputation was of ancient origin and is still very necessary to the human society*".

The Indian Penal Code, 1860 provides protection against criminal defamation under section 499 and 500 but that doesn't mean that it puts restrictions on a person's speech and expression instead it safeguards the reputation of its citizens. The right to reputation is an integral part of article 21 under the Indian constitution. In *Rajiv Kumar vs. State of U.P. and Another*[533], the court held that, "Reputation is built by deeds but can be wounded by words. Reputation is made by character but can be marred by calumny. Good reputation is created by strenuous and honest efforts but can be undermined by motivated and false propaganda. This disinformation becomes persuasive by persistence." Also, court observed that, "the right to defend one's reputation is the tree, while the right to reputation is the shadow. Without the tree there

[532]Smt. Kiran Bedi v. Committee of Inquiry1989,AIR 714, 1989 SCR (1) 20
[533]Rajiv Kumar vs. State of U.P. and Another, 2019 Latest Caselaw 1017 SC

is no shadow." In the case of *Gian Kaur vs. State of Punjab*[534], the Supreme Court confirmed that the right to reputation is a natural right.

It is not a hidden fact that the LGBTQ+ community faces instances of humiliation which tarnishes their reputation. They are a community that is more likely to or are more vulnerable to face humiliation because in India most of the societies are homophobic and are in the phase of denial to embrace this community openly. They socially exclude them, shun them publicly. The two established genders tend to see the third gender from the eyes of disgust. After all the third gender is also a human and the Indian constitution under Article 21 has never differentiated or expressively mention that right to reputation is only for the two genders. Article 21 is gender neutral and interpreting it, it is observed that the word 'person' includes any and every human being. Section 377 of the IPC disposes the LGBTQ+ community of their right to reputation which is a facet of the right to life and liberty of a citizen under Article 21 of the Indian Constitution. The society still denies the LGBTQ+ people to come forward and speak carefree about their sexual identification.

In order to end this kind of discrimination, we need to start from the very place where humans are taught about their genders i.e. home and then comes the second home i.e. the school. First of all the parents and teachers need to understand that the third gender is not something to be scared of but it needs to be embraced and welcomed. If children from a very young age can be taught about the third gender then they will never discriminate but will think that the LGBTQ+ is a part of them. The new generation should be well taught about this through education which is one of the greatest weapons. This will also help those younger ones who are naturally born like that and they will love themselves from their childhood which will save a lot of lives. Talking about homosexuality is still a taboo in Indian society. In comparison to heterosexuals the suicidal rate in LGBT community is three times greater. Thus, there is a need that the society will take the responsibility to consider them and recognize them. Accordingly, Cinema has its contribution to the society since its inception. The binary gender system thinks that this non-binary gender system is either some kind of abnormality or is a mental disorder. Thus, it is very much required that the majority has to understand the physiological and Psychological built up of others.Cinema is possibly the most popular among all the art forms, mainstream and most accessible, especially in India, a country where most number of films have been produced in a year in comparison to any other country.Cinema can accord to modernizing the conventional society by helping to change the orientation of people. The messages carried by

[534]Gian Kaur vs. State of Punjab, 1996 AIR 946

the characters depicted in the films resembling real life people could strengthen the morals more as compared to any other form of mass communication. Hindi films are the markers and upholders of the typical Indian society. Since the beginning it is not only portraying the Hero-Heroine as the love birds and the victory of goodness over all evils but also depicting some bold and controversial issues of the society. Gender minorities are one of those not so talked about topics. Not only this the other land marks in Indian cinema which have portrayed the LGBT characters and are based upon their stories are *Tamil* film '*Appu*' directed by *Vasanth, 'Deshadanakkili*' (1986) in *Malayalam* directed by *P.Padamarajan*, *Marathi* film '*Umbaltha*' directed by Dr. *Jabbar Patel* in 1982, In *Bengali* there are films like '*Uttara*' in 2000 directed by *Buddhadev Das Gupta* and 'Surviving Sabu' in 1998 by *Ian Iqbal Rashid*. At this junction it can be stated that the Indian cinema has portrayed the gender minority in two ways as the object of laugh or in the form of villain which ultimately leads to the negative portrayal of the LGBTQ+ community throwing them in front of immense humiliation harming their reputation.

Right against sexual harassment of LGBTQ+ community at workplace

Harassment can be defined as "an act of annoying or worrying somebody by putting pressure on them or saying or doing unpleasant things to them."[535] Harassment and bullying has become a common phenomenon not only among the youth who identify themselves to be either male or female but also lesbian, gay, bisexual, transgender, queer and the list continues (LGBTQ+). The Article 21 itself has a larger ambit and the right to dignified life also extends to the LGBTQ+ who is equally entitled to live a dignified life without any kinds of humiliation. With the discard of Section 377 of the Indian Penal Code in the case of *Navtej Singh Johar& Others v. Union of India, Ministry of Law and Justice*[536], homosexuality is no more considered to be a crime which is punishable under this penal code. But, the stigma and taboo associated with it, still prevails across the country and the scope of Article 21 equally is entitled to protect LGBTQ+ people in order to protect their human dignity.

Sexual Harassment and gender-based harassment at workplace is the violation of an individual's right to live a life with equality and dignity under Article 21 of the Indian Constitution which also violates the human rights of LGBTQ+ person which are recognized under International Law.According to Oxford Dictionary sexual harassment is defined as

[535]https://www.oxfordlearnersdictionaries.com/definition/english/harassment
[536]Navtej Singh Johar& Others v. Union of India, Ministry of Law and Justice, (2018) 1 SCC 791.

"comments about sex, physical contact, etc., usually happening at work, which a person finds annoying and offensive"[537]. The public workplace is often limited within the scope of binary gender which results in discriminatory effects.The Indian Parliament passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. In addition to audibly defining sexual harassment, this legislation is revolutionary and unique. However, one crucial aspect of the POSH Act is that it is not gender-neutral. As the title suggests, it creates the redressal mechanism only for "aggrieved women". Addressing the issue of a gender-neutral law was taken up before the Parliamentary Standing Committee in 2011 but they recommended that the law should remain gender-specific as women have been at a disadvantaged position and have been bullied and harassed and hence recommended a gender-specific law. India is no stranger to the transgender community and there have been appointments of many transgender in public posts, they are often ridiculed, demeaned and harassed at workplace and alas there is no such law favoring them in helping them fight against such evils at workplace and Vishaka guidelines totally disregarded this matter. The question that triggers the reasonable thinking person in today's context is that why there is no ground for an act which protects sexual harassment which is attributed towards LGBTQ+. Although LGBTQ+ identities are known in the workplace at the time of the recruitment itself, they definitely experience discrimination including harassment, bullying, blackmailing, and misconception of gender every time. The POSH Act fails in recognizing the possibility of LGBTQ+ employees being victims of sexual harassment at workplace. The Founder of Samana Centre, Arpana Mittal expressed her concern regarding the workplace discrimination being a big issue in post 377 India and the workplace is meant to be sensitized.[538]

LGBTQ+ people usually face discrimination, exclusion and abuse when they come out of the societal barriers and seek to get employed in order to earn their own bread and butter.The Central and the State government has an obligation to adapt effective legislative measures to protect them from various sexual harassments which not only hamper their reputation or dignity but also the self-esteem which they hold of freely declaring themselves to be among the LGBTQ+ community. Article 21 of the Indian Constitution never differentiates gender and the "right to life" means a life with dignity which is also applicable for the people who belong to

[537]https://www.oxfordlearnersdictionaries.com/definition/american_english/sexual-harassment
[538]Fatima Khan, "Year after homosexuality was decriminalized, equality a distant dream for LGBTQ community", (https://theprint.in/india/year-after-homosexuality-was-decriminalised-equality-a-distant-dream-for-lgbtq-community/286312/, last visited 30.05.2020).

the LGBTQ+ community.Many provisions in the Criminal Law such as Section 375(rape) do not take into narration for LGBTQ+ relationships. Sexual harassment and rape laws are silent in inclusion of LGBTQ+ community and confine to the binary gender groups

Such discrimination can be put to an end only when the laws become gender-neutral and address immediate justice for people at workplace who suffers from sexual harassment. The enactment of laws should be such that it serves the interest of rainbow community at workplace. There should be a concern raised in the parliament regarding the expansion of definition of "sexual harassment" in the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 to include the punishment for harassment against the rainbow community at workplace. It should become a concern for the employers to maintain and just and favorable environment at workplace. Training programs for the staff and management board should be given emphasis on how they could prevent sexual abuse or harassment in the name of gender identity that may occur at times.

Right to Education

Education helps in the overall development of an individual. Ones who are privileged enough to get education, acquires knowledge, learns behavior and adjustment capacity in order to sustain in the society. A person who is educated in a society is regarded to be a noble inspiration. The right to education passes from right to life and personal liberty guaranteed by Article 21 of the Indian Constitution since there can be no dignified life or the realization of other rights without proper education. The Apex Court of India in the matter of*Unni Krishnan, J.P. v. State of A.P.*, [539] the Apex Court ruled that Article 45 of the Constitution has to be read in "harmonious construction" with Article 21 as right to life loses its significance without education.

The right to "free and compulsory education to all children of the age of six to fourteen years" is implemented under the Right of Children to Free and Compulsory Education (RTE) Act, 2009.Section 2 (c) of the RTE Act defines "child" as "a male or female child of the age of six to fourteen years" which is discriminatory owing to gender. The definition itself is so biased that it clearly implies that there is no such safeguard of right to education for those who doesn't fall under the category of the common binary gender (male/female).

[539]Unni Krishnan, J.P. v. State of Andhra Pradesh, (1993) 1 SCC 645.

There are surveys which are conducted by various organizations across the globe who offers us a broad idea of how the denial of right to education to the LGBTQ+ community, they are often denied of jobs which not only affects their right to lead a dignified life but also to earn their livelihood.Also, the applications of various schools and colleges although has started providing columns for determining oneself under 3rd gender, but such provisions are rarely seen in institution which lacks scrutiny by the student administration board of a particular state. Documents like Aadhar Card, PAN (Permanent Account Number) Card, Passport, educational degree certificates, etc. are required during the time of various admission or academic purposes which may range from High School level to University level and to the extent of Job recruitment.The non-binary gender people face challenges to change their gender markers and names on such documents and identity cards. These problems are made more challengeable for the people who are working in such offices who consider them to be inferior and subject them to the clutches of humiliation. Many remote educational institutions refuse to intake students who identify themselves to be transgender and consider them to be inferior.

SUGGESSTIONS

Although LGBTQ+ community is getting accepted among the youth of this country, but there still lacks acceptance in the family group and to some extent friends circle. Far from gay prides and parades, families in rural India have their own mindset and way of dealing with LGBTQ+ individuals. Honor killings are still done in the name of unnatural gender mainstream and that it gives a hard time for them to come over from such situations to a platform where they can stand for themselves and express their thoughts and ideologies .In few parts of the country, lesbian women goes through emotional trauma who are forced to get married to a male counterpart by their family members and thus the widespread awareness among the mass population doesn't really effect the society in large. Even in urban educated society, we find cases where gay men commit suicide because of the humiliation that they face from their colleagues after revelation of them being gay.

Following are some of the recommendations in order to help the LGBTQ+ increase their stand in the society and avail the actual rights that is provided by our Constitution to every citizen:

1) **Family:** For a kid his home and family are the first school because the family starts to inculcate the values and culture from a very tender age. If the parents start to sensitizing their children from the start then the children grow up to be used to this community and embrace them more freely.

2) **Schools, Colleges and Education: Schools** are the place where a child is influenced the most be it the friends, the teachers and the environment. The schools need to take an initiative to make the idea of LGBTQ+ as adaptable as possible. In schools, colleges and universities, there should be an awareness programme about the LGBTQ+ community and an interaction with them so that their issues & problems can be known. It can be as simple as creating a grief redressal cell for the community.
3) **Sex Education:**Although legal changes can be made, yet to give those equal rights and opportunities to the LGBTQ+ community, social change from the grassroots level is needed. Providing Sex Education and awareness on sexual identities at an age as early as 14 years should be made a part of school curriculum. Instances of bullying, both verbal and physical, should be checked in schools and a comprehensive framework of law should be created in regard to such cases from the level of school itself.
4) **Bathroom Battlegrounds:** If we want the LGBTQ+ community to be independent and self-reliant then there is an urgent need to provide the LGBTQ+ with a hygienic environment. But unfortunately, India doesn't provide this basic need for them. The ones which are even made for them do not work properly and are very few in number. This pattern needs to be changed and a third gender washroom or a gender-neutral washroom needs to be created.
5) **Sports and Changing Rooms:** A basic mentality of an average Indian is that they associate sports with gender. Although we have a lot of sports women change this stereotype like Mary Kom, Geeta and BabitaPhogat and many more but still people would hesitate. When the women are not having opportunities then the dream of LGBTQ+ community having these opportunities is a far-fetched idea. There is a need to break the chains and let them excel in the field of sports as well.

Many sports require enthusiasts to use locker rooms and changing areas. These places pose a serious problem. The Transgenders are afraid to use the rooms because they feel that they are unaware of the unspoken etiquettes of these places for never having used them before. Thus, to avoid being spotted and then ridiculed they prefer remaining secluded. The stress is that Transgenders don't wish to shock the community using the same place. They feel that they are violating the rules of the society which are actually random norms set the majority in place. A Transgender who identifies as male but has a body of female feels guilty about self for being in a gym locker room that has all "normal" women beside him/her. The others who don't wish to have a Transition feel that they are forced to wear an identity that was given to them at birth

without their own consent. The solution that the scholars presented is of having individual cubicles so that no one realizes or interferes in the privacy of other.

6) **Creative Campaigns:** New creative ways can be used to change the culture like media, art, campaigns and more. Hiker Chiu of Taiwan, the person who initiated the global "Free Hugs with Intersex" movement to break down the stigma[540] is the best example. We need creative campaigns like these so that the stigma around it is broken.

Cinema poses to be a big influence on the daily lives of people from affecting their values and traditions to who they aspire to become. The Bollywood industry needs to make more movies like '*Shubh Mangal ZyadaSavdhan*' because then the public will be more familiar and ready to deal with the problems faced by the LGBTQ community.

7) **Law:**Laws are needed to prevent sexuality-based discrimination. This will help the authorities from firing LGBTs because of their sexuality. This solution will impact this problem for good because the laws will make sure that people are not discriminated against.

CONCLUSION

Constitution is not just a charter of governance but is an ethical document that lays down a combined effort that people of a community make to establish a concept and the kind of life they wantto live. The question that who I want to loves is a question of choice. The idea of having Article 21 needs to be remembered when discussing about the issues related to the LGBTQ+ community. Homosexuality is not a disease but is as natural as heterosexuality. We humans can't control it. Given the Indian society where the position of women is still the worst, it is very difficult to raise up issues like that of LGBTQ+ and even difficult to get solutions and protection.

The people of the LGBTQ+ community are as human as we are and just because of their sexual preferences they cannot be tagged as sick or aliens. The constitution of India treats everyone as humans and has never differentiated between the genders then who are we to discriminate them just because of our biases and mentality. The soon we understand that there is no difference between humans the better it is. It will save a lot of young lives. Lives of those who aren't really able to understand what is going on with them already given the things they have to balance all at once. They cannot be treated just the way the other two genders want as they

[540]Leah Entenmann, research and communications coordinator, Alturi, New York, US, @AlturiOrg

aren't inferior to those two. The harassment the community people go through is on a different level altogether. The change needs to brought in with the laws and the mentality.

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OFFENCES RELATING TO FALSE EVIDENCE, PUBLIC JUSTICE. (SECTIONS 197, 212, 213, 215-219, 221-223, 225 A)

- **ABHISHEK ANAND & SHEIKH INAM UL MANSOOR**

There are batch of sections in IPC which are relating to false evidence. The common fact among all these sections is that the false evidence is given always in connivance of other person. It means in all the above sections two or more persons are Involved. Definitely under common intention they defy the legal process by cross expression of their intention which culminates into consent for doing of the act. Now we will study all the above offences where definitely there will be criminal act resulting from some hidden agreement consented thereto. First of all we will study Section 197 of Indian Penal Code.

Issuing or signing false certificate Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

False Certificate :- The expression 'issuing or signing false certificate' required by law in evidence, means that the certificate should by some provision of law be admissible in evidence as such a certificate without further proof.[541] Sections 197 and 198, I.P.C. relate to issue of false certificates. Section 197 makes issuing or signing of false certificate, and Section 198 using as true a certificate known to be false, punishable. To hold a person liable under Section 197 IPC

(i) the certificate must be required by law to be given, or signed, or it must relate to any fact of which such certificate is by law admissible in evidence, and

(ii) it must be given or signed knowing or believing that it is false in a material point.[542]

A certificate is a testimonial given in writing to declare or verify the truth of anything.[543] A copyist who makes an in correct copy is guilty under this section.[544] But if a person, who is not required by law to give a certificate, gives a false certificate, he will not be liable under this

[541]MahabirThalcvr v. Emperor, AIR 1947 Cal. 466 (467).
[542]Charles E. Toreia, Wharton's Criminal Evidence, (1985) Vol. I, pp. 272-273.
[543]Deva Singh, 1878 PR 15 of 1879, Ratanlal and Dhrajlal, Law of Crimes, (1987) 23 rd ed,, Vol I, pp. 714-717.
[544]MahabirThakvr v. Emperor, AIR 1917 Cal 466.

ISSN: 2581-6349

section. For instance, the issue or use of a false medical certificate does not render a person liable under this section, or under Section 198, I.P.C. Likewise, a false certificate issued by a municipal chairman based on a Death Register is not covered under this section.[545]

Harbouring Offender (Section 212)

For conviction under this section, some offence must have actually been committed and the harbourer must give refuge to one whom he know or has reason to believe to be the offender with the intention of screening him from legal punishment. This section has no application where the persons harboured are not criminals but they have absconded merely to avoid or delay a judicial investigation.[546]

Taking gift etc to screen the offender from punishment (Section 213) Scope This section has no application to cases, where the compounding of an offence is legal. As to the scope of this section, there are contradictory views of different High Courts. In ***Hemchandra Mukherjee***,[547] the Calcutta High Court opined that this section applies only where there has been an actual concealment of an offence, or screening of a person from legal punishment or abstention of criminal proceeding against a person in lieu of some consideration.

However, the Bombay High Court[548] has disagreed from this view and has held that this section does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing to taking legal proceedings. It is sufficient if an illegal gratification is received in consideration of a person to conceal an offence or screen any person from legal punishment or resist from taking any proceedings.

• Taking gift to help to recover stolen property etc. (Section 215)

Taking or agrees or consents to take the implication of these words is that the person giving and taking the gratification has not only agreed as to the object for which the gratification is to be given but also as to the form which the gratification is to take. In those case where the gratification has not actually passed and there is a disagreement as to the form or shape which the gratification is to take, the idea of agreement or consent is negative.

Deprived by any offence punishable under this Code The act by which the property is deprived must be the subject of an offence punishable under this Code. In case of *Sharfa*the accused

[545]Balkrishna, AIR 1937 Pat 463.
[546]RamrajChoudhavy, (1945) 24 Pat. 604.
[547](1924) 52 Cal. 151.
[548]Biharilal Kali Charan, (1949) 51 Bom. L.R. 564.

took Rs. 12 from the owner of the cow and promised to restore it in 10 days. Later on, he refused to return either the money or the cow. It was held that no offence was committed under this section.

1.1 Unless he uses all means in his power to cause the offender to the apprehended

The burden of proving the negative that the accused did not use all his power to cause the offender to be apprehended does not lie on the prosecution but it is on the defence to establish that the accused did all to cause the offender to be apprehended.[549]

1.2 Harbouring offender who has escaped from custody or whose apprehension has been ordered (Section 216)

On a comparison of this section with Section 212, it is apparent that this section deals with harbouring of an offender who has escaped from custody after being actually convicted of charged with the offence, or whose apprehension has been ordered. Section 212 deals with the offence of harbouring an offender who having committed an offence absconds. Thus the offence, contemplated under this section is an aggravated form of the offence punishable under Section 212.This section takes into account only those cases where the man who is harboured is wanted for an offence for which a maximum sentence of at least one years' imprisonment is provided. No provision is made for those cases where he' is wanted for offences for which the maximum sentence is less than one year.[550]

1.3 Public servant disobeying direction of law with intention to save person from punishment etc (Section 217).

This section deals with disobedience on the part of a public servant in respect of his official duty. The object of this section is to punish a public servant who intentionally disobeys any direction of law to save a person from punishment. It is not essential to show that the person so intended to be saved, had committed an offence, or was justly liable to legal punishment.

In case of ***Amiruddeen***[551] it was held by the Calcutta High Court that the public servant charged under this section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that persons liability to punishment. Legal Punishment' does not include departmental punishment.[552]

[549]Deo Suchit Rai, 1947 A.L.J. 48 (F.B.); D.K. Balai, 1959 Cr. LJ 1438.

[550]Deo Baksh Singh, (1942) 18 Luck 617.

[551](1878)3 Cal 412.

[552](1878)3 Cal 412.

ISSN: 2581-6349

1.4 Public servant forming incorrect record or writing with intent to save person from punishment or property from forfeiture (Section 218)

This section prescribes punishment to a public servant who intentionally prepares a false record with the object of saving or injuring any person or property. The intention on the part of the public servant is an essential ingredient of offence under this section. For conviction under this section, making of incorrect entry in the record is not sufficient but it is essential to show that the false entries were made with the intention to cause injury.[553] A public servant shall be liable under this section even if the person whom he intends to save from legal punishment is himself.[554]

1.5 'Actual commission of offence not necessary'

Under this section, actual guilt or innocence of the alleged offender is immaterial if the accused believes him to be guilty and intends to screen him.[555]In ***Maulud Ahmad,***[556] the Supreme Court has held that if a police officer has made a false entry in his diary and manipulated other records with a view to save the accused from punishment, the mere fact that the accused was subsequently acquitted will not be of any help to the police officer.

1.6 Public servant framing incorrect record to save person from legal punishment

In case of ***Deodhar Singh,***[557]Za Sub-Inspector was held liable under this section. The fact of the case was that the Sub-Inspector was given a warrant by the Superintendent of Police under the Public ambling Act to arrest persons found gambling in a certain house. The Sub-Inspector, in order to save the persons from legal punishment under the Public Gambling Act in that house, framed a first information and a special diary incorrectly.

1.7 Public servant in judicial proceedings corruptly making report etc. contrary to law (Section 219)

This section should be read along with Section 77. This section is concerned with corrupt or malicious exercise of the power vested in a public servant for a particular purpose.

1.8 Intentional omission to apprehend on the part of Public servant bound to apprehend (Section 221)

[553]Jungle Lall, (1S73) 19 WR (Cr.) 40.
[554]Raghubansli Lai (1957)1 All. 368.
[555]NandKishore. (1897)19 All 305.
[556](1964)2 Cr. L.J.71 (SC).
[557](1899)27 Cal. 344.

The object of Sections 221, 222 and 223 is to provide punishment for intentional omission to apprehend, or negligently suffering the escape of offenders on the part of public servant bound to apprehend or to keep in confinement.

1.9 Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed (Section 222)

This section has similarly with the preceding section. The only point of distinction is that under this section the person to be apprehended has already been convicted or committed for an offence. Thus the offence under this section is an aggravated form of offence under Section 221.

1.10 Escape from confinement or custody negligently suffered by public servant (Section 223)

This section punishes a public servant who negligently allows any person charged with an offence to escape from confinement. The section consists of the following three essentials :-

1. The offender must be a public servant.
2. IT must be legally bound to keep in confinement a person charged with or convicted of an offence.
3. He must negligently suffer such person to escape.

The section will apply only when the custody is lawful. If a public servant is not entitled to keep a person in custody, he does not commit in offence by allowing that person to escape.

1.11 Omission to apprehend or sufferance of escape on part of public servant, in cases not otherwise provided for (Section 225A)

A public servant who is bound to apprehend or to confine any person and who intentionally or negligently omits to apprehend that person is to be punished under this section. The section provides for such punishments which are not within the purview of Sections 221, 222 or 223.

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VICTIM COMPENSATION AND REHABILITATION IN INDIA

- **DIVYANSH SINGH**

ABSTRACT

Victimization is for the victims of crime who are harmed not only by physically but emotionally and mostly financially. For the rehabilitation of the victims, victim compensation and various services plays a major role. This research is a study of various schemes and compensation for the development for example the adequate compensation and support services to the victim is for an effective criminal administration.

The analysis related to Indian constitution, Indian judiciary and the provisions related to the payment of compensation to the victims of crime. The compensation given to the victims by the help of section 357A of Criminal Code of Procedure, 1973 and making it compulsory for the state to provide the compensation to the victims as result of crime and it requires rehabilitation. All the states of the country have to provide adequate compensation according to the scheme.

INTRODUCTION

"There is a place in our courts for the judge, the accused, the lawyer and the witness. But there is no seat for the victim though his plight remains central to the case"- Sr Adv. KTS TULSI[558]

The criminal justice system in India is mostly criticized for its unconcerned approach towards the victim of crimes by scholars and common people[559]. Apart from legislation, the constitutional court have issued a process for the prevention of problems like overcrowding in jail, custodial violence and lack of legal help to accused, lack of medical facilities and mismanagement of prisons. The development of victim rights have evolved from time to time

[558] Bhavna Vij-Aurora V For Victim Outlook, https://www.outlookindia.com/magazine/story/v-for-victim.
[559] Srinivasan, M. and Eyre Mathew, J. (2007). Victims and the Criminal Justice System in India: Need for a Paradigm Shift in the Justice System. [online] Cite seer X, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.429.8305&rep=rep1&type=pdf,

as in ancient times, the king was considered as the guardian and it was his responsibility to provide justice to the victims. In medieval India, most of the time was under Islamic rule and they had some different kind of provisions for the compensation of victims. Mughal ruler's like Akbar and Jahangir were known for their fine sense of justice. In global aspect, the study of victim rights and victimology in general aspect began just after the Second World War.

In India, prof. Dr. K. Chockalingam was known as the first one to give awareness in discipline of victimology. His development and contribution in this field can be translated from that fact that he, even before the UN Declaration of Basic principles of justice for the victims of crime and abuse of power which came into existence, published a book "*Readings in victimology"*. He also established the Indian society of victimology (ISV) later in University of Madras in 1992. Based on the ideas and the advices given by the given by the society the government of Tamil Nadu in 1996, he started a Victim Assistance fund. The ISV Draft bill on victim assistance in collaboration with National Law School, Bangalore (NLSIU) and BHRC was another significant development[560]. In year 2009, 2010 and 2013, Criminal Law was amended and various victim friendly measures were included and victim compensation scheme in criminal code of procedure was considered mandatory. Compensation to the victims is an essential right to them and it's the duty of state to ensure that the victims are able to enjoy those rights.

1.1 Research Background

After the Islamic seizure in India, the society had a strong influence of Sharia and the holy Koran as they were considered as the ideals of the justice. The modern criminal system evolved with time in latter half of nineteenth century when Lord Macaullary decided to draft a uniform penal code for British India.

Various judicial judgment has also strengthen and made significant contributions. In various cases, victims were given relief under Article 32 of Indian constitution by the Supreme Court of India and under Article 226 in the high courts. Compensation to the victim is mentioned in Indian legal system as in the Prohibition of Offenders Act, 1958, Code of Criminal Procedure, 1973, the Motor Vehicles Act, 1988, and the Schedule cast and Scheduled Tribes Act, 1989.

[560]Law Commission of India 154threport

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Later the Section 357 of Cr.P.C. was formed by the law commission of India in 1969. The Cr.P.C. was amended in 2008 and Victim compensation scheme was introduced as Section 357A. Again the amendment was made in 2013 and two new sections were formed 357B and 357C in Cr.P.C. in giving additional assistance given to compensation to the victims of acid attacks under section 326A, and Gang-rape victims under section 376D of the Indian Penal Code.

In India, shallow/hostile arguments are mostly used as a mean for harassment. It is considered to be simple for people to settle score with their enemies by filing false cases by simply registering false accusation. The section like 250[561] of code helps the person to get compensation for accusation without reasonable cause. Some other sections like 358 provides remedy in which court might ask one person to pay compensation to another person for causing wrongful arrest. Although the relief provided shall be of rupees 100, which would not even cover the cost of paperwork.

One of the most interesting and often overlooked aspect of victim rights is that they are the rights of the people who are wrongfully convicted and been jailed. As India being a common law nation, has got it's legal system from British Raj and it is quoted by the Supreme Court "*it is better that ten guilty persons escape than that one innocent suffer.*"
The status of wrongfully convicted person who is jailed is depressing as they are not even declared as victim under any statute.

1.2 Research background and methodology

In this article, the researcher has taken the doctrinal mode of research that is online research. Reference has been taken from various acts like The Constitution of India, Code of Criminal Procedure,.1973, articles, books and various other data bases like online sites. As study is about the "victims in the society", the research is consider to socio-legal type.

1.3 Statements of Problems

It is noticed that the rights of accused is mostly given supremacy against the rights of the victims. The odds for the accused getting away with crime is way more than the odds for a victim getting justice. Various amendments were made like 2005 amendment in Cr.P.C. and

[561] The Criminal Procedure Code, 1973. §250.

criminal law amendments in the year 2008, 2010 and 2013 respectively. However the focus has again shifted towards the victim.

In the absence of proper definition of "victim"[562] and victim rights which are not categorized properly has resulted in debarment of victims from the process or fair and free trail. Although amendments made in Cr.P.C. and Criminal Law have added several new provisions for the protection of rights of victim, the uncaring outlook of the system is a team without the proper coordination between the Union Government and state that has led to the non-fulfillment of the purpose. It should be taken in consideration that various provisions have been introduced for the victim compensation and rehabilitation including the Victim compensation scheme under section 357A of Cr.P.C[563].

The criminal justice system is not able to ensure the safety of victims. It is a team with problems like secondary victimization and indifferent viewpoint of police, judiciary and the government. The judiciary is given the role to provide the compensation to the victims as one of the most important work as it is helpful for the victim compensation and rehabilitation. Some remedies are provided under several provision like section 375 of Cr.P.C. and article 32 and 226 of Indian Constitution.

2. CONCEPTUAL UNDERSTANDING

2.1 Victimology: Meaning and concept

The term was originated in the year 1947 by Benjamin Mendelsohn[564], although it was mentioned in Werthram's book *the snow of violence*[565] for the first time. It is a combination of Latin word *'victima'* which means victim and the Greek word '*logos'* which means system of knowledge. The victimology is for victims in a same way where criminology is for criminals.

Randhava[566] says that victimology is a body of knowledge related to victims. Victimization is how society reacts towards the victim rights. He also explained that the victimology is in

[562] The Code of Criminal Procedure, 1973, Act no. 2, 1974, India Section 2 (wa)
[563] Anusree A, *Right to Compensation of Victims of Crime in India: Need for a Comprehensive Legislation*, LB, , http://ijldai.thelawbrigade.com/wp-content/uploads/2016/01/AnusreeA.pdf

[564] Mendelsohn is often referred to as the father of Victimology.
[565] GC KIRCHOFF, VICTIMOLOGY: A THEORY WITH CONSEQUENCE, GLOBAL VICTIMOLOGY: NEW VOICES 86
[566] GURPREET SINGH RANDHAWA, VICTIMOLOGY & COMPENSATORY JURISPRUDENCE,

versatile nature as it derives its knowledge from many fields like law, psychology, polity, education and sociology.

Drapkin and Viano gave a wide and blur definition where everything connected with the victims of crime is an essential subject of victimology.

Daigle[567] defines as '*The study of etiology of victimization, its consequences, how criminal justice system accommodates and assists victims, and how other elements of the society, such as the media deal with the crime victims.'*
His definition has wider scope and it fits in the modern scenario.

2.2 Historical development in victimology

As humans have evolved with time into various clans, tribes, and states, responsibility of giving justice shifted from an individual to collective group with the time.

In the era of antient and medieval period, the justice system was based on the dharma and morality[568]. As it was the duty of the king to provide justice to the victims. This system acted as deterrence for the state officials thereby preventing corruption and abuse of power.
' if the king could not restore the stolen articles or recover their price for the owner by apprehending the thief, it was deemed to be his duty to pay the price to the owner out of his own treasury, and in his turn he could recover the same from the village officers who by reason of their negligence, were accountable for the thief's escape. '[569]

An old chapter in the legal system of India was identified and developed after the invasion by the Mohammad Ghori it led to the foundation off the Muslim rule in India. Although the Delhi Sultanate got its prestige under some Sultans, but they did not achieve a similar criminal justice system.

One of the most important period in Indian history and the most illustrious was Mughal Empire. The actual and notable changes came when the Great Akbar came into the power. He prohibited

[567] LEAH E DIAGLE, VICTIMOLOGY- A TEXT/READER
[568] Dalbir Bharti , *The Constitution And Criminal Justice Administration,* Dalbir Bharti, http://dalbirbharti.com/CRIME%20AND%20JUSTICE%20for%20PDF.pdf,

[569] P SEN, GENERAL PRINCIPLES OF HINDU JURISPRUDENCE, Tagore Law Lectures, 335, (1984).

slavery system and decided to have a common justice system for all. The strict Islamic impiety laws were reduced and death sentences for basic criticism were prohibited. Jahangir was one of the most known Emperor in the area of justice. He hung the 'Golden bell of justice' outside his palace and anyone who had faced any kind of injustice can ring the bell to get the justice from the Emperor himself. Aurangzeb, the last effective and known Mughal ruler took a step backwards by applying Sharia in the empire. He re-introduced the law by demolishing the religious tolerance policy made by Akbar.

At the time of early modern period the Britisher were confused by the numerous division done in the society and the complexities of Hindu civil war. The Muslims were treated on the basis of Muslim rule and Hindu governance was done through shastras.[570]

3.VICTIMS IN THE CURRENT SCENARIO

3.1 Who are the victims?

Before going after the legal definition of the word victim, it would be better to look into the background of the term, the word the victim is a combination of Latin word *'victima'* which means victim and the Greek word '*logos'* which means system of knowledge.[571] "Victim is an individual who is a passive recipient of misfortune"

Dussich[572] found out that how and when the term *'victimia'* was used and it was used in the context of human sacrifice in 1536 and it was applied to Jesus Christ in John Calvin's Protestant textbook *'Institute Christianae religious'* and translated in many languages like German, English, French and etc. from original Latin[573]. The first ever used of the word victim in English language was done in 1736 for the Crucified Jesus Christ- in a translation of the New Testament. The present definition given by the Cambridge dictionary is "*someone or something that has been hurt, damaged or killed or has suffered, either because of the actions of someone or something else, or because of illness or chance.[574]"*

[570] Madhu Kishwar '*Codified Hindu Law: Myth and Reality*' E&PW 1994 Vol. 29, No. 33.

[571] Editor, *victim*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/victim,

[572] John P. J. Dussich, Ph.D. Professor Emeritus California State University, Fresno

[573] John P.J. Dussich, *The Evolution of International Victimology and its Current Status in the World Today*, 1, Revista de Victmologia / Journal of Victimology, 40-41

[574] Editor, Victim, Cambridge English Dictionary, https://dictionary.cambridge.org/dictionary/english/victim,

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3.1.1 Victims as defined in India

In India, the definition of victim was not mentioned in the original Code of Criminal Procedure, 1973 but after the Amendment made in Criminal Law in 2008, where the new section 2(wa) was added and this section defines victim as: *"victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir*[575].

The Supreme Court and the High Court already had the extremity of victims and the rights of their legal heirs and dependents.

The judgement given by Delhi High Court in the case *Ram Phal vs the state of Ors*[576]. dealt with this problem. According to hon'ble High Court, 2 questions have to be decided which are:-

1. The word victim in section 2(wa) of Cr.P.C. which says that only the legal heir is qualified to the property of the victim under the law of inheritance or would accept any person who has suffered any loss or injury caused by any act or omission for which the accused person has been charged.
2. The remedy to the applicant is available with respect to any offence which was committed as on the date when the appellate right was communicated by law or appellate right would be available with respect to the date of decision or any remedy given to appellate which is without any reference to the two points of time which is:
    - The date when the offence was committed
    - Appellate right was communicated by law

At the time of these two questions, the court decided to go through the legal history of the victim rights. It took the help from its division bench's decision in *Chattar Singh vc Subhash and Ors*[577]. On the first question, the court departed from its earlier decision and went with the decision made by Punjab and Haryana High Court in case *Tata Steel vs Ama Tube Projects*[578].

[575] Section 2 (wa), Code of Criminal Procedure 1973 (as amended in 2008).

[576] 154th Report of Law Commission of India; Committee on the Reforms of Criminal Justice System, 2003.

[577] Chattar Singh v. Subhash and Ors., (2011) 176 DLT 356.

[578] Tata Steel v. Atma Tube Projects CRM-790-MA-2010 Punjab and Haryana HCjkj

by stating *"victim cannot exclude those who actually fallen within the definition of victim by virtue of emotional harm suffered such as the father or siblings of a deceased victim or other categories of persons.*

On the second question, the court held that the right to appeal is considerable right. It helps by quoting the judgement of Apex Cour[579]t and various High Court.

3.2 Various Kinds of Victims

Victims are classified into various types like primary, secondary and tertiary victims but mostly it classified on the nature of the offending Act. Taking into the account various situation includes age, sex, race, mental and physical capacity and etc. although there are many other non-orthodox victims such as victim of socio-economic crimes, victim of organized crimes and etc.

3.2.1 Victims of violent crimes

There are few specific crimes mention in IPC as violent crimes.

- Murder (Section 302 IPC)
- Culpable Homicide (section 304 IPC)
- Dowry Death (section 304B IPC)
- Attempt to commit Murder (section 307 IPC)
- Attempt to commit Culpable Homicide (section 308 IPC)
- Kidnaping & Abduction (section 363-396 IPC)
- Rape (section 376 IPC)
- Attempt to commit Rape (section 376 and 511 IPC)

Around 94.6% cases of rape were reported last year and the criminal was known to be victim.

3.2.2 Victim of Socio-Economic Crimes

The socio-economic crimes are one of the most ignored crimes in India. They are known as white collar crimes which are increasing at high rate in current scenario. The 29th report of Law commission of India, which held in 1966[580], decided to enter certain socio-economic crimes in the Indian Penal Code. The report further categorized the types into:

- Offences preventing economic development

[579] Thirumalai Chemicals Ltd. v. Union of India (2011) 6 SCC 739; Hitendra Vishnu Thakur v. State of Maharashtra AIR 1994 SC 2623; Kailash v. Nanhku and Ors. (2005) 4 SCC 480; H.P. State Electricity Regulatory Commission v. H.P, (2014) 5 SCC 219.

[580] Law Commission of India (29th Report, 1966), http://lawcommissionofindia.nic.in/1-50/Report29.pdf,

- Misuse of public position by public servants
- Adulteration
- Theft and misappropriate of public property and funds
- Trafficking in licenses

3.2.3 Victims of abuse of power

Abuse of power simply means 'official misconduct'. The abuse of power refers to such acts done by the elements of the executives, specially police by performing Arbitrary arrest, custodial torture, force confession, custodial deaths and false imprisonment are few of the examples of abuse of power by the state. Other than this victims can be classified into:

- Victims of custodial death
- Victims of death due firing
- Victims of groundless arrest and detention
- Victims of unnecessary harassment

3.3 Right of Victims

Victim rights at the International level have developed over the years. As already highlighted, the return of victim into the accused centric criminal justice system did not commence until the latter half of the 20th century. Victim rights at the International level have developed over the years. International organizations such as the United Nations, and International Courts (ICC, ICTY, and ICTR) have played an important role in its development. It may be inferred from the 1985 UN Principles which categorize victim rights into 4 major heads:

1. Right to Access to justice and fair treatment
2.Restitution
3.Compensation
4. Assistance

4. VICTIM COMPENSATION AND REHALBILITATION

4.1 The concept of compensation and its evolution

The definition of word compensation given by oxford dictionary is *something, typically money, awarded to someone in recognition of loss, suffering or injury*[581]. In today's scenario the word means something that is granted to make good for the loss or injury caused. The decision made by supreme court of India in the case of Shantilal[582] said that "*In ordinary parlance the expression compensation means anything given to make things equivalent; a thing is given to or to make amends for loss recompense and remuneration or pay.*"

On the other hand, rehabilitation is a vast term that includes other aspects of victim right. It consists of compensation, restitution, victim assistance and access to justice and fair treatment[583].

4.1.1 Why Compensation?

There are so many answers to this question. There are various reason like psychological, social and economic reasons for the compensation to victims. It is a common knowledge that how crime affects the mental health of a victims. The mental health of a victim is affected due to many reasons like constant visits to the police station, court and lawyer which can break a person. The insensitivity of the society leads to secondary victimization of the victim. A day spent at a court or any police station can lead to income loss of that particular day. So the actual motive of compensation is to provide relief to the victims.

4.1.2 Victim Compensation in India

The history behind these provisions especially section 357 can be taken from the old code of 1898. The section like 545 and 546 of the old code[584] which were taken as the provision for compensation are as follows:

Section 545 – power of court to pay expenses or compensation out of time

Wherever under any law forces for the time being a Criminal Court imposes a fine or confirms in appeal revision or otherwise a sentence of fine, or a sentence of which fine form a part, the Court may, when passing judgment order the whole or any part of the fine recovered.

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[581] Editor, Compensation, Oxford Dictionary, https://en.oxforddictionaries.com/definition/compensation,

[582] State of Gujarat v. Shri Shantilal Mangaldas &Ors, AIR 1969 634.

[583] Barcelona Panda, *Victim's right to rehabilitation: India, UK and US Experience,* Manupatra, http://www.manupatra.com/roundup/348/Articles/Article%20Victim.pdf,

[584] The Code of Criminal Procedure, 1898, (India).

Section 546 – Payment to be taken into the account in subsequent suit. At the time of giving compensation in any subsequent civil suit relating to the same matter, the court shall take into the account any sum paid or recovered as compensation under section 545. Later an amendment was made in 1955[585] which added 545(1) empowering the court to direct an accused who has caused the death of another person, to pay compensation to the legal heir entitled under the Fatal Accidents Act.

4.1.3 Recommendation of Law Commission

The Reports of Law Commission of India highlighted these problems. In its 41st Report[586], it recommended deletion of 'substantial' from the section 545(1) (b) as the criminal Courts have underutilized their discretion in granting compensation under this provision. Another notable suggestion was the enhancement in power of Judicial Magistrate to impose fine up to ₹5000 for JMIC and ₹1000 for JMIIC. The report[587] at 3.12 notes that victim reparation has come into limelight in the previous years and the realization has dawned that mere punishment to offender may exhaust the role of criminal law, but it doesn't completely fulfil the role of law. Further it quotes *"The injured party is not always adequately served by civil courts, and in the criminal law he often takes a back seat. Having given his evidence, he stands aside and watches the offended majesty of public justice being satisfied by conviction and sentence. He himself is fortunate if he gets compensation, or even his expenses. Often, he must have recourse to the civil courts to reclaim his property, and, not infrequently, may have suffered a loss or injury for which he cannot be recompensed."*

The report then highlights the gradual diminishing of the concept of victim reparation and how the civil proceedings became ancillary to the criminal trial i.e. the State started giving primacy to penal action instead of reparation part. Three patterns of compensation were listed by the commission:

1. State may take it upon itself (in certain defined class of cases);

[585] The Code of Criminal Procedure, 1898, (Amendment) Act, Act 26 of 1955, (India).

[586] Law Commission of India, 41st Report, 356, http://lawcommissionofindia.nic.in/1-50/Report41.pdf

[587] Law Commission of India, 41st Report, 50, http://lawcommissionofindia.nic.in/1-50/report42.pdf

2. Secondly, the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine; compensation can be awarded to the victim.
3. Thirdly, the court trying the offender can, in addition to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence.

4.1.4 Victim compensation scheme

The Criminal Procedure Code (Amendment) Act, 2008 added a new provision in Section 357A. This provision has been introduced to ensure that the victims of their legal heirs who have suffered loss or injury due to crime and those who require rehabilitation are provided with the same via a scheme (to be prepared by State Government in co-ordination with the Government of India). The section is as under: "357A. (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

Whenever a recommendation is made by the Court for compensation, the District legal Services Authority or the State Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section(1)

If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

Where the offender is not traced or identified, but the victim is identified,

Where no trial takes, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

On receipt of such recommendations or on the application under subsection (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

Victim's right to appeal against any order- In section 372 of the CrPC, the following proviso is inserted: - "Provided that the victim shall have a right to prefer an appeal against any order

passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

4.3.6 Judicial analysis of Court's power to grant compensation:

The compensatory jurisprudence under the Code has been explained in detail by the Apex Court in a single judgement. In its judgment in the 2013 case of *Ankush Shivaji Gaikwad v. State of Maharashtra*[588], the Court traced the history of the provisions of the Criminal Procedure Code with a comparative analysis of the position in United States and the UK. This decision is significant as the Court has considered all past judicial decisions on this matter before passing its judgment. Some significant observations by the Supreme Court are as under:

1. On the question whether the Courts are under a duty to grant compensation under s.357 or give reasons despite the use of the word 'may' in the section, the Court observed that "*..it appears to us that the provision confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation* "Quoting a plethora of judgments, the Court held that intention of the Legislature is to be given primacy and due to a word, the victim should not suffer.

2. The purpose of this power of the Court is to "*reassure the victim that he or she is not forgotten in the criminal justice system*"

3. The position of the accused is relevant to determine the amount of compensation and an enquiry should be made for the same (unless it gets clear in the course of trial)

4.4 Provisions in other laws

4.4.1 Probation of Offenders Act, 1958

The Probation of Offenders Act, 1958 is a legislation that provides for release of convicts in certain cases where the offence committed is not punishable by death or life imprisonment after due admonition. The purpose of this Act is to give another chance to the offender to mend his/her conduct and prove that he/she is capable of living in the society. Despite being a practical and innovative scheme to ensure reformation over deterrence, this legislation has not realized its true potential. Moving to the present context, the section 5 of the Act is reproduced below:

[588] Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC.

"5. Power of court to require released offenders to pay compensation and costs:

(1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay—

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) Such costs of the proceedings as the court think reasonable.

(2) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of sections 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted[589],

shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages ."

The section provides for compensation to the victim by the offender in case he is being released on probation under section 3 and 4 of the Act.

The judgment further analyses the section and holds that although the section 357 of Cr.P.C. and section 5(1) of this Act are similar, the payment of compensation in both sections is entirely different. In Cr.P.C. the payment of compensation is preceded by the imposition of fine, out of which it is to be paid. On the other hand, under this Act the offender has to pay the compensation at the end of the trial. The section further mandates any civil Court in which a suit for damages has been instituted shall take into consideration the amount paid to the victim which indicates that the compensation so awarded is of the nature of civil liability. Further, the section provides the method of recovery of the fine (compensation) in which it mentions section 386 and 387 of the Code. However, these sections are of the old Cr.P.C. and the corresponding sections in the new Cr.P.C. are sections 421 and 422. The judgement makes it clear that the method of recovery cannot equate 'compensation' with 'fine'. Citing the Supreme Court decisions in cases of *Gurbachan Singh v. State of Punjab*[590] the Court made it clear that there is a 'marked distinction' between the award under section 5 of the Probation of Offenders Act and Section 357 of the Cr.P.C. and costs awarded under the former have no such penal element. In a decision of Patna HC, the Court held that compensation under Section 5 is in the discretion of the

[589] Section 5, Probation of Offenders Act, 1958

[590] Gurbachan Singh v. State of Punjab, AIR 1957 SC 623.

court. The court will allow compensation and costs only when it thinks fit in any case and the appellate court cannot interfere with the decision of lower court unless it is capricious or unreasonable[591].

4.4.2 Motor Vehicles Act, 1988

The Motor Vehicles Act was brought to address the problems arising out of increase in number of vehicles, deplorable status of roads, lack of knowledge and road sense in drivers. To prevent the ever increasing accident rate, the Act was brought in to replace the old British Raj era law. The section 140[592] of this Act provides the rationale behind the compensation. Under this section, the owner of the motor vehicle has to pay a specified amount as compensation if death or permanent disability is caused. This section is significant as the compensation paid is on the basis of "no fault liability." however, the amount paid is a meagre Rs. 50,000 in case of death and Rs. 25,000 in case of permanent disability. Section 163 of the Act provides for compensation in hit-and-run cases. It lays down the power of the central government to enact schemes, and formation of administrative bodies and its procedure thereof. Section 166 provides for compensation on fault basis i.e. the negligent act has to be proved. Another significant provision added later via the Motor Vehicles (Amendment) Act, 1994 is the section 163-A. This section was introduced to provide compensation on no fault liability principles in a structured form. Several factors serve as parameters to determine the amount of compensation- such as age, annual income, profession, education etc. However, the 2018 amendment[593] by the central government has limited the compensation in case of death to a fixed amount of rupees five lacs and in cases of disability, the maximum amount is also 5 lacs. For minor injuries, fixed amount of Rs. 25,000 has been prescribed.

4.4.3 Fatal Accidents Act, 1855[594]

The purpose of the Act is stated as "*..To provide compensation to families for loss occasioned by the death of person caused by actionable wrong*". The Act provides compensation for the tort resulting in death of the victim. The claims under this Act are subject to be determined on

[591] Rajeshwari Prasad v. Ram Babu Gupta, AIR 1961 Pat 19.

[592] S. 140, The Motor Vehicles Act, 1988, (India).

[593] Government of India, *Gazette Notification no. 1829 of May 22, 2018,* ITTA, ,http://www.ittaindia.com/wp-content/uploads/2018/05/GAZETTE-NOTIFICATION-OF-22-MAY-18-UNDER-MOTOR-VEHICLE-ACT-compensation- on-death-injury.pdf

[594] Fatal Accidents Act, 1855, Act 13 of 1855, (India).

case to case basis[595]. However, these claims are subject to limitation as per section 82 of the Limitation Act[596].

5.CONCLUSION AND SUGGESTIONS:

5.1 Research findings

- 'Victim' under Indian law is only defined in Cr.P.C. and the definition does not have a wide scope. It does not recognize all types of victims (eg. Victims of abuse of power)
- The provisions of Criminal Procedure Code, 1973 are still inadequate in providing an effective compensation and rehabilitation mechanism to the victims.
- There is a lack of clarity regarding the mechanism and working of the Courts, Legal Service Authority and the State government with respect to the compensation and rehabilitation.
- Individuals who have their fundamental rights violated due to the misconduct and wrong committed by the servants of the State have no effective right to compensation or rehabilitation.
- The International obligations with respect to Victim's right (especially compensation and rehabilitation) as reflected in 1985 UN basic principles and ICCPR have not been met by India.

5.2 Hypothesis analysis

The hypothesis of the research, which is "**The existing framework of Indian Criminal Justice System is inadequate in terms of providing compensation to the victim in a uniform manner. Despite amendments to the Cr.P.C. and various judicial decisions, the actual state of victim in the system remains dismal. Abuse of power by the State needs to be addressed at the earliest as the wrongful convictions and detentions despite being rampant, are the least concern of the State.** " stands proved through the research. Throughout the study, it has been established that the Criminal Justice System as a whole suffers from inadequacies. Despite several changes in law and introduction of new schemes, the Courts, police and other institutions remain entangled in their perennial insensitivity towards the

[595] Sardar Ishwar Singh v. Himachal Puri, AIR 1990 MP 282.

[596] Damini and anr. . v. Managing Director, Jodhpur Vidyut Vitran Nigam Limited (2017) SCC OnLine SC 1105.

victims. Abuse of power, especially wrongful convictions and detentions are not addressed by the State despite international obligations arising out of the UN Basic Principles and ICCPR. No law or scheme provides any right to compensation for unfortunate victims of abuse of power.

5.3 Suggestions:

The researcher has attempted to highlight the inadequacies and issues in the existing framework for victim compensation and rehabilitation in India and the problem of abuse of power. The researcher shall now attempt to propose how the victim compensation and rehabilitation may be improvised.

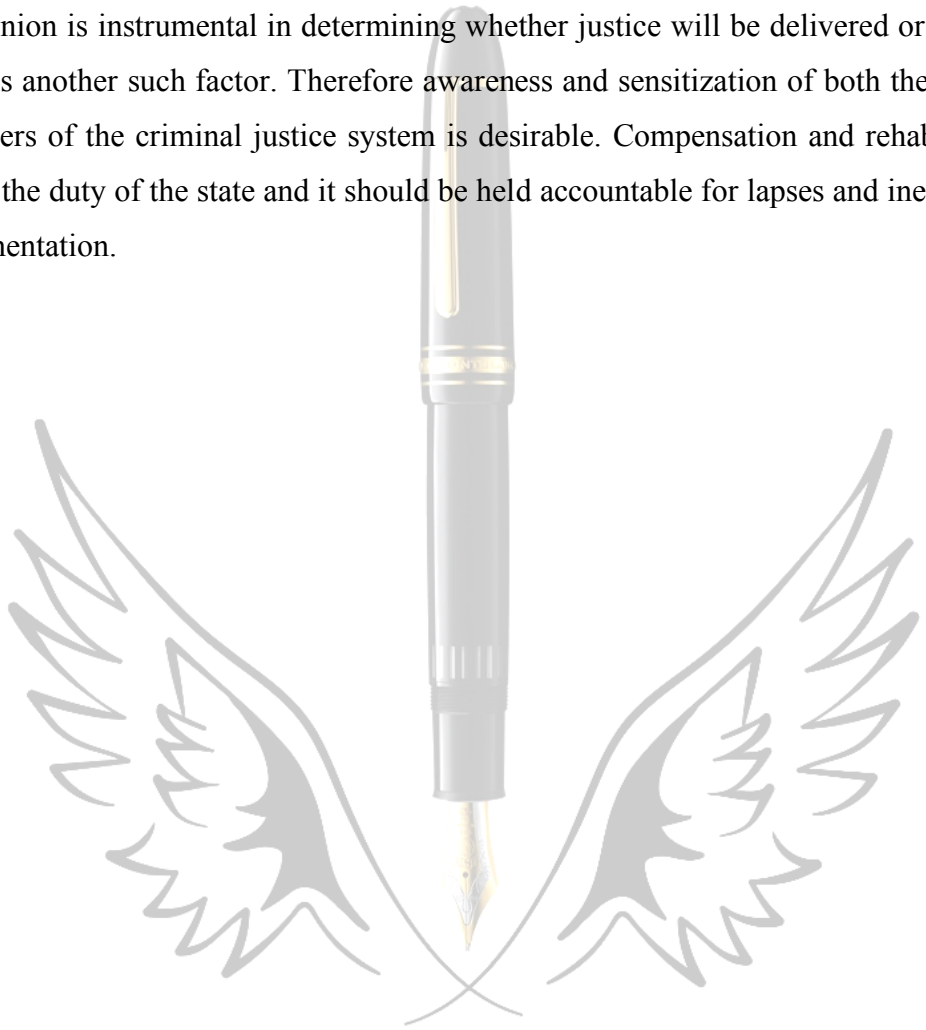
Several problems in the victim compensation under the Cr.P.C. have been identified over the course of this research. As far as the problem of abuse of power is concerned, the National Commission to review the working of the Constitution in its 2002 report proposed a few points. The commission was of the view that the Supreme Court in the cases of *Nilabati* and *DK Basu* has made it clear that for violation of fundamental right under Article 21; there exists a right to compensation as a public law remedy. It cited the Article 9(5) of ICCPR that mandates compensation to individuals who have been groundlessly arrested and notes that India has maintained a reservation to the same[597].

5.4 Concluding remarks

The plight of the victim, the inadequacies of the system, and the need for compensation and rehabilitation have been highlighted throughout the study. However, the need of the hour is not just confined to legislative reforms. It is a fact that the role of victim is still confined to a secondary one. For instance the gruesome rape and murder cases (Be it 2012 in Delhi or 2018 Kathua) highlight the fact that despite public outrage, the condition remains grim. The actions of media, government and other political parties shatter one's faith in humanity. Instead of empathic understanding of the ordeal of victims, those in position of power use their plight to advance their own agenda. The criminal justice system and its constituents are in urgent need of an overhaul. In order to understand and help the victims, it is necessary that their pains be understood. The need for acknowledgment and support is sometimes more important than the

[597] Consultation Paper, *Enlargement Of Fundamental Rights,* National Commission To Review The Working Of The Constitution, GOI, http://legalaffairs.gov.in/sites/default/files/%28i%29Enlargement-of-Fundamental-Rights.pdf

monetary compensation. Legislative changes and reforms should be implemented accordingly. The major impediment is that the same personnel and the very same system cannot be expected to change dramatically due to changes in law. It has been observed in several cases that the public opinion is instrumental in determining whether justice will be delivered or not. Media attention is another such factor. Therefore awareness and sensitization of both the public and the members of the criminal justice system is desirable. Compensation and rehabilitation of victims is the duty of the state and it should be held accountable for lapses and inefficiency in its implementation.



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INTERNET GAMING & ITS INTERFACE WITH INTELLECTUAL PROPERTY RIGHTS AND CENSORSHIP LAWS IN INDIA

- **MANU SHARMA**

ABSTRACT

There is no denying the fact that the online gaming industry is undergoing drastic changes in recent times. As the industry is transmutating from being restricted to friends and family activity to a thriving online experience, engagement and participation in online gaming is becoming widely recognized. The growth in the online industry is fuelled by the enhanced connectivity, modifying requirement of social interactions and an increasing base of youth population. The ubiquitous appeal and social nature of the online gaming industry offers a window of opportunities for direct monetization, user engagement and brand promotion. For the reason of modulating the monetary offerings and copyrights issues in the online gaming industry, Indian laws differentiate games of skill and games of chance. The differential treatment according to games of skill and chance, as the former form is legally permitted and the latter being prohibited has been a historic feature of Indian law which flowed into the Indian legal system from the prevalent principles under the British colonized India. This paper gives an overview of the online gaming industry in India while highlighting the current regulatory landscape particularly, in terms of intellectual property and censorship laws pertaining to the same.

Key Words: Online gaming, Intellectual property, Social media, Censorship, Technology

INTRODUCTION/ BACKGROUND

A game is classified as a game of skill based on the outcome of the game, which predominantly depends upon the skills of the players and not on a chance event and hence is considered legal in all aspects including in social settings, clubs, casinos as well as in online gaming.[598] Though typically gaming practices date back to the early 17th century, the advent of the digital age has

[598] K.R. Lakshmanan v. State of Tamil Nadu, 1996 (2) SCC 226; State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825.

completely revolutionized this industry. The gaming industry has witnessed a paradigm shift with the evolution of television, digital and online gaming models. Following the escalated penetration of internet in the mid- 1990s, from being targeted at academics to being used by the general population, internet based online games achieved popularity. The popularity of online gaming is best evidenced by the tremendous growth in popularity of mobile games, gaming consoles, VR headsets etc. The reasons of such growth are attributed directly to features like lifelike graphics, thrill and stimulating story mode making people believe in the existence of an alternate world, which they can personalized accordingly. In India, telecom revolution, greater penetration of internet and mass connectivity led to the further invigoration in the appeal of computers and mobile based model. In a research study by the KPMG India, (dated March 2019), it has suggested that Indian online gaming industry is set to become $ 1 bn industry by 2021.[599] Such an intense and detailed level of internet gaming and its technologically aspects raises issues pertaining to the legal protection of such games including the rights of the people engaged in the same especially in the field of intellectual property and advertising, which are discussed hereinafter.

CRITICAL ANALYSIS/ LAWS APPLICABLE

ONLINE GAMES FROM THE STANDPOINT OF INTELLECTUAL PROPERTY RIGHTS

A. International Perspective: Classification of Games in terms of Copyright

In today's era, the extent to which a new business model will be feasible is influenced by the way we classify computer games with regards to copyrights. A computer program can be protected either as software or as a film but it would also be pertinent to protect the individual elements of a computer program. The arrangements selected will determine, simplify, strengthen or lessen the potential for exploitation and copying, and degree of legal protection in individual cases.

i. Protection of games as Computer Software

A computer game consists of a computer program, its concept, design, characteristics, and its multimedia representation in form of audio and graphic visual. A computer program commands the computer to make certain computations in order to resolve a particular problem, which can

[599]KPMG & IFSG: *'The Evolving Landscape of Sports Gaming in India'*, (March 2019) pg. 35 https://assets.kpmg/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf

be done by devising an approach to the solution. This can be done in various ways such as through application of logic, various range of ideas or algorithms etc., which results in differently structured programs depending upon the chosen approach and on the programmer. All these elements of a computer program could prospectively enjoy the protection under copyright laws.

Looking at international level, the notion of protection of software program is enshrined in the *World Intellectual Property Organization Copyright Treaty (WIPO Copyright Treaty- WCT)* in association with the *Berne Convention for the Protection of Literary and Artistic Works as revised on July 14, 1967*[600] *(Berne Convention)* and the *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)*. Computer programs as work has not been explicitly identified under Berne Convention but nonetheless they are still protected as work of language by the exclusive nature of the list mentioned in Article 2 (1). Moreover, under Article 5(1) of Convention computer programmes enjoy protection of work outside the country of origin even if the parent country does not have law pertaining to it if such rights are protected and specially granted by the convention. However, the Convention does not impose any obligation to observe minimum standards.

The provisions which explicitly protect the computer programs as literary works are Article 10 of TRIPS and Article 4 of WCT. These provisions go ultra vires to the provisions of Berne Convention by affording minimum standards of protection. Moreover, TRIPS, article 10(2) confers protection to all databases and Article 11 requires the member states to make provisions pertaining to rental rights. Article 8 of the WCT further provides for a right to communication to the public which in the context of computer programs implies affording access and making retrievable online.

Furthermore, looking at other international provisions, there is the European Union Computer Programs Directive which predominantly provides for the legal protection of computer programs under the copyright law of European Union. It consists of two directives, namely the **Software directive** (contains provisions pertaining to legal protection of the computer programs) and **Copyright directive** (on the harmonization of certain aspects of copyrights and related rights like lending and rental in the information society), which mandatorily obligated the members state to afford protection to the computer programs. The sense in which the term

[600]WIPO, 'Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries)', UNTS Series No. 828 (p.221).

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'computer program' is used in the software directive clearly implied protection of computer programs in every form which also includes design materials.[601] Moreover, it also affords authors (which in this case are the developer of the programs), the right of permanent or temporary reproduction and the rights of translation, adaption and reproduction of the program's result, as well as the distributive rights pertaining to the original computer program or copies thereof. Given this conception of the term 'computer program', there shall be no doubt that the programs underlying the category of computer games fall within the scope of software directive. Any program in the form of data, printed matter or preliminary design materials, or even in the form of source codes thus enjoy at least protection from identical copying. However the question arises as to what extent the software directive protects programs internal structure characteristics from imitation. By looking at the provisions of the directives, such protection cannot be deduced from the wording of the directive. In fact, the provisions suggest a distinction between content and form by stipulating that protection shall not be extended to the ideas and principles underlying a program.[602] Speaking particularly in context of online gaming, it means that specific elements of content, such as the concept of game, its layout, engine and the method its uses which influence the code of the program are beyond the scope of copyright protection. Even if this consideration is set aside for a moment, yet we cannot conclude that the audio-visual representation of a game enjoys protection even if the term 'expression in any form' under article 1 (2) of the software directive is interpretated literally because the directive requires computer programs to be classified as literary work within the meaning of Berne Convention. This indicates that any online gaming computer program enjoys the protection as a work of language which means in the form of source code, but extending the ambit of the protection to the program's audiovisual representation would run counter to the logic of the copyright laws.

ii. *Protection of Games as Films*

On the above lines, if computer games can be classified as films or multimedia work of audio-visual graphics, they become eligible for wide ranging protection, extending in particular to their audio- visual settings. There has been an old tradition of copyright protection for films and cinematographic works, even including the work that corresponds to cinematography. Article 2 (1) of the Berne Convention explicitly protects such work and WCT also incorporate

[601] DIRECTIVE 2009/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the legal protection of computer programs, OJL 111/16, 5.5 2009, p-16-22, art. 1
[602] *Id*., art.1, cl. (2)

similar provisions under Article 3 in consonance with articles 2-6 of the Berne Convention. At European level, reference to protection of films can be endowed in the Copyright Directive which harmonizes the term of protection of copyright and certain related rights. In the context of the same, whether computer games can be protected under this category depends highly on how the concept of 'film' is defined. The term has not been defined under any international agreement or in copyright directive; only the directive of rental and lending rights set forth the meaning of this. It stipulates that a film is a cinematographic or audiovisual work or moving images, whether or not accompanied by sound,[603] but it does not claim any validity for that definition beyond its own field of application. It is to be noted that the definition talks about the audio- visual works, which was first originated in the French Copyright Law in 1985 to ensure that TV films were protected, as prior to that only the 'work of cinematography' was protected. Hence, the introduction of the term 'audio-visual work' signaled, most importantly the wider acceptance of films in all guises. Before jumping into the perspective of online gaming with regards to its audio-visual work, it should firstly be established that computer games enjoy protection as cinematographic works or as moving pictures. A cinematographic work is just simply not a compilation of the works necessary for its production, but a type of work in its own right for which individual creativity is required. Protection of cinematographic works means protection of an actual film, not the individual components such as music and individual images contained within it. These components can be protected individually if they are deemed to be personal intellectual creations in their own right. In case of an online computer game the creative input lied in the translation of games idea into playable audio-visual representations. Cinematographic works, like movable pictures, sequence of images gives the viewer the impression of a moving image. Hence it can be said that defining factor is the impression created of a moving image and not the manner in which the work came into being and hence the protection is extended to films created on a computer. The overwhelming majority of today's online games, including action games and sports stimulation, create the impression of a moving image throughout. In cases of computer games an extensive process is involved in translating the concept of game into a computer program. There are however different views of courts in regard to this while some view that graphic representation cannot be the key factor in determing copyright protection and it is immaterial whether the images are

[603]DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJL 167/10 from 22/06/2001, art. 2, cl.(1) (c)

predetermined or are generated through a computer program.[604] On the other hand, this view was contested on the grounds that all that appears on screen is predetermined variants of a game. It is not the player who is determing the audio- visual or graphic representation, through their decision in the course of game they can only influence the output of individual variants that are already been set up by the creator and hence the only artistic creativity is of the computer game's creator[605]. Furthermore, in any computer game a story is developed from the concept, an environement is created, characteristics are created using graphics and the play and control options for each player element have to be set up. In this process an entire team of designers, writers, developers and computer experts are involved which shows that online computer games of this type could therefore be classified as films. Moreover, as provided in the directive on rental and lending rights also cover audio- visual works, which are afforded same protection as given to traditional films. The WIPO handbook on IPR defines audio- visual work as something which involves moving image irrespective of sound inputs,[606] which means that what is output in a computer game on the screen and via speakers is audio-visual. Moreover, the WIPO requires the member states to protect audio-visual work in all its forms. Considering today's scenario it can be said that if the term incorporates the function of enclosing modern technological developments in films, then as discussed above, it must entail broadening the traditional understanding of what constitutes a film.

Therefore, from the above discussion it can be said that most of the online games enjoy dual protection, on one hand as computer software, while on other hand as 'cinematographic works' or similar to such work or 'audio-visual works'.

B. Domestic implications of the Intellectual Property Rights: Indian Scenario

Overview of Online Games: Meaning & Description

There are many different types of games available online including action games, fighting games, first person shooter games, open world games (category of games wherein a person is allotted a specific character in a virtual place, allowing him to do various kinds of actions like GTA Vice City) etc. Games that are based on some kind of sport encompass personalities from that particular sport along with brand advertisements to incorporate a lifelike appearance. When

[604]Universal City Studios Inc. v. Nintendo Co. Ltd., 746 F.2d 112; OLG Hamburg, GRUR 1983, C.H. Beck, Munich 1990. pp. 127-128, on Super Mario III

[605]OLG Koln GRUR 1992, C.H.Beck, Munich 1992, pp.312-313 on Amiga Club

[606]WIPO Handbook on Intellectual Property, Chapter 5, International Treaties and Conventions on Intellectual Property, p. 95, available at: http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf#wct [last accessed on March 30,2020]

it comes to lifelike appearances in any game which are the characters, background music, theme, storyline, codes, artwork etc., require a staunching protection over its trademarks, copyrights, designs. This becomes significant because of the hard work, creativity, innovation, time been put together by a team of people to bring such games into existence. Although the popularity of such games is on a surge amongst the youth, there are no specific regulations in place dealing with the same. There have been instances where the IP laws are interpretated in the light and context of the online gaming, which is not a permanent and adequate solution to the issues related to this and hence there is a burning need for stringent law to regulate intellectual property rights of the people in the internet gaming industry.

Online gaming/ Internet gaming in India can be dealt under various heads of the Intellectual Property Rights like Copyright, Patents and design which are explained in the subsequent discussion.

A. Copyright Act, 1957

Cinematographic Work: In India, when it comes to cinematographic work of an online game, there are no specific regulations provided under the IP law and thereby it creates huge ambiguities for the game developers. The Copyright Act, 1957 provides cinematographic film as a work of visual recordings analogous to cinematography.[607] Video recording means a representation of moving images or representations in any medium. A video game may be presented in the form of a movie but the fact that it is generated by the computations of various computer program codes cannot be construed to be as video recording under the concerned Act. Even if an online game sets out an impression of being a video, it is basically the actions of the player caused through pressing buttons which runs the game which strongly question the notion of considering video games as cinematographic work. Therefore, from the above discussion it can be assumed that internet games cannot be covered under the scope of cinematographic works.

Author/Developer of Games*:* In internet gaming, developer plays a key role as they are the architect of the game codes. As per the CA 1957, an author is defined with respect to literary, dramatic, musical, artistic, photographic and cinematographic works.[608] Moreover, the Act includes computer programmes, tables, database and compilations which mean that the developer, producer or whosesoever has caused the work to be created can be assumed to be

[607]The Copyright Act § 2, cl. (f) (1957).
[608]*Id*., § 2, cl. (xxa)

the author of that video game.[609] Going by the interpretation of the above definition, it can only cover the coder, programmer or any other person using a computer to run the game, other contributors like the producer, game animator, creative director etc. will still not be covered in the definition of an author. This means that their contribution may not get deserved monetary reward. Thus, the challenge lies in the ability to do the apportionment linked with every individual's contribution and how that can be allocated internally, assuming copyright is in the name of the company for which they develop the game.

Furthermore, a contract of service and a contract for service create confusion in the rights of the developers. Under the former form, an employer owns the copyright created in the course of employment unless contrary and is also entitled to the royalties,610 while in the latter the developer who is specifically hired to create all or any of the components of a game ought to have the actual ownership of the work. This would provide royalties to both the employee as well as the developer. However the issue here is that when these parties have a joint IP rights in the game, the CA 1957 does not provide any clear definition of an author pertaining to multiple developers in the gaming industry and which can create various ambiguities regarding the allocation of the royalties.

In case where a person uploaded pirated software which can break the encrypted code on the original machines so as to make it compatible with the pirated version of installed games was held to be voilative of the copyrights of the plaintiff in the software of its operating gaming system.[611]

Computer Programme: A computer programme is defined to be a set of instructions in the form of codes which causes a computer to perform a particular task or achieve a particular result.[612] A gaming console or a particular game does not provide instructions to the computer; it is the software that does it. Therefore, the definition needs modification since it refers to the technology for software used for different purpose and as such does not consider gaming.

B. *Patents Act, 1970*

The Patent Act, 1970 does not recognizes the method of playing a game as an invention.[613] However, on other hand it also provides that any invention or technology can be patented even if it does not exist in the country.[614] Moreover, invention has been provided as an inventive

[609] *Id*., § 2, cl. (d)
[610] *Id*., § 17, cl. (c).
[611] Sony Computer Entertainment Europe Ltd. v. Harmeet Singh, 2013 SCC OnLine Del 6491.
[612] The Copyright Act § 2, cl. (ffc) (1957).
[613] The Patents Act § 3, cl. (m) (1970).
[614] *Id*., § 2, cl. (i).

step which leads to technological advancement having economic significance.[615] Though in 2005 the Act was amended to incorporate software patents by virtue of clause 3(k), but this was rejected by the parliament which chose to retain the original clause. The Indian Supreme Court discussed about the concept of invention and held that it is the fundamental principle of the patent law, that patent should only be granted for an invention which is new and useful. It must have novelty and utility. Moreover the Court opined that for the validity of a patent it is essential that it is inventor's own discovery as opposed to mere verification of what was already known.[616] The basic crux of any game is the way it is played, which is not just an ideas or expression but also involves writing of different complex codes for the game to function. If someone creates new methods of playing a game, then it should be allowed to be protected as a patent so as to encourage the creativity of the developers.

C. *Design Act, 2002*

Designs Act, 2002 defines design as something which includes features of shape, configuration, patterns, composition of lines applied to any article in 2 or 3 dimensional forms by any industrial process.[617] This clearly indicates that the designs created through technology have not been covered by the statute, which only provides for the designs processed out of an industry.

ONLINE GAMES FROM THE STANDPOINT OF CENSORSHIP LAWS

A. International Perspective- Censorship Law in Relation to Online Games

When it comes to censorship law in relation to online games there is no common international agreement or treaty pertaining to the same but there is European Union's Audio visual Media Services Directive[618] that govern the law relating to censorship of content, most of which represent criminal offence and those which can be subject to restrictive dissemination on grounds of potential danger of addiction, violence, sexual content etc.

I. General protection of children and young people and of human dignity

With regards to the protection of children and young people, the provisions of Article 3(a) to 3 (g) of AVMSD must be observed. Article 3 (b) of AVMSD echoing the European

[615] *Id*., § 2, cl. (ja).
[616] Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, AIR 1982 SC 1444; Aditi Manufacturing Co. v. Bharat Bhogilal Patel, [2012] IPAB 107.
[617] The Designs Act, § 2, cl. (d) (2002).
[618] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJL 95,15.4.2010, p.1-24, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013 [last accessed on March 26, 2020]

commission's 1996 Paper on the protection of minors and human dignity in audio visual and information services provides that audio-visual content must not be inciting in nature to promote hatred on the basis of race, sex, religion or nationality.[619] Further audio visual commercial communications must not prejudice respect for human dignity and must not promote any discrimination of any kind. Article 3 (e) (1) (d), (e) and (g) further stipulates standard for audio-visual commercial communication. In so far as we accept as the categorization of online computer games as audio-visual media services, if they involve pornography or gratuitous violence, their dissemination could be completely ban.

i. *Prohibited Content: Games involving gruesome violence*

Online games involving gruesome violence have been part of heavy criticism and debate around the world about 'killer games'. The term 'killer games' is often used to refer to the games in which the aim is to kill other human characters. However a distinction must be drawn here between games in which violence is just an element of the action and games where the direct or sole aim of the play is to exercise the virtual violence. For example – The game counterstrike which is famously known as an ego shooter whose aim is the deliberate and systematically killing of the virtual human being. The player in the game operates from the outlook of a marksman and the weapon and the target are always in view. The real to life depiction of the action includes sensational audio and visual impression. There is a tremendous stimulation of physical impact on the victim including in few cases sounds of groaning. It is a common feature that most of the killer and ego shooter games that they include graphical and functional representation of real existing weapons. To tackle this, a self regulatory PEGI system of age rating of game has been in force since 2003 and a new project known as PEGI Online is addressing the classification of both online games as well as mobile games. However there is no formal law that has been legislated by any of the member state pertaining to the same which shows that certainly it will take time to achieve harmonization at European level beyond the scope of PEGI initiative particularly in respect of online games to find a suitable protective cover for children and adults. Technical protection such as age control integrated into the gaming consoles, provided that parents are aware of them can produce significant changes.

ii. *Virtual Child pornography*

Virtual child pornography is an unpleasant product of a high level of graphic realism in computer games and of facility to direct avatars using a script language. In games like GTA

[619]Green Paper on the Protection of Minors and Human Dignity in Audio- Visual and Information Services, COM (96) 483 final, October 16, 1996, available at: http://aei.pitt.edu/1163/ [last accessed on March 30, 2020]

Vice City it is possible to have sex with a prostitute and then kill her to get the money back; some mission also includes filming a porn shoot which depicts human beings in an extremely detailed and realistic sense. As a standard setting international agreement, the Convention on Cybercrime, which came into effect from July 1, 2004, can potentially oblige its member state to make virtual child pornography a criminal offence. The purpose of this convention is to promote a common criminal policy against crimes committed in the cyberspace. Article 9 of the said convention deals with the offences related to child pornography. In this context it says that child pornography shall not only include the visual depiction of minors engaged in explicit sexual conduct but also realistic images of them engaging in such act.[620] Realistic images are deemed to include pictures which are altered or generated by the computer as per the Paragraph 101 of the Explanatory Report accompanying the convention. If such images are being used to seduce or encourage children into participating in pornographic acts, then it constitutes a criminal offence as per Paragraph 102 of the report. However, this seems to be contradictory to Article 9 (4) of the Convention which gives discretion to the member states on the criminalization of virtual child pornography.[621] If this international provision is transposed into national law, virtual child pornography can be punishable on the same basis as other form but differences may arise with regard to the meaning of pornography as convention does not refer to any standard definition of the same. At European level, child pornography has been addressed by council framework Decision 2004/68/JI on combating the sexual exploitation of children and child pornography. Article 1(b) (iii) of the Framework Decision stipulates that its provisions extend to virtual child pornography which is therefore punishable under criminal law. Article 5(4), however, contains a provision paralleling that in the Cybercrime Convention permitting Member States to exercise discretion in this regard. The main issue at European level is in relation to virtual child pornography is whether it can be tackled within the relevant system of protection under criminal law, to which there is a conflict as the virtual actors in such pornographic scenes are not controlled by children. Where no child is involved, it can be said that there is no victim. For ex- Taking the example of German Criminal Code, the aim of Section 184b is to protect 'real children' from exploitation as sexual objects and hence the definition makes it inapplicable to virtual cases. It is however argued that virtual child pornography should be treated in the same way that the law treats it in film photographic form to stop the exploitation from online games.

[620]Council of Europe, Convention on Cybercrime, Budapest, 23.XI.2001, ETS-No.185, art.9, cl. (2) (c).
[621]*Id*., art.9, cl. (4).

B. Domestic implications of Censorship Laws: Indian Scenario

On the above lines, in the recent years, there has been huge hue and cry in India also, seeking to constrain increasingly graphic and violent content found in the large number of online games. As many groups raised the demand for permanent censorship of these controversial and violent videos or erotic expression, the set is already set for a battle between the governments and gamers in this exponentially increasing digital age. Looking at the laws in India, there is no specific legislation for the regulation of video games either in the matter of violence or obscenity, there has been no judgment which has required special focus on online gaming industry. Therefore the law is to be gathered from various other statues of which most important in this issue is the Information Technology Act, 2000 (IT Act) and the Indian Penal Code, 1860 (IPC). However here the main focus is on the censorship aspect pertaining to such games as they specifically applies to the computer system.

Internet censorship has increased in manifold in India, since the past couple of years. In 2011, we adopted Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules and IT (Intermediaries Guidelines) Rules to supplement the Act. As per these rules, it is obligatory for the internet intermediaries to extract any objectionable content within 36 hours of receiving complaint.[622] With such rules coming into force government drew flak as they asked major sites like Google, Facebook, Yahoo to pre- screen content and remove any objectionable, defamatory content from going live. While Freedom of Speech and Expression is considered the cornerstone of democracy and it has been held to be a fundamental right on multiple occasion[623], subject to only certain reasonable restrictions provided under Article 19 (2) of constitution.[624] In consonance with 19 (2), the IT Act contains numerous provisions that can be used to censor the online content – notably Section 69A and 79. Section 69A of the IT Act authorizes the government to block any content from being accessed by the public on various grounds. The provision empowers the government to block content it deems to fall within a fairly broad spectrum. On the other hand Section 79 requires an intermediary to observe certain guidelines in order to avail exemption

[622]Information Technology (Intermediaries Gu*id*elines) Rules, 2011 rl.4, cl. (2). https://meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdfhttps://meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf [last accessed on March 24, 2020].

[623]S Rangarajan v. P Jagjivan Ram, (1989) 2 SCC 574; Sakal Paper v. Union of India, 1962 AIR 305; Indian Express Newspaper v. Union of India, 1986 AIR 515.

[624]INDIAN Const. art.19, cl. (2); V.G Row v. State of Madras, 1952 AIR 196; Romesh Thappar v. Union of India, AIR 1950 SC 124; Chintaman Rao v. State of Madhya Pradesh, 1950 SCR 759.

from any liability.[625] These guidelines mandate the intermediaries to take down any information that is inter alia grossly harmful, blasphemous, defamatory, obscene, pornographic, pedophilic, libelous, invasive of privacy, hateful, racist or ethically objectionable, relating or encouraging gambling, corruption etc. upon receiving actual knowledge or on being notified by the appropriate government or its agency. In relation to the same, in one instance, the government's decision to ban as many as 857 pornographic websites to reduce violence against women was heavily criticized. The Ministry of IT under Section 79 (3) (b) banned them stating their content to be 'immoral and obscene'.[626] On the same line the access to such online games websites can be banned by government if it deems it to be violent and sexually explicit.

CONCLUSION

From the above discussion which can be concluded as Internet gaming and its interface with IP and Media laws it can be said the current position of law pertaining to online gaming is inefficient. While gaming industry is booming with a massive growth in India, the law are yet undeveloped and ambiguous. In terms of IPR law, law needs to be amended to incorporate detailed and wider provisions of this industry, taking into consideration the technological advancements the world is going through. Such absence of legislative protection creates major problem for domestic as well as international developers since majority of online games played in India are developed outside. The same goes with the censorship laws, there is no law for the regulation of these online available video games either in the matter of violence or obscenity and hence there has been no judgment which has required special focus on online gaming industry. Simply blocking the access to an online gaming site is direct infringement of people's right to freedom of speech and expression and obligatory international provisions of ICCPR to which India is a ratifying party.[627]

SUGGESTIONS/ RECOMMENDATIONS

- First and foremost, a legislation specifically dealing with all the implications of online gaming industry in India should be enacted and provisions of Berne Convention should be transposed as India is a signatory of this convention.

[625] The Information Technology Act § 79 (2000).
[626] https://qz.com/india/1441110/how-indians-still-visit-pornhub-despite-the-porn-ban/.
[627] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 19 (2), available at: https://www.refworld.org/doc*Id*/3ae6b3aa0.html [last accessed March 24, 2020].

- Till a new legislation is crafted, the current subsidiaries laws dealing with the aspects of online gaming industries should be made clear and precise like procedural aspects.
- The definitions in the IPR laws are very inclusive and narrow and do not cover in its ambit the creative elements of technology, hence it should be amended to cover this industry under its ambit.
- On the above lines, I think that a whole new chapter must be introduced in IPR as well as in media laws to deal specifically with the computer system and programmes which must also include provisions related to gaming software and sites.
- The legislature needs to analyze and implement a law on the legal classification of games, developed in India and outside it, which will provide the necessary protection to the developers.
- Blocking of access to online gaming sites should be restrained by the government, as it is a very farfetched view of the government. However, a regulatory system can be set-up considering the huge craze of these games of young teens and children.
- There should be necessary amendments in the notice period and takedown procedures, which will provide greater clarity and certainity to the intermediaries.
- I think the game developers should be provided with a means of addressing their issues when their gaming content is blocked by the intermediary, which is a process that can take longer than 36 hours and therefore, time frame for intermediaries to respond shall also be increased.

ISSN: 2581-6349

K. VEERASWAMI V. UNION OF INDIA AND OTHERS[628]

- NIKHIL TUPAKULA

INTRODUCTION:

Until this judgment, ambiguity prevailed as to whether a criminal case can be lodged against an incumbent High Court or Supreme court judge. This judgment answered it in an affirmative, subject to a few conditions.

High Court and Supreme Court judges hold valuable posts and carry the belief of people on judiciary. The trust of people on judiciary erodes when allegations on higher constitutional bodies are on rife. This verdict slyly balances both 'curbing of unwarranted cases by the executive' and 'punishing the wrong doer'.

The guidelines given by the Supreme Court bring both High Court and Supreme Court judges under the ambit of Prevention of Corruption Act, 1947. This entrenches the belief of people on judiciary and hinders the judges from committing criminal misconduct.

BENCH:

The bench comprises of the following Hon'ble Judges of Supreme Court:

Justice B.C. Ray;

Justice K. Jagannatha Shetty;

Justice L.M. Sharma;

Justice MN Venkatachalliah;

Justice J.S. Verma.

FACTS:

The appellant was a former Chief Justice of Madras High Court. He started his career as an Advocate of Madras High Court. He was appointed as an Assistant Government Pleader in the year 1953. He was elevated to the post of Government Pleader in the year 1959. He continued till 1960. In the same year, he was appointed as a Permanent Judge of the Madras High Court. He continued in that post till 1969 when he was elevated to the position of Chief Justice. It was alleged that during his tenures as the Judge of High Court and the Chief Justice of High Court, he acquired assets disproportionate to the known source of income. On the said basis, a

[628] K. VEERASWAMI V. UNION OF INDIA AND OTHERS, (1991) 3 SCC 655.

complaint was lodged before the Delhi Special Police Establishment (Central Bureau of Investigation-CBI). CBI registered a case against him, in pursuant of First Information Report filed in one of the courts situated in New Delhi.

In the First Information Report, it was alleged that taking into consideration the sources of the appellant's income as a judge, the Chief Justice, the mode and style of his living with the probable expenses required during the period of his Judgeship or Chief Justiceship, it could be reasonably gleaned that he couldn't satisfactorily account for the possession of assets which are far disproportionate to his known source of income. It was also alleged that he committed offences under Section 5(2) read with clauses b, d, e of Section 5(1) of the Prevention of Corruption Act, 1947. On February 28, 1976 the copy of the concerned First Information Report was taken by the Investigation Officer and submitted the copy before the Court of Special Judge, Madras himself.

CBI hasn't been stymied regarding investigation. They had continued with the investigation and filed a charge sheet under Section 173(2) of Criminal Procedure code. The charge sheet mentioned that the appellant, after assuming office as the Chief Justice of Madras High court, gradually commenced accumulation of disproportionate assets. It also mentioned that for the period i.e. from 1st May, 1969 to 24th February, 1976 he was in possession of the pecuniary resources and property disproportionate by 6,41,416,36 to the known sources of income over the same period. The concerned income, which was alleged to be disproportionate, was in his own name as well as in his wife's name and his son's name. It was alleged that he cannot satisfactory account for such disproportionate assets. Hence, it was alleged that he committed the offence of criminal misconduct under Section 5(1)(e), which was punishable under Section 5(2) of Prevention of Corruption Act, 1947.

On perusal of the Charge sheet, the Sessions Judge concluded and issued process to the accused.

PROCEDURAL HISTORY:

HIGH COURT: after perusal of the charge sheet, the appellant filed a 482 petition before the Madras High Court. A three-judge bench heard the matter and via majority of 2:1 held that procedure was proper and doesn't behove its intervention. The appeal was dismissed.

But in view of the substantial questions of law involved, High court granted certificate for appeal to the supreme court.

SUPREME COURT: Hence, the appellant approached this court under Articles 132(1) and 134(1)(e) of the Indian Constitution.

ISSUES INVOLVED:

1. Whether a Judge of Supreme Court or High Court, as the case may be, is a public servant under Section 2 of Prevention of corruption Act, 1947?
2. Whether a judge of supreme court or High Court, as the case may be, be prosecuted for having committed the offence of criminal misconduct as referred under Section 5(1)(e) of Prevention of Corruption Act, 1947?
3. Whether the President is the competent authority to remove a judge either of the Supreme court or high court from his office in order to enable that to grant sanction for prosecution of the judge under the provisions as enjoined by Section 6 of Prevention of Corruption Act, 1947

JUDGMENT

This judgment was delivered by 5- judge bench of Hon'ble Supreme Court. The judgement was delivered with 4:1 ration and 3 learned judges accepted the ratio delivered by Hon'ble Justice K. Jagannatha Shetty.

K. JAGANNATHA SHETTY, J.

1. Section 21(3) of Indian Penal code, 1869 states that Public servant includes any judge, who's empowered by law to discharge, either by himself or via anybody, any adjudicative functions. Section 5 of the prevention of Corruption Act, 1947 deals with different acts of corruption by public servants. Section 6 prerequisites mandate of sanction for offences under the Act.
2. Section 6 mandates sanction for the offences committed under Section 5 of the Act i.e. Prevention of Corruption act, 1947. The Act was neither intended to condone the offence of corruption nor it was meant to guard the public servant. It was mandated due to fact that many false cases had been on rise and to stymie the same, sanction was mandated for the prosecution. If at all there are no materials then competent authority may deny the sanction for prosecution. If there exists credence to the materials submitted then the competent authority may grant the sanction for prosecution.

3. No relation of either 'master and servant' or 'employer and employee" exists between government and judiciary. In the case of **Union of Indian V. Sankalchand[629], Justice Y. Chandrachud** stated that the judges shall uphold the constitution and the laws without any prejudice or fear from executive and without favour from the executive. This is the difference between 'master and servant relationship' and 'judiciary and executive.'
4. The word "PUBLIC SERVANT" was amended and enlarged after the recommendations of C.K SANTHANAM COMMITTEE. This committee recommended the change of the section. The section was, thus, amended in the year 1964 to include judges as well. Section 21 of the Indian Penal Code, 1860 was amended.
5. The argument that clauses a, b, c of Section 6 shall be read ***ejusdem generis*** isn't sound and does not contain merit. The first two clauses of Section 6 of Prevention of Corruption Act, 1947 embody master and servant relationship. Whereas, the third clause, refers to the word called "OTHER". This word 'other' signifies the fact that it does not have any relation with previous clauses. Clause c applies on those public servants who do not come under the ambit of prior two clauses.
6. The **Judges (Inquiry) Act, 1968 and** the **Judges (Inquiry) Rules, 1969** lay down the procedure for removal. The conditions are that firstly, one hundred members (House of People) or fifty members (Council of States) shall sign the notice of motion; secondly, the notice shall be given to speaker or chairman. Basing upon the evidence, they may accept or reject the same; Thirdly, a committee shall be formed and it shall constitute three members. Those three members will be a Supreme Court judge, High Court judge and one jurist. Their report shall be submitted to the concerned speaker or chairman, as the case may be; Fourthly, it shall be voted and later on, having passed as per the prescribed norms, he shall be impeached or removed from the office after the assent from the President.
7. The appellant is correct in the sense that under Section 6(1), Parliament may not be a sanctioning authority. Unless it can discuss in the Sabha, it cannot grant the permission. Whereas, only exception to Article 121 is during their impeachment motion. Hence, it isn't an authority under Section 6(1).

[629]Union of India v. SankalChand, AIR 1977 (SC) 2328.

8. They can be tried under this act i.e Prevention of Corruption Act, 1947. The intention of the Act can be understood with the help of **M. Narayan V. State of Kerela[630].** In that case, it was held that the provisions are made so as to prevent the instances of bribery and corruption. Indian Penal code wasn't sufficient to curb the menace of Corruption.
9. The order of President is sine qua non for the removal of Judge. There shall be vertical hierarchy for the removal of a public servant. In the case of **R.S Nayak V. A.R. Antulay[631],** it was held that the vertical hierarchy shall remove a public servant from that office. The nature of the office shall indicate a hierarchy so as to permit interference and inference of knowledge about the functions, duties of the office and misuse by the public servant. But this cannot be a proper law, which can be applied in the present case. The situations are different from the present case. Hence, it wasn't considered as a good law for this case. The only thing which has to be seen is that it may be any department but they shall be in a position to appreciate the material collected against him or her so as to decide whether it was a frivolous or a proper complaint.
10. As far as Judiciary is concerned, he isn't outside the scope of it. He appoints the judges of High Court and Supreme Court. President, as per the law laid down in the case of **Shamsher Singh And Another V. State of Punjab[632],** is bound by the aid and advice of council as per Article 74 of the Indian Constitution.
11. Separate law isn't required. Chief Justice of India is a participatory functionary in the matter of appointment of judges of High court and Supreme Court. He shall be consulted first. Even the transfer from one High Court to another High Court can be done only after consultation with Chief Justice of India. Hence, he's a participatory functionary.
12. Hence it was directed that no criminal case can be filed against a judge of Supreme court or high court under this Act unless the chief justice is consulted before granting imprimatur to prosecution. In cases where the charges are against the Chief Justice of India then the Supreme Court Judge's consultation is must. This is done in order to protect not only the independence of judiciary but also from unwarranted harassment via prosecutions by the executive.

[630] M Narayan v. State of Kerela, (1963) 2 Suppl. SCR 724.
[631] RS Nayak v. AR Antulae, (1984) Indlaw SC 338.
[632] Shamsher Singh and another v. State of Punjab, (1975) 1 SCR 814.

13. If the ingredients are satisfied under Section 173(2) of Crpc then others aren't required. Hence, the appeal shall be dismissed.

VERMA, J. (SOLE DISSENT- OBITER)

1. He's the sole dissent in the Five-bench Court. Albeit his opinion isn't binding yet it is trite to fathom for the academic purpose.
2. As Supreme Court of India, it is the onus on the part of the court to interpret the laws. The law-making power has been conferred on the legislature by the makers of the constitution. Interference or intrusion by one body into the bastion of another is an anathema to the principles of constitution. It completely depends upon the machinery enacted by the legislature. Hence, it shall be adjudged upon what law is but not on what law ought to be.
3. Inclusion of Supreme court judges and High Court judges is not correct as the removal procedure for CHIEF ELECTION COMMISSIONER AND COMPTROLLER AND AUDITOR GENERAL is same. It follows Article 124. Hence, if the judges are incorporated under the Prevention of Corruption Act then the others i.e.,CEC and CAG shall also be included in the list.
4. The role of judicial activism is to fill the gaps created by the constitution but not to add any new edifice to which there exists none. The answer shall be either yes or no. It should not be yes but subject to certain conditions. This is adding an edifice to which there exists none. **Sampath Kumar And Another V. Union of India**[633] cannot be applied to the present case. In that case, the legislation pertaining to the administrative tribunals had several infirmities and hence, behoved judicial activism. Whereas, to the contrary, no infirmities have been elicited in the present statute. Hence, it cannot be applied in the present scenario.
5. The judges of High court and Supreme court do not fall under the categories of Clauses of a, b, c of Section 6. It is due to the fact that in the case of **R.S Nayak V. A.R. Antulay**[634]**,** it was held that sanctioning authority under Section 6 shall belong to vertical hierarchy. The body shall be higher when compared to that of the public servant. Whereas, in this case, Chief Justice of India has only moral supervisory role towards his brethren judges. Vertical hierarchy is sine qua non because unless he's of

[633] Sampath Kumar v. Union of India, (1987) 1 SCC 124.
[634] RS Nayak v. AR Antulae, (1984) Indlaw SC 338.

ISSN: 2581-6349

superior officer, he cannot be in a position to fathom the material evidence and adjudicate the issue. This office does not possess any vertical hierarchy. Hence, it cannot come under the ambit of Section 6 of Prevention of Corruption Act, 1947.

6. The second reason as to why it isn't a part of Section 6 is that the "authority competent to remove" shall be substantive in nature but not mere technical in nature. In pursuance of the **Judges (Inquiry) Act, 1968 And Judges (Inquiry) Rules, 1969,** certain procedure is prescribed under those rules for removal of Judges of High Court and Supreme Court. Hence, under Article 124(5) it is the law governing the removal of High Court and Supreme Court judges. Certain prerequisites have been mentioned. One of them is that notice shall be signed either by 50 or 100, as the case may be; then it shall be passes during the total majority of each house and majority in two-thirds present and voting. This is the procedure that has been enunciated as per the powers given under the Constitution.
7. In the SNATHANAM COMMITTEE REPORT, it was clarified that the satisfaction shall be determined based upon the periodic submissions pertaining to the properties. It shall be based on that but not on the statement filed by an accused. Hence, the appellant's argument that the statement of the accused shall be accompanied in the charge sheet is of no merit.
8. In the absence of any statute, the misconduct is not a criminal offence but impeachment is the exclusive panacea.
9. Hence, according to his opinion, it shall be allowed.

CONCLUSION:

As per the majority opinion (4:1), the appeal shall be dismissed and the following was laid down:

a. Judges of Supreme Court and High Court are public servants under Prevention of Corruption Act, 1947. They come under the ambit of Section 21 of Indian Penal Code, 1860.
b. No criminal Case can be lodged against a judge of High Court or Supreme Court unless the incumbent government consults the Chief Justice of India.
c. Albeit President is the removal authority yet consultation with Chief Justice of India was made mandatory. No criminal prosecution can be launched against a judge of Supreme Court or High Court under this act unless the Chief Justice of India is consulted before granting imprimatur to prosecution. President has the authority to

grant sanction only after consulting the Chief Justice of India and he's bound by the advice of chief justice of India.

d. In cases where the charges are against the Chief Justice of India then the Supreme Court judge's consultation is must.
e. Until this judgment, the judges of High Court and Supreme court were excluded from this Act. They couldn't be prosecuted under this Act. This case brought Hon'ble High Court and Supreme Court judges under the ambit of Prevention of Corruption Act, 1947

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ANTI-DEFECTION LAW: A FLAWLESS BRIDLEWAY TOWARDS POLITICAL INTEGRITY OR A CHIME TOWARDS POLITICAL DISSENT

- **SHANTANU SETH**

INTRODUCTION

The word "Defection" is has derived from the Latin word 'defectio' and is defined as "to abandon a position or association, often to join an opposing group"[635]. In the political scenario, it primarily means a member abandoning his previous political party and joining the other party thus, disapproving his support and loyalty of the previous political party. This is usually done in order to remain in the majority.[636]

The Anti- defection law was introduced by the 52nd Amendment in 1985 during the tenure of Rajiv Gandhi.[637] It is designated out in India's tenth constitutional schedule. The 10th schedule previously was related to Sikkim's association with India. But when Sikkim became a fully-fledged state, the old schedule was repealed via the 36th Amendment in 1975.[638]

During the time of coalition era at the time of 1967 general assembly elections which were the 4th Lok Sabha elections, around 142 MPs and 1900 MLAs were defected to other parties. One such MLA named Gaya Lal from Haryana changed his party thrice in one day and hence the phrase "*AAYA RAM, GAYA RAM*" was inspired by the Indian politics[639]. Many people continued to change their parties continuously both at the centre and in the state. Such continuous defections resulted in the continuous fall of the governments. Hence, because of the continuous political instability and continuous change in the governments, the Anti Defection law was introduced in 1985 by inserting the tenth schedule.

The primary reason for enactment of such laws is to ensure political stability within the government hence, punitive measures are imposed to ensure such is achieved. On one hand there is the case of loyalty towards one's party, from which the member has been elected, while on the other hand such could amount to restriction regarding that of speech and expression.

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[635] Cambridge Learners Dictionary (4th edition, 2013).
[636] M.P. Jain, Indian Constitutional Law (8th Edition, 2018).
[637] *GK Today: Anti-defection Law & 10th Schedule Explained* (March 27, 2016) https://www.gktoday.in/gk/anti-defection-law-in-india-history-provisions-issues-and-analysis/.
[638] *Id.*
[639] Vibhor Relhan, *The Anti-Defection Law Explained* (December 6, 2017) https://www.prsindia.org/theprsblog/anti-defection-law-explained.

ISSN: 2581-6349

ORIGIN OF ANTI- DEFECTION LAW IN INDIA

Originally the Indian Constitution conveyed no reference or information to the political parties, whether related to their working, budget or even existence. There was also no information on multi-party democracy as there was barely any previous instance of it in the 1950s till the early 1960s, the dialogue relating to defection and its implications were not felt mandatory. But after the 1967 elections, the scales shifted majorly and referencing relating to the political parties were started to being discussed. The 1967 elections are thus called a watershed moment in India's democracy.

In the 1967 elections, around sixteen states had gone to polls. The Congress was able to form the government in only one of the state while losing in the majority of them. This was the start of the coalition era in India. These elections set off defections on a large scale. From 1967 to 1971, over 1900 MLA's and 142 MPs migrated from their political parties to other political parties. Till 1985 the number of cases relating to defection increased to around 2500. Out of these 2500 cases 30 were related to Chief Ministers of various states. There were also hundreds of cases of defections which involved members of prominent posts in different parties. Then there was also the infamous case of Gaya Lal in Haryana. Governments of many states, collapsed (first being that of Haryana). The defectors were awarded with plum ministries in the governments, including Chief Ministership in Haryana.[640]

The initial resolution with regards to defection was discussed in the Lok Sabha by Shri P. Venkatasubbaiah. This act of frequently crossing the floor and growth of the parliament was deliberated upon in the meetings of Presiding Officers' Conference in 1967. In December 1967, the resolution was passed stating for a formation of a high level committee to look into the matter and provide for some recommendation. A committee was set up by the government headed by Y.B. Chavan apropos of defection. In 1969, a recommendation was put forward by the committee to formulate for a code of conduct for the members elected in the parliament and ensure for a systematic implementation regarding such problem. This required for a constitutional amendment as the committee did not wanted to affect the prevailing incumbents. Further recommendations included to debar the defector for 1 year or till the time he gets re-elected.

However, the committee could not provide adequate measure to prevent such problem. The 32nd amendment bill (1973), was the first to provide for the problem of disqualification as to

[640] Dhananjay Mahapatra, *Does anti-defection law need an overhaul?* (March 16, 2020) http://timesofindia.indiatimes.com/articleshow/74643907.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

defection. It provided that if the member gives up his membership of the party through which he stood as a candidate during elections, voted or abstained from voting without providing prior permission to the party, or going at odds with the decision of the party, would be liable to be disqualified from the party[641]. However, if membership given up voluntarily because of party split would not amount to disqualifications. It was not applicable on nominated or independent members. The powers to decide whether disqualification regarding members be provided to the president and governors for MPs and MLA's respectively. The bill did not materialised as the houses of parliament dissolved in 1977 and became defunct.

Another attempt was made via the 48th amendment bill (1978). Nevertheless, the bill was never passed because of several members opposing to it in the introduction stage and raised several objections.

In 1985 the 52nd amendment to the Indian Constitution was introduced and the 10th schedule was inserted in the Constitution. This schedule dealt with the provisions as to disqualification on ground of defection.[642]

ANALYSIS OF THE TENTH SCHEDULE

The 52nd amendment introduced the 10th schedule into the Indian Constitution. Various amendments were made to the Constitution and the process was laid out through which disqualification on grounds of defection was to be conducted.

Para 2 of the tenth schedule tells about the various grounds on which a member is disqualified under the aegis of defection:

MEMBERS OF A POLITICAL PARTY-

- When a member voluntarily resigns/ gives up his membership of such party.
- When a member of a party votes or abstains from voting in the house, against the discretion of his member party or against the person authorised on his behalf, without providing any prior permission from the political party, unless the same has been condoned by the party, can be condemned by the party within 15 days of such voting or abstention.

NOMINATED MEMBERS-

[641] G.C. Malhotra, ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH (2nd edition, 2005).
[642] Mohamed Zeeshan, *India's anti-defection law needs changes to promote party-level dissent on issues like CAA* (March 17, 2020) https://theprint.in/opinion/indias-anti-defection-law-needs-changes-to-promote-party-level-dissent-on-issues-like-caa/382505/.

- If the nominated member joins any political party within six months from the date of joining the house as per the requirements given by article 99 or 188, shall be subjected to disqualification. After that period, the nominated members will be treated as either an independent member or a member of the party.

INDEPENDENT MEMBERS-

- The independently elected member would be subjected to disqualification on joining any other political party after being elected.

Paragraph 4 of the schedule tells about the exceptions of anti- defection law:

- If any member of the party is elected as a speaker to the house or chairman, then he could resign from his party. He could later re-join the same party if he has resigned from the post of speaker of chairman. As such, there would be no defection on the part of that member.
- If a member exits from the political party as a result of merger with another party and formation of a new party altogether, then such case would not amount to disqualification. Earlier the law stated that at least one- third of the members of both of the parties must have voted for the merger. But after the 91st amendment in 2003, the number of members to have voted in favour of the merger was increased to two-thirds. The 2016, recent mass migration of congress party members into PPA (People's Party of Arunachal), is a perfect example. The Congress previously occupied 44 seats, then 43 MLAs dropped from the party, formed a brand new party (PPA) and later merged with the BJP. The total strength in favour of the merger was conspicuously more than the two- thirds required by the law.

Instantly, when the original law was passed (one-third in favour of the merger) it was met with severe backlash from all over the country on the basis that it affects the right of freedom of speech to the legislators. A PIL was filed in the Hon'ble Supreme Court which challenged the constitutional cogency of the Anti- defection law. In *Kihoto Hollohon v. Zachillhu and Others*, the validity of the newly formed 10th schedule was challenged, but Supreme Court held that 10th schedule is constitutionally valid in nature. It further added that "the schedule does not violate any rights of the free speech or any of the basic structure of the democracy."[643]

However, observations as to Section 2(1) (b) of the schedule were also made by the Apex court. Section 2(1) (b) reads that "a member shall be disqualified if he votes or abstains from voting

[643] (1992) 1 SCC 304.

contrary to any direction issued by the political party" [644]. The judgement stressed on the requirement to curtail disqualifications to votes which are of utmost importance to the continuity and presence of a government and to matters that are integral to the party's electoral programme, so as not to 'unreasonably impinge' on members' speech and expression thus violating Article 19(1)(a).

As per the 52nd Amendment, the Chairman or the Speaker has been given the power to disqualify a member, but if a complaint is received with regards to defection of the Chairman or Speaker, a member from within the house is elected, wherein the decision regarding the defection is taken[645]. However, a specified time period is not mentioned with regards to the disqualification plea.

The court can intervene in the matter of disqualification only after the plea has been given by the presiding officer, the petitioner seeking review of the disqualification has to wait for the decision of the court. Till the time the decision is made he remains disqualified.

Changes were made to the tenth schedule in the 91st amendment in 2003. The change primarily revolved around the disqualification with regards to a merger between the parties. Post the 91st amendment, defection was changed to two- thirds of members of both parties each for a merger between the concerned parties (pre 91st amendment, it was validation up to one- third in both the political parties each required for the merger). This amendment also made it compulsory for all those members who are switching their political sides, whether in single or a majority to step down of their legislative position and membership. If they are defected they will have to seek re- election.

RELATED CASES

In the landmark case of *Kilhota Hollohon v. Zachilhu and others*[646], the issue raised regarding the 10th schedule was regarding the restrains it bring with regards to the freedom of speech and expression embossed within the Article 19(1)(a) of the constitution to the elected MP's and MLA's present in the parliament. Furthermore, the final decision relating to defection which is granted by the Speaker/ Chairman is valid in law. It was decided by the Supreme Court that the 10th schedule does not restricts the freedom of speech and expression nor overthrow the rights democratically available to the legislators. Hence, this schedule was constitutionally valid in the eyes of the law. The court further added that the provision relating to the final decision

[644] Section 2(1) (b) of the 10th schedule, Constitution of India, 1947.
[645] *Supra note 9.*
[646](1992) 1 SCC 304.

ISSN: 2581-6349

given by either the Speaker or Chairman is valid in nature but the Supreme Court and the High Court was given the power to make judicial review in this regard. However, no prior stage to the decision when made by the Speaker or the Chairman should come under this judicial review.

In *Ravi S Naik v. Union of India*[647], the ambit of the term "Voluntarily giving up" was discussed. It was decided by the Supreme Court that the term "Voluntarily giving up membership" is not only related to just handing of the resignation but also such can be drawn from the bodily conduct of members also.

The Supreme Court while again discussing the scope of the 10th schedule in the case of *G. Vishwanathan v. Speaker*, *Tamil Nadu Legislative Assembly* held that, "Once a member is expelled, he is treated as unattached member in the house but he continues to be a member of the old party as per the Tenth Schedule. If he joins a new party after being expelled, he can be said to have voluntarily given up membership of his old party."[648] A similar decision was upheld in the case of Rajendra Singh Rana vs. Swami Prasad Maurya and Ors.[649]

In the case of *Speaker, Haryana Vidhan Sabha Vs Kuldeep Bishnoi & Ors*[650], the Supreme Court has expressed concern regarding the unnecessary delay in deciding the petitions after the plea regarding the defection has been announced by the Speaker/ Chairman.

In the case of *Jagit singh v. State of Haryana*[651], it was held that the speakers' order, if open to judicial review, can only be made available on limited grounds but if the order is violative by the order of natural justice, it would be a nullity. It was also held that when an application is made to the speaker under the 10th schedule he should decide it according to the procedure set by the law under the rules and if he himself decides the matter, it is a clear misuse of power by him and the court has the power to review the speaker's decision.

LAWS WITH RESPECT TO DEFECTION IN OTHER COMMONWEALTH COUNTRIES

BANGLADESH-

"Political Party" has been defined under Article 152 of the Constitution. As per the definition provided in the Constitution " 'Political Party' includes a group or combination of persons who operate within or outside Parliament under a name and who hold themselves out for the purpose

[647] 1994 AIR 1558.
[648] 1996 SCC (2) 353.
[649] (2007) 12 SCC 198.
[650] 2012 AIR 1765.
[651] AIR 2007 SC 590.

of propagating a political opinion or engaging in any other political activity."[652] The provisions with regards to political defections provided in the Constitution are very austere and stern. Because of such stringent rules, problems rarely occur regarding defection. Article 70 read with article 66(4) of the Bangladeshi Constitution, the Members of Parliament (Determination of Dispute) Act, 1980 and Rule 178(1), (2) and (4) of the Rules of Procedure of Parliament check the menace of defection.

But anywhere in the law, the term "defection" has not been blatantly used. The term used in place is "dispute". "Article 66(4) of the Constitution lays down that if a member is subjected to any provisions as per clause (2) of the Article and a dispute with regards to disqualification or if the member is forced to vacate his seat as per Article 70 of the Constitution, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final."[653] Article 70 deals with vacation of seat on resignation, etc. "Clause (I) provides for an elected MP in which the political party nominated him as a candidate shall vacate his seat if he resigns from that party or votes against it in Parliament. Through explanation to this clause it has been provided that if a Member of Parliament: (a) abstains from voting if present in the parliament or (b) makes himself unavailable from any sitting of the parliament and goes against the directions of the party which nominates him as a candidate in the elections. Clause (2) provides that if anytime, a question which deals with the leadership of the party arises, the speaker should be provided information in writing and within seven days of being notified a meeting should be convened with all the members in the Parliament in accordance with Parliament's Rules of Procedure and determine its parliamentary leadership by the votes of the majority through division and if, in the matter of voting in Parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under Clause (1) and shall vacate his seat in the Parliament. Further, clause (3) lays down that if a person, after being elected an independent MP, joins any political party, he should be deemed to have been elected as a nominee of that party which he has joined."[654]

The Election Commission of Bangladesh has been given full power regarding the provisions of clause (4) of Article 66 of the Constitution through the Member of Parliament (Determination of Dispute) Act, 1980. The procedure to deal with such disputes is mentioned in Rule 178 of the Rules of Procedure of Parliament. "If any dispute arises with regards to

[652] Article 152, Constitution of Bangladesh, 1972.
[653] Article 66(4), Constitution of Bangladesh, 1972.
[654] Article 70, Constitution of Bangladesh, 1972.

disqualification as per Article 66 (2) or with vacation of his seat as per Article 70 of the Constitution of the elected member, such a dispute is to be mentioned to the Election Commission by the Speaker of the House"[655].The dispute cannot be taken up by the Speaker or Deputy Speaker suo-moto. Any person or a member of the House can file a petition for disqualification against another member under the Members of Parliament (Determination of Dispute) Act, 1980 and under article 66(4) of the Constitution.

As per Section 3 of the aforementioned Act, "a statement within 30 days should be prepared by the Speaker after the dispute has arisen, containing the facts, name and address of the concerned members relating to the dispute (those who have filed it and against those who has been filed), and then send the statement for hearing to the Election Commission."[656]

However, till the decision of the Election Commission as to the matter of disqualification of the member is made, the member continues to be a member of the Parliament. Furthermore no provision is found in relation to a separate seat once a member has been expelled from the party. Once the decision is given by the Election Commission, it is absolute and subsequently no appeal can be filed.

No provision has been provided regarding the nominated members in the Parliament of Bangladesh. Article 72(3) of the Constitution mentions about the independent member of the parliament and says that if an independent member joins a political party after he is elected, he shall for the purpose of the article be believed to have been elected as a nominee of that party. No time limit has been fixed for such joining. As concerns to the splits in and mergers of parties, there is no specific provision/ exemption for the same in the law. Such situations are sporadic in Bangladesh. In case of splits and mergers, the members of Parliament continue to be the members of the party unless there is a dispute. In case of any dispute, the matter is referred to the Election Commission for determination of membership. No immunity is available to the Speaker or the Deputy Speaker of the House from the rules in this regard. They continue to remain members of Parliament from the party they originally belonged to, unless dispute arises and the same is determined by the Election Commission otherwise.

UNITED KINGDOM-

In United Kingdom, the members of the party are not required to register towards a particular party towards which they are affiliated to. There are however, times when there is a change towards the membership regarding the parties between the members. A member is not required

[655] Rule 178, Rules of Procedure of Parliament (Jatiyo Sangshad), 1972.
[656] Section 3, Members of Parliament (Determination of Dispute) Act, 1980.

to resign from the parliament if there is a change in his/ her party. Furthermore, if a member is expelled from the political party, he is still eligible to retain his seat earned by him. He is still allowed in the Parliament, however would be seated separately from the members of the party previously he was a part of.

With regards to the House of Lords, they hold their seat during the lifetime. The House of Lords is governed by the regime. As many as one- third members are not affiliated to any political party. These one- third members are known as "cross benchers" and are independent. They do not immediately declare themselves as a party whip or an independent member. Hence, the party label is not significant in the House of Lords. It is a rare occasion that a member either changes his party or is expelled from the party. However, there are no punitive measures regarding such actions. If expelled, the membership of the House is not disqualified. The House does not get involved regarding the matters of defection and is purely related to the parties.

PAKISTAN-

Anti- defection law also exist in Pakistan as it had previously faced the problems. The Constitution of Pakistan vide article 63A lays down the grounds of defection on which a member of a Parliamentary Party in a House is disqualified. It provides for disqualification of the member if- "(a) resigns from the political party or joins another party in the parliament or (b) gives vote or abstains from doing so hence, going contrary to the decision given by the political party to which he/ she belongs to, as to matters regarding- (i) Prime Minister's or the Chief Minister's election, (ii) a vote of Confidence or No-confidence, or (iii) a Money Bill" [657] However, before making such statement, the Head of the Parliamentary Party shall provide the member with a chance to show cause as to why such declaration may not be made against him. Upon receiving of the declaration, the Presiding Officer of the House shall, within two days, refer the declaration to the Chief Election Commissioner, who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner. Where the Election Commission checks the declaration, the member cease to be a participant within the house and his seat shall become unoccupied. If any party present in the house is aggrieved as to the decision taken by the Election Commission may, file an appeal before the Supreme Court within thirty days of the decision, and the matter shall be decided within 30 days after the

[657] Article 63A, Constitution of Pakistan, 1973.

ISSN: 2581-6349

appeal has been filed by the aggrieved party. Though, article 63A is not applicable to the Chairman or the Speaker of a House.

RECENT CASES OF KARNATAKA AND MADHYA PRADESH REGARDING DEFECTION

The primary aim after the introduction of Anti- defection law in 1985 was to curb the menace of those defections which are corruption driven and to ensure political stability at both the state and national level. This was also done to ensure that the elected representatives remain loyal towards the party he/ she has won his/ her seat in the legislature. However, the current iteration of anti- defection law has been miserably futile towards achieving this. More recently, the political crisis in states of Karnataka, Madhya Pradesh, etc. are the onlookers.

In Karnataka, the JD(S) and Congress was the government in power after the 2019 elections and BJP was the opposition. However, after a period of about 14 months, as many as 16 MLA's resigned from the ruling party and within days by- elections were taken place and the government changed hands.

In Madhya Pradesh, after 15 months, the government fell with the resignation of the then CM Kamal Nath after the exodus of the members of the ruling party (led by Jyotiraditya Scindia) which led to a plea in the Supreme Court and finally ending with the Apex Court ordering for a floor test. This was keeping in mind the majority was already at a slender majority and the party officials were at loggerheads against each other.

CONCLUSION & SUGGESTIONS

Defection is a tool which is detrimental for a country. Because of defection a nation is unable to function as the government in various states keeps on falling. Such behaviour of the MLA's and MP's is deleterious not only to their own parties but also to the state and the nation. Anti-defection law was an answer to this situation but due to the relaxed and libertine nature of the law, workaround were made and loopholes were created and exploited as seen in the recent calamity of Karnataka and Madhya Pradesh. There are reasons as to why other democracies have not adopted a law in relation to anti- defection. The members are made accountable for their votes of their constituencies, thus diluting the separation in the powers of legislature and executive. If there is independence within the house, the voters will elect that candidate which they fell is suitable and provides best for their interests; irrespective of the party.

Members should be given freedom in their vote. A possible solution is to disqualify them only when the members votes against in case for a no confidence motion. Stringent actions must be

taken by the courts and Anti defection law must be amended in order to iron out these loopholes and protect the states from the fear of political instability, while also reducing the resignation of candidates in both the houses and providing the candidates for freedom with respect to speech, expression and voting. The law should also forbid for re-election of the resigned candidate in the by elections and making that member eligible only after the assembly has ended.

The Anti- defection law, instead of providing democracy with regards to debate and discussion has provided for democracy within the parties. An amendment is tardy as the law making is seemed to be overly reliant on the number of members of a party in the legislature rather than the logic and vindication presented. It has to be realised that running of a state through these MPs and MLAs is an important task and the assembly has to be protected from such spontaneous incidents which later prove to be damaging to a state, or even the nation.

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INFRINGEMENT OF COPYRIGHT IN THE DRAMATIC WORKS

- **ANOOP KUMAR & RANJANA**

INTRODUCTION

Human beings possess the faculty to think and create. They exploit their creation to earn bread. Since it is the creation of their mind, it is called the intellectual property. Every intellectual property, which adds to the cultural, social, scientific and economic development of the society, must be protected and encouraged. The creator must be suitably rewarded for his creation by providing legal protection to the intellectual output. The intellectual property law regulates the creation, use and exploitation of mental or creative labour. It prevents third parties from unjustifiably reaping the fruits of the creative labour of the author, which they have not sown. The Intellectual Property Rights (IPRs) are the legal rights governing the use of creation of human minds.

Among other components, the copyright also forms the subject matter of the IPRs. The concepts of 'copyright' and 'neighbouring rights' have assumed significance in the light of current scientific, economic, social, political and legal environment not only in India but also across the world. The subject matter of the copyright has increased in ambit. Earlier the scope of copyright was restricted to protection of literary and artistic works. But the contemporary regime on the copyright also includes dramatic and musical works, cinematograph film, and sound recording. Apart from that, the copyright law also covers the neighbouring rights which consist of the right of performers, the rights of producers of phonograms and the rights of broadcasting organisations. The technological inventions that took place in past two centuries have substantiated the basis for the development of the copyright law.

DEFINITION OF COPYRIGHT.

Non-legal Definition. Copyright derives from the expression of "Copies of words", first used in the context according to the Oxford Dictionary in 1586.

According to the Oxford English Dictionary, 'Copyright' is 'the exclusive right given by law for a certain term of years to an author, composer etc. (or his assignee) to print, publish and sell copies of his original work'.

Statutory Definition. As far as the Indian context is concerned, Section 14 of the Copyright Act, 1957 lays down a bundle of several rights with respect to the original work of the author. The statutory provision is as follows:

14. Meaning of copyright.-For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

(a) in the case of a literary, dramatic or musical work, not being a computer programme, -

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,-

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental."

(c) in the case of an artistic work,-

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) In the case of cinematograph film, -

(i) to make a copy of the film, including a photograph of any image forming part thereof;

ISSN: 2581-6349

(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public;

(e) In the case of sound recording, -

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public.

Thus, going through the provision of the Act, following features of the definition can be inferred:

a) Sec. 14 deals with the definition of the copyright as the exclusive rights to do or to authorise to do certain acts in relation to the literary, dramatic or musical works, computer programmes, artistic works, cinematograph films and sound recordings.

b) The nature of the acts authorised by the Act vary according to the subject matter of rights.

c) The definition of 'Copyright' is exhaustive and extends only to those rights mentioned in Sec.14.

NATURE OF COPYRIGHT.

Copyright is an incorporeal property in nature. Since the owner creates the subject matter of the copyright, it becomes his property and he is justified in disposing it of by outright sale (assignment of his right) or by licensing. The property is termed as the incorporeal property as it originates in the mind of persons before it is expressed in material form. Ideas and thoughts are not protected under the copyright law as they are not considered works under the copyright law. But once it is reduced in writing or other material form, it becomes worthy of copyright protection.

Copyright, being the aggregate of several rights, endowed on its owner, following features of copyright can be enumerated:

a. *Bundle of several statutory rights.* Copyright is a creation of statute. It is granted and protected according to the Copyright Act. It is not a common law right. But it is not a single right but a bundle of several rights.

b. *Negative right.* Copyright is the bundle of several exclusive rights, which entitle the owner to prevent others from copying his work or doing those acts which only he is entitled to do.

c. *For a time duration.* These rights are accorded only for a limited duration of time. After the expiry of this duration, the subject matter of copyright becomes the public property and can be used by anyone without any hindrance.
d. *Originality of work.* The protection of the subject matter of copyright is dependent upon the originality of the work and not its quality. Thus, howsoever bad is the quality of the work, if it is the original one, the author is endowed with the copyright protection.

MORAL BASIS OF COPYRIGHT.

The state of law prohibits one man to reap the profit and appropriate to himself what has been produced by the labour, skill and capital of another.[658]

The United Nations Declaration of Human Rights adopted by the United Nations on December 10, 1948 proclaimed the moral basis of intellectual property in Article 27 of the Declaration, which lays down that:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article *6 bis* of the Berne Copyright Convention (International Convention for the Protection of Literary and Artistic Works) substantiates the moral basis of Copyright as follows:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

[658] ***WALTER V. LANES*** **1990 AC 519 (HL).**

ISSN: 2581-6349

OBJECTIVES OF COPYRIGHT LAW.

The copyright law mainly serves two purposes. First, the copyright law is developed to encourage and reward authors, composers, artists, designers and other creative people, who apply their skill and capital in presenting their works before the public. The author, or in some cases his employer, are given certain exclusive rights to enjoy the benefits of their work for a certain period of time. During this period the copyright owner is entitled to exclude others from enjoying the fruits of labour and skill put by him in producing the copyrighted work. These form the part of the economic rights. Apart from these rights the copyright law also recognises the moral rights of authors.

Secondly, it creates an amicable balance between the rights of the author and public interests.

AMBIT OF THE COPYRIGHT PROTECTION.

As far as the Copyright Act, 1957 is concerned, Sec. 13 (1) of the Act lays down the various fields, in which the copyright protection can be endowed to the author.

13. Works in which copyright subsists.- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recordings.

DRAMATIC WORK.

Sec.2 (h) of the Copyright Act, 1957 defines 'Dramatic work' as:

(h) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film.

If we go through Sec.2 (h), the definition of the term 'dramatic work' includes following elements:

1. any piece for recitation;
2. choreographic work or entertainment in a dumb show; and
3. The scenic arrangement or acting form of which is fixed in writing or otherwise.

It excludes a film cinematograph.

In the English Copyright Act of 1956, dramatic work is defined to include "a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented but does not include a cinematograph film as distinct from a scenario or script for a cinematographic film." The word 'scenic arrangement' which appears in the Indian definition does not appear in the English definition.

The definition of 'dramatic work' of this clause of the Indian Copyright Act follows the definition given in the Act of 1911.

RIGHTS AVAILABLE TO THE COPYRIGHT OWNER.

Section 14 of the Copyright Act, 1957 lays down several exclusive rights, available to the owner of copyright in relation to a literary, dramatic or musical work. These exclusive rights are subject to the provisions of the Act. These rights are:

a. to reproduce the work in any material form including the storing of it in any medium by electronic means;
b. to issue copies of the work to the public not being copies already in circulation;
c. to perform the work in public, or communicate it to the public;
d. to make any cinematograph film or sound recording in respect of the work;
e. to make any translation of the work;
f. to make any adaptation of the work; and
g. to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses 'a' to 'f'.

INFRINGEMENT OF COPYRIGHT IN DRAMATIC WORKS.

For the infringement of a dramatic work, it is not necessary that the speech or dialogue should be copied. Also, if mere theme is adopted within the limits of fair use, it does not constitute infringement. But if the same dramatic meaning is merely expressed in a different expression without exercise of any original skill or labour, it constitutes infringement. Similarity in scenes and sequences is the evidence of piracy. In *Frankel v. Irwin*[659], it was observed that piracy may also consist in appropriating the action of a play without any of the words. In order to constitute infringement, the production on the stage must tell the same story as the copyrighted drama. If the production tells a different story, or enacts another and different sequences or events[660]. If

[659] **34 F (2D) 142.**
[660] **SELTZER V. SUNBROCK 22 F SUPP 621.**

a substantial number of incidents, scenes and episodes, in an alleged infringing play are so nearly identical, in detail and combination with those found in the copyrighted drama, as to exclude all reasonable possibility of coincidence and point to the conclusion that they were taken from the infringed play, it amounts to piracy of the original play[661]. If the ordinary observation fails to reveal existence of any common feature between the two plays, except as 'incomplete skeleton' or 'mere sub-section of a plot' not susceptible of copyright, there is no infringement[662]. But if the defendant reproduces the original copyrighted drama's scenes with substantially the same dramatic situation, he is held liable for infringement[663].

The Copyright Act, 1957 lays down following provision in respect of the infringement of copyright:

51. When copyright infringed. -Copyright in a work shall be deemed to be infringed-
(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-
(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
(ii) permits for profit any place 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 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, or
(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
(iii) by way of trade exhibits in public, or
(iv) imports into India, any infringing copies of the work.

Ball in his book Ball on Copyright[664] has defined 'dramatic work' as a composition consisting of a series of events with various parts and characters, invented and arranged in sequence,

[661] SIMONTON V. GORDON 12 F (2D) 116.
[662] DYMAOW V. BOLTON 11F (2D) 690, 692.
[663] CHAPPEL & CO. V. FIELDS 210 FED 864.
[664] R. G. CHATURVEDI, IYENGER'S THE COPYRIGHT ACT, 1957 (6TH ED.) P. 333.

which are capable of being so realistically represented and developed on the stage by the presentation of the successive incidents and display of feelings and earnestness on the part of actors impersonating the characters of the play as to produce corresponding emotions in the spectators and tell them a story as intelligibly as if it had been presented as a written narrative.

Ball defines drama as representation of passion which progressively increases in interest and emotion as the action proceeds[665]. It is the product of human mind, arrived at by the exercise of substantial independent skill, creative labour or judgment, which can be presented through the medium of dancing and acting and is capable of being recorded in writing. The definition provided by the Copyright Act, 1957 is the inclusive one. Other things can also come under the ambit of the definition. In order to look into the infringement of an original copyrighted dramatic work, its essential elements have to be touched upon.

- ***Choreographic work.*** Choreography is the art of arranging or designing of ballet or stage dance in symbolic language. In order to qualify for copyright protection, it must be reduced in writing. The form of writing is immaterial.
- ***Scenic arrangement.*** Scenic arrangement or acting form is protected under the Copyright Act, 1957, provided it is fixed in writing or otherwise. Thus the scenic effects, in order to be protected, must be reduced in some permanent form.

In Tate v. Fullbrook[666], FARWELL LJ. observed that mere scenic effects, taken by themselves and apart from words and incidents of the piece, were not protected by copyright. But once there is a dialogue, scenic effects become accessory to the dramatic work, and the whole becomes the subject of copyright.

- ***Gags.*** Gags are an actor's interpolations in dramatic dialogue. They are changed from time to time and do not form a permanent part of the play. Also there is no certainty of subject matter. Therefore they are not subject matter of copyright protection.
- ***Ballet.*** The music, the story, the choreography, the scenery and the costumes form the part of a ballet. Thus, it is a composite work. Such a work could be the subject matter of copyright.
- ***Drama or the film based on a newspaper article.*** The form, manner or arrangement of a drama and movie are materially different from a newspaper article and by virtue of the media there is substantial dissimilarity in the mode of expression of the idea in the

[665] IBID, P. 334.

[666] (1908) 1 KB 821.

newspaper article and in a stage play or in a movie. In *Indian Express v. Jagmohan*[667], the defendants made a stage play and a movie based on the central theme of certain articles published by the plaintiff. The court declined to hold that the stage play or the movie was infringement of the newspaper article. It was further held that there exists no copyright in an event, which has actually taken place.

- ***Parallelism of Phrase.*** Mere fact that the same or similar isolated expressions are found in the defendant's play, does not constitute it an infringement, for the reason that copyright does not cover words or phrases, or ideas[668]. The enquiry must be as to the copyrightable matter the plaintiff had protected under the copyright law. The defendants are liable only if they have impinged upon the private domain of the plaintiff. The private domain here is referred to, includes the sequence of language used, that is, the dialogue[669].

Detached word and phrases employed in the dramatic work can be freely used. No one can appropriate them altogether[670]. The copying of the phraseology is not essential part of the infringement.

- ***Incidents.*** Incidents form the part of episode of the story. Incidents are in public domain. If incidents of a copyrighted play are adapted to a subsequent play, no infringement of copyright is committed. The author does not have monopoly over the incidents in the play. Others have right to exploit the facts, experiences, field of thought and general ideas, but they are not entitled to substantially copy a concrete form in which the circumstances and ideas have been developed, arranged and put into shape[671].

Copying of the form, in which the incident is expressed, amounts to infringement[672]. But the appropriation of a number of incidents constitutes infringement, because these together form the plot or action of a play or novel[673].

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[667] AIR 1985 BOM 229.

[668] LOWENFELS V. NATHAN 2 FED SUPP 73, 80.

[669] SHELDON V. METRO-GOLDWYN PICTURES 7 FED SUPP 837, 842.

[670] FRANKEL V. IRWIN 34 F (2D) 142, 143.

[671] HOLMES V. HURST 174 US 82: SUP 606; EICHLE V. MARCIN 241 FED 404, 408.

[672] RUSH V. OURSLER 39 F (2D) 469, 473.

[673] FRANKEL V. IRWIN 34 F (2D) 142, 143.

- ***Plot.*** The copyright does not protect the fundamental plot, which was common property long before the story was written. If the particular treatment, embellishments or dress are appropriated out of the old plot, it amounts to infringement.
- ***Theme.*** Ideas are not protected by copyright. Theme, being the basic idea of the play is not protected. But if the theme is presented in an original way, with novelty of treatment or establishment, the copyright in theme is exclusively protected[674]. If a particular theme of a play is appropriated and presented in the same way and with the same treatment and embellishment, it results into infringement.
- ***Environment.*** The mere fact that two plays are based on the same environment does not constitute the infringement of one play by another. An artist may paint a picture of a landscape for which he can get a copyright, but he can not obtain a copyright in the landscape. Same applies to the author who places his plot in a particular locale[675].
- ***Emotions.*** Emotions like mere ideas are common property. The fact that the underlying emotions are found in the latter play would not be alone sufficient to prove infringement. If the similar emotions are portrayed by sequence of events, presented in like manner, expression and form then infringement would be apparent[676].

Adaptation of a dramatic work. The owner of the copyright enjoys the exclusive right to adapt a dramatic work. If there is no originality in the new work, and if dramatic scene or situations of another's work are incorporated therein, thereby lacking in originality, without any alteration in the constituting part of the series of events, or the sequence of the events in the series, there is infringement[677].

Infringement may also occur where the dramatic work is converted into a non-dramatic work.

Infringement by Cinematograph Film. If on reading the screen play and the dialogue one gets an impression that this is the reproduction of the drama, the case of infringement can be noted. In *R G Anand v. Delux Films*[678], the Supreme Court, after careful consideration of various authorities and case laws on the point of infringement of copyright, laid down following propositions:

[674] **ROE LAWTON V. HAL E. ROACH STUDIOS 18 F (2D) 126.**
[675] **SHELDON V. METRO-GOLDWYN PICTURES 7 FED SUPP 837, 843.**
[676] **NICHOLS V. UNIVERSAL PICTURES CORPORATION 34 F (2D) 145, 147.**
[677] **DALY V. PALMER 6 FED CAS 1133, 1136.**
[678] **AIR 1978 SC 1613.**

1. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by tile author of the copy-righted work.
2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.
3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.
5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two words are clearly incidental no infringement of the copyright comes into existence.
6. As a violation of copyright amounts to an act of piracy it must be proved By clear and cogent evidence after applying the various tests laid down by decided cases

7. Where however the question is of the violation of the copyright of a stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the Idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

In *Fortune Films International v. Dev Anand*[679], The main issue in this case was whether the performance of a cine artiste in a film is a work protected as an artistic work or dramatic work

[679] **AIR 1979 BOM. 17**

ISSN: 2581-6349

or that of a cinematograph film. The Court held that the copyright of the respondent actor extended to his work in the film and not in the film as a whole. As to the nature of the respondent's work, the Court considered whether it would fall into any of the protected categories. It held that it was not an artistic work as it was not a painting, sculpture, drawing, engraving or a photograph. It was not a dramatic work as it was not a piece of recitation, choreographic works, or entertainment in a dumb show and further. Also, since 'dramatic work' in the sub-section excluded cinematographic film, it could not be said to be a dramatic work.

REMEDIES FOR THE INFRINGEMENT.

Civil Remedies. Sections 54 to 62 lay down the provision of remedy in the form of civil nature. These remedies include injunction, damages and accounts, delivery of infringing copies and damages for conversion.

Criminal Remedies. Sections 63 to 66 provide for the criminal remedies, which include imprisonment of the accused or imposition of fine or both, seizure of infringing copies and delivery of infringing copies to the original owner.

Administrative Remedies. Section 53 says that in case of infringement of the copyright, the plaintiff can move to the Registrar of Copyright to ban the import of infringing copies into India and the delivery of the infringing copies to the owner of the copyright.

CONCLUSION.

A man is entitled to the fruits of his mental labour. He is entitled to exclude others from enjoying the fruits of the labour and hard work, which he puts in giving shape to his creation. The moral basis on which the law of copyright exists is the English Commandment- THOU SHALT NOT STEAL. There are sufficient case laws on the point of infringement of the copyright in dramatic works. But largely, these cases can be found in the foreign authorities. The Copyright Act 1957 lays down the provision of remedy for the infringement of the copyright. These remedies are of three types, namely civil, criminal and administrative.

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IMPORTANCE OF INSOLVENCY AND BANKRUPTCY CODE AND THE EFFECT OF ITS SUSPENSION DUE TO COVID-19

-NIKITA MITTU

ABSTRACT

The Insolvency and Bankruptcy Code, 2016 is one of the most important legal reforms in India. It provides for a global economic recognition to India in relation to insolvency laws. This legislation consolidates the existing legal structure into a single law in regard to insolvency and bankruptcy. This study discusses the features and importance of the Insolvency and Bankruptcy Code, 2016 and its impact on the creditors and debtors along with the impact it has on the Indian economy.

Further, this study also discusses the suspension of fresh insolvency resolution proceedings for a period of six months, commencing from March 25, 2020 owing to the nation-wide lockdown due to the ongoing COVID-19 pandemic.

INTRODUCTION

The legal system of a country is essential for its economic development. The provisions of the law, along with their implementation provides for a strong economic growth of the country. The introduction of the Insolvency and Bankruptcy Code, 2016 **("IBC"** or **"Code")** has been one of the most important reforms in India. IBC provides for limiting the risks of credit and a comprehensive procedure for insolvency resolution. The impact of IBC in the economy has been positive due to its access to corporations, lenders and financial institutions. It aims to provide a resolution mechanism to ensure the interests of the creditors/investors.

BACKGROUND

The legal structure and framework in India in relation to debt defaults and recovery had been feel falling behind globally. The recovery steps taken by the creditors under Indian Contract Act, 1872 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 have not had a wide impact and the advantages have been limited. Furthermore, any action under Sick Industrial Companies (Special Provisions) Act, 1985 or winding up under the Companies Act, 1956 or Companies Act, 2013 have not been effective

provisions to ensure recovery of debt or the restructuring of firms. Further, the laws of insolvency, Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 were old and not relevant in current day and age. Due to the lack of efficient structure, the lenders' position in the market had not been encouraging. The introduction of the Insolvency and Bankruptcy Code, 2016 is hence considered to be one of the biggest reforms in India. It consolidates the legal framework regulating the restructure and liquidation of entities with the aim to promote the availability of credit and ensure that the interests of stakeholders are protected. Thus, IBC provides for clarity of law, facilitating the provisions in relation to insolvency and debt recovery of companies and limited liability partnerships.

ADVANTAGES OF THE CODE

1. Comprehensive: The IBC is a comprehensive legislation providing and regulating the mechanism of insolvency and bankruptcy for persons defined to include corporations, partnerships, limited liability partnerships and individuals.
2. Single law: The introduction of IBC has led to ensuring that multiple laws in regard to recovery of debt and liquidation process do not exist, by provision a single code to the complete structure.
3. Time efficiency: IBC provides for limitation of time to resolve insolvency procedure. It is mandated by the Code that the process is to be completed within 180 (one-hundred eighty) days, which may be extendable to 90 (ninety) days.[680] Further, the Code also provides for fast track resolution of cases of corporate insolvency, which are required to be completed within 90 (ninety) days.[681] Thus, if the insolvency process has not been completed within the requisite time, the creditors are paid by selling the assets of the defaulters.
4. One window clearance: Under IBC, the resolution is carried on by a single authority as opposed to the mechanism earlier, whereby the winding up and the liquidation were initiated under different law and governed by different authorities.
5. Unambiguous procedure: IBC provides for a clear mechanism of insolvency and bankruptcy, whereby all the provisions are specific and the resolution process is mandated to be completed within 180 (one-hundred eighty) days.

[680] The Insolvency and Bankruptcy Code, No. 31 of 2016, Section 12, 2016.
[681] *id.* Section 12(3), third Proviso.

6. Single authority: IBC specifically provides for jurisdiction of National Company Law Tribunal (NCLT) to adjudicate matters relating to insolvency of companies, and Debt Recovery Tribunal (DRT) to adjudicate matters relating to insolvency of individuals. Civil courts are not allowed to adjudicate matters pending before the said authorities[682].
7. Priority of the interest of workers: IBC ensures the protection of workmen and employees by excluding dues during liquidation, which are payable under provident fund, pension fund and gratuity fund from the borrower.
8. Constitution of regulating authority: The Code constitutes "Insolvency and Bankruptcy Board of India'[683] as a regulatory authority to ensure resolution of insolvency matters of companies, partnerships and individuals.

INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 is an important legislation for the benefit of economic system. It provides for an umbrella of insolvencies relating to companies, limited liability partnerships, firms and individuals. Further, it provides for liquidation and its procedure and establishes a regulator to perform all functions relating to insolvency of professionals or professional agencies.

Process of Corporate Insolvency Resolution:

The process of Corporate Insolvency resolution is where the financial creditors asses in regard to the business of the debtor and whether it is viable to be continued and the options relating to the same. In case where the financial creditors are of the opinion that the business cannot be run profitably, the debtor is required to go through the process of liquidation and the liquidator realises and distributes the debtor's assets. The process under this Code provides for a single framework for the creditors to ensure the steps taken in regard to the position of corporate debtor.[684]

The regulations for the Corporate Insolvency Resolution Process are:

1. The process of corporate insolvency resolution begins with an application to NCLT. The application may be made by:

[682] The Insolvency and Bankruptcy Code, No. 31 of 2016, Section 180, 2016.
[683] *id.* Section 188.
[684] Srijan Anant, Aayushi Mishra, A Study of Insolvency and Bankruptcy Code and its Impact on Macro Environment of India, Volume 7, Issue 3 IJEDR (2019).

a) a financial creditor, may itself or with another financial creditor (financial facility), whereby financial transaction includes the same meaning as under accounting standards[685];
b) an operational creditor, which is a creditor other than a financial creditor or a person giving nan operational debt;[686] or
c) the corporate debtor, which is the company[687].

2. Default is required to exist. Default is the non-payment of debt, whereby the debtor has not paid the whole or part of his due, which is required to be at least Rs. 1 lakh[688] (Rupees one lakh).[689]
3. After admission of the application to the adjudicating authority, it is required that:
   a) A moratorium period is declared[690]: This is essential to ensure that no other suit is instituted or pending suits are not continued against the corporate debtor since it could lead to any judgement, decree or order regarding the asset or interest in the asset of the debtor. This is one of the most essential features of the Code which provides for a mandatory period of moratorium, since under Companies Act, 2013, moratorium period may be granted by the NCLT up to 120 (one hundred twenty) days. Hence, under the Code, the moratorium period continues till the resolution process is completed. However, the moratorium period ceases whereby the liquidation of the company is approved.
   b) Interim Insolvency Professional (**"IP"**) is appointed: A public announcement is made during the initiation of insolvency resolution process. An Interim IP is thereby appointed[691], who in turn manages the powers of Board of Directors of the corporate debtor and gathers information in regard to all the finances, assets and operations of the concerned company and further constitutes a Committee of Creditors (**"COC"**)[692]. Thereafter, the Committee of Creditors either chooses to appoint the interim IP as the IP or appoints a new IP. The Insolvency Professional has wide range of responsibilities and powers assigned and takes over the management and

[685] The Insolvency and Bankruptcy Code, No. 31 of 2016, Section 7, 2016.
[686] *id.* Section 9.
[687] *id.* Section 10.
[688] *id.* Section 4.
[689] The minimum amount of default has been increased to rupees one crore through Notification S.O. 1205 (E) dated March 24, 2020. Ministry of Corporate Affairs, The Gazette of India (Jun. 14, 2020, 10:24 AM), https://ibbi.gov.in//uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf.
[690] The Insolvency and Bankruptcy Code, No. 31 of 2016, Section 14, 2016.
[691] The Insolvency and Bankruptcy Code, No. 31 of 2016, Section 16, 2016.
[692] *id.* Section 18.

assets of the corporate debtor. An information memorandum is prepared by the IP which is the basis of the resolution plan. The resolution plan is then presented to the COC for its approval; the approved plan is then submitted to the adjudicating authority for acceptance, which becomes binding on the stakeholders and the resolution of corporate insolvency is initiated. In case where the adjudicating authority has rejected the plan, the process of liquidation begins.

c) Timelines: A Resolution Professional is appointed[693] on admission of application by adjudicating authority, whereby the Resolution Professional conducts the process of corporate insolvency resolution and another information memorandum[694] in order to ensure that the resolution applicant, who submits the resolution plan to the Resolution Professional, prepares the resolution plan and thereafter presented to the COC for approval.

On passing of the resolution, the restructuring process is decided by the COC to provide for a different scheme of payment of debt or the liquidation of the assets of the corporate debtor. In case where no resolution is passed, the liquidation would take place. The approved resolution plan is thus, sent to NCT for approval and implementation.

Process of Corporate Liquidation:

Corporate Liquidation begins by appointing a Liquidator[695]. No suit can be instituted against the Corporate Debtor due to the moratorium period granted till the completion of the insolvency resolution proceeding against the corporate debtor. A winding up order is passed to realise the assets of the corporate debtor and the distribution of the proceeds to the creditors and the stakeholders. On competition of the liquidation, an order is passed by the NCT to liquefy the corporate debtor.

SUSPENSION OF IBC DUE TO COVID-19

On June 05. 2020, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 was passed, suspending the initiation of any insolvency proceedings against a corporate debtor for six months owing to the economic conditions due to the nation-wide lockdown in India because of the COVID-19 pandemic.

COVID-19 pandemic caused a distress in the economy of India since businesses have been interrupted owing to the nation-wide lockdown and consequent need of social distancing. This

[693] *id.* Section 22.
[694] *id.* Section 29.
[695] *id.* Section 34.

is leading to corporate entities being pushed towards insolvency, which by the opinion of the government is unprecedented[696] and unfair and hence a suspension of six months (extendable to one year as may be notified).

"10A. "Notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf." [697]

The words "as may be notified" under Section 10A have caused confusion which leads to extension of the current suspension to the creditors in the economic market. However, the Ordinance provides clarity under the Explanation of this section, stating that any default committed before the date of March 25, 2020 do not come under the ambit of this section and thereby will be liable to action under the Code.

Despite the Ordinance being a welcomed changed by corporate entities, there seems to be a wide disappointment by the creditors. The aim of IBC is defeated whereby a time bound resolution was being provided and the position has been shifted from creditor-in control to debtor in control.[698] This would thereby lead to excessive litigation and defeat the purpose of introduction of IBC. Further, there is likely to be an increase in the number of cases filed when the suspension is lifted which would lead to hence lead to overburdening the Adjudicating Authority, thereby affecting the time bound resolution of insolvency process.

CONCLUSION

The introduction of Insolvency and Bankruptcy Code, 2016 was a welcomed change to provide a global standing to Indian legal framework relating to insolvency law. Since this legislation provided a comprehensive system which shed light upon the importance of clarity and single adjudicating authority, the creditors have been encouraged in the market, which led to better economic prospects in the country.

However, the passing of the Ordinance suspending the procedures for six months due to the COVID-19 pandemic has raised questions relating to the purpose of IBC which is being defeated by this suspension. Despite the fact that it was considered essential for businesses in

[696] Sakal Bhushan, IBC (Amendment) Ordinance, 2020: A Pandemic of Bad Drafting, The Leaflet, Jun. 13, 2020, 11:20 AM, https://theleaflet.in/ibc-amendment-ordinance-2020-a-pandemic-of-bad-drafting/.
[697] The Insolvency and Bankruptcy Code (Amendment) Ordinance, No. 9 of 2020, Section 10A, 2020.
[698] Anvit Seemansh, Suspension of IBC during COVID-19: A mere mask while what is needed is a vaccine, IBC Laws (Jun. 14, 2020, 11.35 AM), https://ibclaw.in/suspension-of-ibc-during-covid-19-a-mere-mask-while-what-is-needed-is-a-vaccine-by-anvit-seemansh/.

ISSN: 2581-6349

the country, the prospective of interests of the creditors have not been taken into consideration, which was eventually the main aim of introducing the Code.

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AN IN-DEPTH ANALYSIS OF ARBITRATION IN INDIA WITH A SPECIAL REFERENCE TO THIRD PARTY FUNDING

- VATSALA

ABSTRACT

Arbitration has emerged to be one of the most important forms of alternate dispute resolution in recent times. It is a mode of settlement for the resolution of all types of disputes arbitrable in a country, *outside* the national courts, where the parties to the dispute refer it to a third party, often known as the Arbitral Tribunal. The most interesting feature about arbitration is that they gain their power from the agreement between the parties and not from the State.[699] However, with every mode of dispute resolution comes its own set of unique problems. Arbitration, while an extremely effective and speedy mode of resolution, often misses the mark for parties by becoming inaccessible due to the costs involved. The extremely expensive nature of arbitration makes it a costly affair, and often leads to parties pursuing the traditional mode of dispute resolution and thus, increases the burden on Courts. This paper discusses and analyses Arbitration in India and a possible solution to the inaccessibility caused due to monetary restrictions of parties.

WHAT IS ARBITRATION?

Arbitration is a mode of dispute settlement for the resolution of all types disputes outside the national courts of a country, where the parties between whom the dispute has arisen refers it to a neutral party or parties, for its resolution. The third neutral party is known as the Sole Arbitrator or where there is more than one Arbitrator, the Arbitral Tribunal. The Arbitral Tribunal is usually formed of parties who are experts in their fields and are familiar with the law and the actual or potential disputes between the parties. The arbitration agreement between the parties may be in the form of a separate contract or may be included in the primary contract itself in the form of an arbitration clause.

The primary feature of this method is that the parties *explicitly agree* that in the event a dispute arises between the parties, such dispute will be submitted to the arbitral tribunal so envisioned

[699] Rene David, *Arbitration in International Trade* 5 (Springer, USA, 1st edn. 1985).

in the agreement, for final determination and resolution of the dispute. Arbitrators, and Arbitration as a dispute resolution method in general, are preferred by parties since they follow procedures that allow for more flexibility. Since a number of disputes also include transnational laws, these arbitral tribunals are better placed to deal with such disputes than National Courts.[700]

Arbitration, in the Indian context, has been defined under S.2(a) of the Indian Arbitration and Conciliation Act, 1996 which, however, does not throw any light on what Arbitration is, merely defining it as "any arbitration whether or not administered by a permanent arbitral institute."[701]

Arbitration has four fundamental characteristics:

- It works as an inherent alternative to National Courts.
- It is a privately powered mode of dispute resolution.
- In this mode of dispute resolution, the parties themselves are in control.
- It is binding upon the parties.

The most enticing feature of arbitration is perhaps the fact that the parties are entirely in control of the process, thus leading to a greater satisfaction with the final award in comparison to the outcomes of litigation.

What are the types of Arbitration?

Arbitration may be Institutional or Ad-Hoc in nature. In Ad-Hoc Arbitration, the parties themselves are responsible for determining aspects of the arbitration such as the number of arbitrators, their appointment, the laws applicable, and the procedural law applicable to the arbitration. On the other hand, in Institutional Arbitration, the formally recognised institution administers the arbitration. Each Institution has its pre-determined rules and framework to administer the arbitration.

[700] Christopher R. Drahozal, "Commercial Norms, Commercial Codes, and International Commercial Arbitration", 33 *Vand. J. Transnat'l L.*, 79, (2000).
[701] S. 2(a), The Indian Arbitration and Conciliation Act, 1996.

The Indian Arbitration Act primarily deals with three sets of arbitrations in Parts I and II of the Indian Arbitration Act[702]. They are:

1. Domestic Arbitrations;
2. International Commercial Arbitrations with a seat in India; and
3. International Commercial Arbitrations with a seat outside India.

The Procedure followed for Domestic Arbitrations and International Commercial Arbitrations with a seat in India

Currently, the Arbitration and Conciliation Act, 1996[703] (as amended from time to time) stands as the prime arbitration law of India.

The Act[704] provides a limited definition of the term Arbitration. S.2(1)(a) defines "arbitration" as follows:

"(a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;"

The Act is divided into four parts, namely:

1. Part I: Arbitration.
2. Part II: Enforcement of Certain Foreign Awards.
3. Part III: Conciliation.
4. Part IV: Supplementary Provisions.

The division of the Act with respect to Arbitration into Parts I and II has been created to differentiate and recognize the difference between arbitral awards made in India and arbitral awards made outside of India. The first part exclusively deals with the commencement and conduct of arbitration as well as the challenge to and the recognition and enforcement of the arbitral award.

[702] The Arbitration and Conciliation Act, 1996 (Act 11 of 1996).
[703] *Ibid.*
[704] *Ibid.*

Part II of the Act, on the other hand, deals with the regulation of and the recognition and enforcement of foreign awards made under the New York Convention on Recognition and Enforcement of Foreign Awards[705].

The Hon'ble Supreme Court of India, in the case of *Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Ltd*.,[706] held that Part I and Part II of the 1996 Act are mutually exclusive of each other. The Court further held that Part I of the Act is mandatorily applicable to all arbitrations seated in India while Part II of the Act is mandatorily applicable to enforcement of foreign awards seated outside India. Therefore, the 1996 Act follows the territoriality principle and *'seat'* is deemed to be the center of gravity under the Act.[707]

It is first important to discuss what exactly an Arbitration Agreement is. The Indian Arbitration Act defines an "Arbitration Agreement in S.2(1)(b) as an Agreement referred to in Section 7. Section 7 then further lays down certain essentials for an agreement to be knows as an Arbitration Agreement. They are as follows:

(1) The Agreement is in writing
(2) By way of the Agreement, the Parties agree to submit all or certain disputes that may arise or have arisen between them, with regards to a defined legal relationship, to arbitration.
(3) Parties must be competent to enter into a contract.
(4) The Consent of Parties must not have been obtained by fraud.
(5) The Intention of the parties must be to refer their disputes to arbitration.

In the case of *K.K. Modi v. K.N. Modi*[708], the Hon'ble Supreme Court of India discussed the essentials which were necessary for an Arbitration Agreement to be a valid one. They were as follows:

[705] UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNIS 88.
[706] (2012) 9 SCC 552.
[707] V Niranjan and Shantanu Naravane, "Bhatia International Rightly Overruled: The Consequence of Three Errors in BALCO" 9 *SCC J* 26, 27 (2012).
[708] AIR 1998 SC 1297.

- The Arbitration Clause or Agreement between the parties must contemplate that the decision of the Arbitrator/Arbitral Tribunal will be final and binding upon the parties.

- The jurisdiction of the tribunal to arbitrate upon the dispute must come from the consent of the parties, or in certain cases, from an order of the Court or from a statute.

- The Arbitration Clause or Agreement must contain the stipulation that the substantive rights of the parties will be finally determined by the Arbitrator or the Arbitral Tribunal, as chosen.

- The Arbitration Agreement or Clause must stipulate that, at the time of reference of dispute to tribunal, the dispute must already have been formulated.

- The Arbitration Agreement or Clause by which the parties refer their disputes to Arbitration, must be intended to be enforceable in Law.

- The Arbitral Tribunal or Arbitrator to whom the dispute(s) have been referred to, must decide the same in a judicial manner while being fair to both parties involved.

The first step, per se, after an Arbitration Agreement has been made, is the sending of the Notice of Arbitration. When a dispute between the parties arises, either party can send the other party a 'Notice of Arbitration' for invoking the arbitration clause/ agreement between the parties. Section 21 of the Act[709] talks about the commencement of arbitral proceedings and states that arbitral proceedings, unless otherwise agreed by the parties, are said to have commenced from the date of receipt of request for arbitration, that is, the Notice of Arbitration by the Respondent.

After the receipt of the Notice, the Parties are required to appoint an arbitrator(s) in accordance with the manner specified in the arbitration agreement or clause or in the manner specified in the Arbitration Act. Section 11 talks about the Appointment of Arbitrators.[710] In accordance

[709] The Arbitration and Conciliation Act, 1996, S. 21.
[710] *Id.*, S. 11.

with this Section, the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrator(s).[711]

Where the parties fail to act in accordance with such agreement, S. 11(5)[712] provides that in an arbitration with a sole arbitrator, if the parties are unable to agree on an arbitrator within thirty days of receipt of reference/request of dispute to arbitration, upon request of either party, the Appropriate Court can make such appointment by designating an Arbitral Institution which will do the needful. The Appropriate Court may be the High Court, the Supreme Court or any person or institution designated by such Courts, as the case may be. If, however, the parties had failed to make an agreement about the appointment of an Arbitrator or Arbitrators, then, the following scenarios may play out:

(a) In the case of three arbitrators, each party shall appoint an arbitrator and the two arbitrators will together appoint the third arbitrator.[713]

(b) In the case of a sole arbitrator, the parties should come into agreement about the appointment of sole arbitrator, within 30 days of the receipt of notice of arbitration.

However, in the situation that the parties or the two appointed arbitrators are unable to come to an agreement about the appointment of the sole arbitrator or third arbitrator, the appointment shall be made by the Appropriate Court or person or institution designated by such Court.[714]

The next step in an Arbitration is the submission of Statements of Claim and Defence. The Statement of Claim and Defence is governed by Section 23 of the Act[715]. This section stipulates that the Claimant and the Respondent shall, respectively, state the facts supporting their claim and the defence thereto, along with the points in issue and the relief sought by them within the time stipulated by the Parties or the Arbitral Tribunal, as agreed, unless there is an agreement to the contrary.

[711] *Id.*, S.11(2).
[712] *Id.*, S. 11(5).
[713] *Id.*, S. 11(3).
[714] *Id.*, S. 11(4).
[715] *Id.*, S. 23.

The Hearings and the Written Proceedings of the Arbitration are governed by S. 24 of the Act[716]. This Section provides that that unless there is an agreement to the contrary, it lies in the hands of the Arbitral Tribunal to decide whether oral hearings will be held for the presentation of evidence or whether proceedings shall be conducted on the basis of documents and other materials.

Finally, Section 25 of the Arbitration Act[717] talks about Default on the part of a party. Where there is a default in the submission of the Statement of Claim by the Claimant in accordance with S. 23 of the Act, the Arbitral Tribunal is entitled to terminate the proceedings. Similarly, if the Respondent fails to communicate his Statement of Defence, the Arbitral Tribunal is entitled to continue the proceedings without treating the failure in itself as an admission of the allegations by the claimant.

Once the pleadings are completed, the Arbitral Tribunal makes the Arbitral Award. Chapter VI, in Sections 28 to 33 talks about the making of the Arbitral Award and the termination of the proceedings. Chapter VII talks about the Recourse against and Arbitral Award in S. 34 while Chapter VIII talks about the finality and enforcement of arbitral award. In this context, it is pertinent to note here that a Court may interfere in an Arbitration only in the situations particularly mentioned in the Act. The Challenge of and Arbitral Award is one such situation. S.28(1)(a)[718] stipulates that where an arbitration is one other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute in accordance with the substantive law for the time being in force in India. However, the Parties may expressly authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeur*.[719] The Arbitral tribunal, in all cases, *must* take into account the terms of the contract between the parties and trade usages applicable to the transaction.

4.3.2 International Commercial Arbitration with a seat in a Reciprocating Country

The Law in India with regards to International Commercial Arbitration which has a *seat* in a reciprocating country is governed by Part II of the Indian Arbitration Act. Post the amendment

[716] *Id.*, S. 24.
[717] *Id.*, S. 25.
[718] *Ibid.*
[719] *Id.*, S. 28(2).

of 2015 and the decision of the Hon'ble Supreme Court of India in the case of *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc.*[720] the law has seen major changes, with the law becoming more focused on the *seat* of arbitration. The Amendment Act[721] makes it clear that Part I of the Arbitration Act does not apply to foreign seated arbitrations, with the exception of Sections 9, 27 and 37, unless there is an agreement to the contrary between the parties.[722] The choice of a foreign seat of arbitration is an implication that the application of Part I of the Arbitration Act is excluded.[723]

Part II of the Act is divided into two chapters and is applicable to all foreign awards sought to be enforced in India and to refer parties to arbitration when the seat is outside India. Chapter I deals with foreign awards delivered by the signatory territories to the New York Convention which have reciprocity with India, while Chapter II deals with the Geneva Convention. Since now most countries which are a signatory to the Geneva Convention are a signatory to the New York Convention, Chapter II of Part I of the Act has almost been rendered infructuous.[724]

The implication of having a foreign seat is that there are three different sets of law which need to be taken into consideration. They are:[725]

(a) The law governing the substantive law of the contract[726] – this is the law which governs the substantive issues in dispute in the contract. Also referred to as "applicable law", "governing law", "proper law of the contract" or "substantive law".

(b) The law governing the existence and proceedings of the arbitral tribunal[727] – This is the law in which the arbitration proceedings have to be conducted and is also referred to as the "curial law". This is the law which is derived from the seat of arbitration.

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[720] 2012 (9) SCC 552.
[721] The Arbitration and Conciliation (Amendment) Act, 2015.
[722] *Raveechee and Co. v. Union of India*, 2018 SCCOnLineSC 654.
[723] *IMAX Corporation v. E-City Entertainment Pvt. Ltd.*, 2017 SCC OnLine SC 239.
[724] Nishith Desai Associates, *International Commercial Arbitration, Law and Recent Developments* (Nishith Desai Associates, Delhi, May 2019).
[725] Ravi Singhania and Gunjan Chhabra, "*The "Appropriate Courts" In Foreign Seated Arbitration: An Indian Perspective*", available at: https://singhania.in/arbitration-outside-india-international-arbitration-lex-arbitri-foreign-seated-arbitrations-for-indian-parties-legal-precedents-on-foreign-seated-arbitration/
[726] *Reliance Industries Ltd. v. Union of India*, (2014) 7 SCC 603.
[727] *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* (1998) 1 SCC 305.

(c) The law governing the recognition and enforcement of the award[728] – This is the law which governs the enforcement, as well as filing or setting aside of the award and is also the law which governs the Arbitrability of the dispute.

The Arbitrability of disputes in India

According to S. 2(3)[729] of the Act, the provisions contained in Part I of the Act do not affect any other law for the time being in force. The implication this has is that it renders certain disputes *un-arbitrable*, as some laws might preclude the submission of certain kinds of disputes to arbitration.

Accordingly, in India, all kinds of disputes are arbitrable, that is, can be submitted to arbitration, except in the following two areas:

(1) Subjects which are considered to be non-arbitrable such as family relationships, divorce, conjugal rights, etc.,[730] disputes relating to charities and matters relating to Insolvency and Bankruptcy.

(2) Matters which come under the ambit of special statutes which confer exclusive jurisdiction on specified court such as Patents under the Patents Act, 1970; matters relating to infringement of Trademarks or Copyrights under the Trade Marks Act, 1958 and Copyrights Act, 1957, respectively; matters relating to the winding up of companies, etc.[731]

The concept of 'Arbitrability' was discussed in great length in the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*[732] It was held by the Hon'ble Court that the term 'Arbitrability' may have varying meanings depending upon the context it is used in. It may mean[733]:

(a) disputes capable of being adjudicated through arbitration

(b) disputes covered by the arbitration agreement

[728] *Ibid.*
[729] The Arbitration and Conciliation Act, 1996, S. 2(3).
[730] Ranbir Krishan, "An Overview of the Arbitration and Conciliation Act", 21(3) *J. Int'l Arb.* 265, 266 (2004).
[731] *Id.* at 266.
[732] (2011) 5 SCC 532.
[733] *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*., (2011) 5 SCC 532.

ISSN: 2581-6349

(c) disputes that parties have referred to arbitration.

According to the Court, in principle, any dispute that can be decided by a civil court can be referred to and resolved by arbitration. However, some disputes, by necessary implication, stand excluded from being resolved by a private forum. Some types of 'non-arbitrable' disputes are:

(a) disputes relating to rights and liabilities which give rise to or arise out of criminal offenses;
(b) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, or child custody;
(c) guardianship matters;
(d) insolvency and winding up matters;
(e) testamentary matters (grant of probate, letters of administration and succession certificate)
(f) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction, and only specified courts are conferred jurisdiction to grant eviction or decide the disputes.[734]

The Court in *N. Radhakrishnan v. M/S Maestro Engineers*[735] further held that where fraud and serious malpractices are alleged, the matter can only be settled by the court and such situations cannot be referred to Arbitration. This is for the reason that allegations such as fraud and other serious malpractices are serious criminal allegations, and Arbitrators being a creature of contract, have limited jurisdiction vested in them.

However, the Hon'ble Supreme Court in the case of *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi*[736] and *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd*.[737] held that allegations of fraud do not act as a bar to the

[734] *Ibid.*
[735] (2010) 1 SCC 72.
[736] (2014) 6 SCC 677.
[737] AIR 2014 SC 968.

reference of the dispute to a foreign seated arbitration and that the only exception to refer parties to a foreign seated arbitration are those which are specified in Section 45 of the Act.[738]

THE NEED FOR THIRD PARTY FUNDING IN INDIA

Third Party Funding is an emerging way for parties to disputes to be able to pursue their resolution, be it through arbitration, litigation or other methods. The basic idea behind third party funding is that the funder provides for and funds all arbitration related costs (usually for the Claimant and at times the Counter-Claimant) during the pendency of the proceedings. The monetary incentive for the funder in this scenario is that on the culmination of the proceedings, if the party receives a monetary award, the funder, pursuant to the terms of agreement, becomes entitled to a share in such award.

This concept has been recognised as far back as 1876, when the Privy Council gave its decision in *Ram Coomar Coondoo v. Chunder Canto Mookerjee,* and where the Court permitted TPF on the grounds of promoting access to justice, but held that:[739]

"agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

While the concept of 'Third Part Funding' has largely remained unrecognized in India, the unorganized sector has seen a number of cases being financed in this manner by opportunistic investors and desperate litigants, often resulting in the transfer of the very asset that is the subject matter of the litigation.[740] Overall, the financing of disputes remains unrecognized in India, however, certain States like Maharashtra and Goa expressly recognize the financing of disputes through state amendments to the Code of Civil Procedure.

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[738] *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi*, (2014) 6 SCC 677; *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, AIR 2014 SC 968.
[739] Cyril Amarchand Mangaldas, *Third Party Funding in India* 8, available at: http://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf.
[740] *Ibid.*

However, since the Arbitration and Conciliation Act, 1996 does not talk about third party funding, the state amendments to that effect, have no use in Arbitration. The only pre-condition, currently, it seems, is that the Third Party Funding contract is a valid one under the Indian Contract Act, 1872.[741]

The Supreme Court addressed the issue of third party funding in brief in the case of *Bar Council of India v. A.K. Balaji*[742] and observed as follows:

"There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation.".

Therefore, even though there is no express provision barring third party funding, there is no legislation to support and regulate it as well. Third party funding, if regulated properly, can allow a number of parties to pursue arbitration, which is often a costly procedure, and allow for a speedier resolution of disputes.

CONCLUSION

India is a fast growing economy which requires a stable arbitration law in order to become a global arbitration hub. In order to achieve this target, it is important to maintain a balance between keeping the arbitration law updated and establishing arbitration centers capable of resolving and handling commercial disputes efficiently. With Courts and legislators taking a pro-arbitration approach, and the Amendment Act in place, the adoption of best practices is vital in the near future.

The Arbitration law of India has seen great progress, right from the Arbitration Act of 1940 to the current Arbitration Act of 1996 which has seen amendments from time to time, the most recent one being in 2019. These Amendments have played a major role in keeping the Arbitration Scheme of India up to date with the rest of the world and have been highly topical.

[741] Sammer Jain, Jayashree Parihar, et. al., *India: Third Party Funding In International Arbitration: An Indian Perspective*, available at: https://www.mondaq.com/india/trials-appeals-compensation/875506/third-party-funding-in-international-arbitration-an-indian-perspective.
[742] (2018) 5 SCC 379.

The existing Arbitration scheme of India can now be said to be majorly influenced from the UNCITRAL Model Law, which also forms the basis of several other National Legislations. Such influence has led to greater confidence from parties, more specifically foreign businesses, as court intervention has been minimized. Even the jurisdiction of the Tribunal, when challenged, is decided by the Tribunal itself, by virtue of the Kompetenz-Kompetenz principle. Only after this challenge is decided by the Tribunal, can the party challenge the competence of the Tribunal in the Court.

The introduction of Third Party Funding can be seen as the next step to lead India into the future of Arbitration as it will allow greater accessibility to arbitration. A very important reason that measures relating to Third Party Funding need to be introduced is that it is already prevalent, albeit unchecked, in the Litigation Sector of India. If such use is allowed in Arbitration as well, it will lead to more harm than good.

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APPEAL

- **MD. AFTAB**

ABSTRACT

An appeal is given by the statute and there is no right of appeal unless it is given clearly and in express terms. A right to appeal is not a normal or an intrinsic right .It is a given right and accrues to the litigant and exists as on and from the date the lies commences. The right to appeal must, at this juncture, be compared and differentiate from a right to file a suit. As said, the right to appeal is a statutory right and any such right must have the express power of a law. The right to sue or to file a suit is, however, an intrinsic right and no express permission from any statute may be required to start a suit. It is sufficient that no statute specifically bars the filing of such suit. The appellate court would give burden to that finding, but where disbelief is based upon contrast of the evidence given, the appellate court can arrive at an independent decision. Section 96 of the Code recognizes the right of appeal from every decree passed by any court exercising its original jurisdiction. It does not refer to specify the persons who may file an appeal. But before an appeal can be filed under this section, two conditions must be complied with:

1) The subject-matter of the appeal must be a 'decree', that is, a conclusive purpose of 'the rights of the parties with regard to all or any of the matters in debate in the suit".

2) The party appealing must have been unfavourably affected by such determination.

In this I will also talk about the procedure of appeal and the difference between revision, appeal, review and other related things about appeal in civil procedure code

INTRODUCTION

An appeal is given by the statute and there is no right of appeal unless it is given clearly and in express terms. A right to appeal is not a normal or an intrinsic right .It is a given right and accrues to the litigant and exists as on and from the date the lies commences. The expression "appeal" is not defined in the code, but it may be defined as the judicial examination of the verdict by a higher court of the verdict of a lower court[743] . It means elimination of a cause from a lower to a higher court for the purpose of testing the reliability of the decision of the lower court. It is thus a remedy vested by law for getting the decree of the lower court to set

[743]C.K Thakker., Civil Procedure Code, 3rd Edition, Eastern book Company, p - 260

aside. In other words, it is a complaint made to the higher court that the decree passed by the lower court is unsafe and wrong. The right to appeal must, at this juncture, be compared and differentiate from a right to file a suit.[744] As said, the right to appeal is a statutory right and any such right must have the express power of a law. The right to sue or to file a suit is, however, an intrinsic right and no express permission from any statute may be required to start a suit. It is sufficient that no statute specifically bars the filing of such suit. The appellate court would give burden to that finding, but where disbelief is based upon contrast of the evidence given, the appellate court can arrive at an independent decision.[745]

HISTORY OF APPEAL

Appellate courts and other systems of mistake and alteration have existed for many millions. During the first dynasty of Babylon, Hammurabi and his governors served as the maximum appellate courts of the land. Ancient Roman law working a complex hierarchy of appellate courts, where some appeals would be listen by the emperor. Moreover, appellate courts have existed in Japan since at least the Kamakura Shogunate (1185–1333 CE). During this time, the Shogunate recognized hikitsuke, a high appellate court to aid the state in adjudicating law suits. In the 18th century, William Blackstone observed in his commentary on the Laws of England that appeals existed as a form of mistake alteration in the common law during the reign of Edward III of England. Although some scholars disagree that "the right to appeal is itself a substantive freedom interest," the notion of a right to appeal is a comparatively recent beginning in common law jurisdictions. In fact, commentators have observed that common law jurisdictions were mainly "slow to add in a right to appeal into moreover its civil or criminal jurisprudence. For example, the United States first created a scheme of federal appellate courts in 1789, but a federal right to appeal did not exist in the United States until 1889, when Congress passed the Judiciary Act to allow appeals in capital cases. Two years later, the right to appeals was comprehensive to other criminal cases, and the United States Courts of Appeals were recognized to review decisions from district courts.

PROCEDURE RELATED TO APPEAL

The appeal being the furtherance of the suit is held not with none reason; it's going to be examined within the light of the next proposition:

[744] (1931-32) 59 IA 283 : AIR 1932 PC 165
[745] Akbar vs. W. 8 DLR (PC) 19

1. the appeals court has all the powers and has got to do all those things necessary that an attempt court has got to do. During this sense, even when the case goes on appeal, it's just the name that has undergone a change; the shape and substance still remain an equivalent.
2. As same as above, the appeals court has got to do all that has been done by the trail court therein particular case, then a choice on agree or disagree from the court.
3. Hence, even the appeals court has got to write a judgment and pass a decree. within the event of the court upholding the lower court's decision, the appeals court may write down an equivalent decree, without changing it, and therefore the decree will now be deemed to possess been that of the appeals court .
4. Finally, the suit isn't deemed to be "finally concluded" for matters of res adjudicate till the appeals are over. This deemed that an equivalent suit is progress even while the appeals are on. It's only the courts have ultimately come to a conclusion, in any case possible appeals are used and tried by the appellant, that the suit is claimed to possess been conclusively decided.

The above said propositions means, in essence, what's unspoken when it's said that the appeal may be a continuation of the suit. The varied provisions concerning the appeals have already been stated within the introduction to the present work. An in depth check out these provisions at now in time becomes relevant

A right of appeal is not natural right. Sometimes, appeal may be a matter of right; sometimes it depends upon discretion of the court to which such appeal lies. In the latter group of cases, the right is to apply to the court to grant leave to file an appeal; for instance, an appeal to the Supreme Court under Article 136 of the Constitution of India. If a particular Act does not provide a right to appeal, it will not be declared ultra vires only on that ground. Right of appeal may be a statutory and substantive right. It is not only a matter of procedure. Right of appeal is governed by the law existing at the date of the suit and not by law that prevails at the date of the decision or at the date of filling of the appeal. This given right of appeal can be taken away only by a subsequent performance if it so provides expressly or by necessary implication and not otherwise.

In Anant Mills Co. Ltd. v. State of Gujarat, speaking for the Supreme Court, Khanna, J. said: "It is well-settled by several decisions of this court that the rights of appeal may be a creature of a statute and there's no reason why the legislature while granting the proper cannot impose conditions for the exercise of such right goodbye because the conditions aren't so onerous on amount to unreasonable restrictions rendering the proper almost illusory."

ISSN: 2581-6349

WHO MAY APPEAL

Section 96 of the Code recognizes the right of appeal from every decree passed by any court exercising its original jurisdiction. It does not refer to specify the persons who may file an appeal. But before an appeal can be filed under this section, two conditions must be complied with:

1) The subject-matter of the appeal must be a 'decree', that is, a conclusive purpose of 'the rights of the parties with regard to all or any of the matters in debate in the suit".

2) The party appealing must have been unfavourably affected by such determination.

The ordinary rule is that only a party to a suit unfavourably affected by the decree or any of his representatives-in-interest may file an appeal. But an individual who isn't a celebration to a decree or order may, with the leave of the court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially suffering from it.

From the above general principles, the subsequent persons are allowed to appeal under this section: Any party to the suit, who is unfavourably suffering from the decree or the transferee of interest of such party, has been unfavourably affected by the decree provided his name was entered into record of suit. A person claiming under a celebration to the suit or a transferee of the interests of such party, who, thus far intrinsically interest cares , is bound by the decree, such as his name is entered on the record of the suit. A guardian ad litem appointed by the court during a suit by or against a minor. Any other person, with the leave of the court, if he is unfavourably affected by the decree.

APPEAL BY ONE PLAINTIFF AGAINST ANOTHER PLAINTIFF

As a general rule, one plaintiff cannot file an appeal against a co-plaintiff. But where the matter in debatable in the suit forms subject-matter of dispute between plaintiffs inter se, an appeal can be filed by one plaintiff against another plaintiff.

APPEAL BY ONE DEFENDANT AGAINST ANOTHER DEFENDANT

The principle which applies to filing of appeal by a plaintiff against another plaintiff equally applies to an appeal by a defendant against another defendant. It is only where the dispute is not only between plaintiffs and the defendants but between defendants inter se and such decision unfavorably affects one defendant against the other that appeal.

WHO CANNOT APPEAL

If a party to the suit not to appeal or waives his right to appeal, he cannot file an appeal and can be bound by an agreement if otherwise such agreement is valid. Such an agreement must be clear. Whether a party to the suit has or has not waived his right of appeal depends upon the facts and situation of every case. Similarly, where a party to the suit has accepted the advantages under a decree of the court, he is often stopped from questioning the validity of the decree.

You can't take the advantage of a judgment as being good then appeal against it as being bad."

Finally, the given right of appeal is destroyed if the court to which an appeal lies is abolished altogether with none forum being substituted in its place

AGREEMENT NOT TO APPEAL

A right of appeal is a statutory right. If a statute does not grant such right, no appeal can be filed even with the consent or agreement between the parties.

But an agreement between the parties not to file an appeal is valid if it is based on lawful or legal consideration and if or else it is not illegal

APPEAL: NOMENCLATURE NOT MATERIAL

The use of appearance "appeal", "first appeal" or "second appeal" is neither material nor crucial. It is the matter and not the form which is relevant.

In Ramchandra Goverdhan Pandit v. Charity Commr[746], a first appeal was filed in the High Court against an order passed by the Commissioner on an application under Section 72 of the Bombay Public Trusts Act, 195. The Supreme Court held that the appeal before the single judge of the High Court was in matter and in reality Second Appeal and Letters Patent Appeal was not maintainable against the "judgment" by the Single judge.

APPEAL AGAINST EX PARTE DECREE: SECTION 96(2)

The defendant, against whom an ex parte decree has been passed, has the subsequent remedies available to him:

(1) Apply to the court in which such decree is passed to set aside ex parte decree: Order 9 Rule 13

(2) Have a preference of an appeal against such decree: Section 96(2) (or to file a revision under Section 115 where no appeal lies)

(3) Apply for review: Order 47 Rule 1

[746] (1987) 3 SCC273: AIR 1987 SC 1598

ISSN: 2581-6349

(4) File a suit on the ground of fraud or froudgary

The above remedies are parallel and they can be prosecuted simultaneously or at the same time has been rightly said:

"Where two trial or two remedies are provided by a statute, one of them must not be taken as working in derogation of the other."[747]

In an appeal against an ex parte decree, the appellate court is competent to go into the question of the propriety or else of the ex parte decree passed by the trial court.

NO APPEAL AGAINST CONSENT DECREE: SECTION 96(3)

Section 96(3) talks about no appeal shall lie against a consent decree. This provision is based on the wide principle of estoppels. It says that the parties to an action can, expressly or impliedly, give up or forgo their right of appeal by any lawful agreement or compromise or even by conduct. The consideration for the agreement comprises in a consent decree is that both the sides sacrifice their right of appeal.[748]

Once the decree is shown to have been passed with the consent of the parties, Section 96(3) becomes effective and binds them. It creates estoppels between the parties in a judgment on contest.[749] Where there is a biased compromise and adjustment of a suit and a decree is passed in accordance with it, the decree to that extent is a consent decree and is not appealable. This provision, on the other hand, does not apply where the factum of compromise is in dispute or the compromise decree is challenged on the opinion that such compromise had not been arrived at lawfully.[750]

APPEAL AGAINST PRELIMINARY DECREE

An appeal lies against a preliminary decree.[751] A preliminary decree is considered as final decree. In fact, a final decree is but machinery for the functioning of a preliminary decree. Where an appeal is filed against a preliminary decree and is allowed and the decree is set aside, the final decree falls to the opinion as ineffective since there is no preliminary decree to sustain the final decree.

[747]Ajudhia Prasad v. Balmukund, ILR (1866) 8 All 354 (FB)
[748]Katikara Chintamani Dora v. Guntreddi Annamanaidu, (1974) 1 SCC 567 at pp. 584-85
[749]Thakur Prasad v. Bhagwan Das, AIR 1985 MP 171
[750]Banwari Lal v. Chando Devi, (1993) 1 SCC 581
[751] Phoolchand v. Gopal Lal, AIR 1963 SC 992 at pp. 994-95

ISSN: 2581-6349

NO APPEAL AGAINST FINAL DECREE WHERE NO APPEAL AGAINST PRELIMINARY DECREE

In suits which consider the making of two decrees-a preliminary decree and a final decree-the decree which would be executable would be the final decree. But the conclusiveness of a decree or a decision does not necessarily depend upon it being executable. The legislature in its knowledge has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and wholly decided only after a final decree is passed, the decision of the court arrived at the earlier stage also has a conclusiveness attached to it. It would be applicable to refer to s. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, it is prohibited from disputing its Correctness in any appeal which may be chosen from the final decree. This provision thus undoubtedly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.[752]

APPEAL AGAINST JUDGMENT

The Code gives an appeal from a decree and not from a judgment. An aggrieved party, on the other hand, may file an appeal against the judgment, if a decree is not drawn up by the court.

APPEAL AGAINST DEAD PERSON

No appeal shall lies against a dead person. Such an appeal, consequently, can be consider as a "stillborn" appeal. In such suit, an application can be made praying for the replacement of the legal representatives of the deceased respondent who died prior to the filing of the appeal. In that case, the appeal can be considered to have been filed on the date of the application for replacement of the legal representatives.[753]

FORM OF APPEAL

GROUNDS WHICH MAY BE TAKEN IN APPEAL

The plaintiff shall not, separately from by leave of the Court, urge or be heard in support of any ground of objection set forth in the memorandum of appeal, but the Appellate Court, in

[752] Venkata Reddi and Others v. Pothi Reddi, 1963 AIR 992, 1963 SCR Supl. (2) 616
[753] Bank of Commerce Ltd. v. Protap Chandra Ghose, AIR 1946 FC

deciding the appeal, shall not be restricted on the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had an adequate opportunity of contesting the case on that ground.

REJECTION OR AMENDMENT OF MEMORANDUMS

(1) Where the memorandum of appeal is not be in the way hereinbefore given, it may be rejected, or be returned to the appellant for the purpose of being modify a time is fixed by the Court or be amended then and there.

(2) Where the Court discards any memorandum, it shall record the reasons for such rejection.

(3) When a memorandum of appeal is modified, the Judge, or such officer as he appoints in this behalf, shall sign or initial the modification.

COMPARE BETWEEN RIGHT TO SUIT AND RIGHT TO APPEAL[754]

There is a basic difference between suit and appeal and the same is being explained properly by J. Chandrachudin Ganga Bai v. Vijay Kumar in the subsequent words: "There is a fundamental division between the right of suit and the right of appeal. There is an intrinsic right in every person to bring a suit of a civil nature and except the suit is barred by statute one may, at one's threat, bring a suit of one's choice. It is no answering to a suit however frivolous the claim, that the law confers no right to sue. A suit for its maintainability requires no authority of law and it is sufficient that no statute bars the suit. But the situation in regard to appeals is quite the opposite. The right of appeal inheres in no one and so an appeal for its maintainability must have the clear authority of law."

APPEAL AND REVISION

The revisional power of a High Court is a part and parcel of the appellate jurisdiction of the High Court. When the aid of the High Court is conjure on the revisional side it is done because it is a superior court and it can hinder for the purpose of rectifying the error of the court below. It is only one of the methods of exercising power given by the Statute; basically and primarily it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and better sense.[755]

[754]Dayawati v. Inderjit

[755] Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, AIR 1970 SC 1, (1970) 72 BOMLR 179, (1969) 2 SCC 74, 1970 1 SCR 322

ISSN: 2581-6349

The division between an appeal and a revision is a genuine one. A right of appeal carries with it a right of reheared on law as well as fact, unless the statute conferring the right of appeal confines the rehearing one way or the other. The power to hear a revision is generally given to a higher Court so that it may convince itself that a particular case has been decided according to law.[756] Revisional power is not broad and sufficient enough to make the High Court a second court of first appeal.[757] The High Court cannot, in exercise of revisional powers, replacement its own view for the view taken by a subordinate court.[758]

FIRST APPEAL AND SECOND APPEAL

The First Appeal will be admitted on the grounds – (1) question of fact; and (2) question of law. The Second Appeal will be admitted only on the point of 'substantial question of law'. The First Appeal can be entertained by lower Courts to District Judge's Court and to High Courts. Example: An appeal from the District Munsiff Magistrate s Court or lower Judge's Court to the District Judge.

The Second Appeal will be entertained by the High Court.

CONVERSION OF APPEAL INTO REVISION

If an appeal is chosen in a case in which no appeal lies, the court may treat the memorandum of appeal into revision or vice versa.[759] Since there is no specific provision for such alteration, the court would be justified in invoking the intrinsic powers under Section 151 and in passing suitable orders as may be required in the interests of justice. There is nothing like a period of limitation for making an application for alteration of an appeal into revision or vice versa. All that is required to be seen is if the appeal or the revision had been filed within the time givenor permissible for the filing of the appeal, or the revision, as the case may be.[760]

PROCEDURE AT HEARING[761]: RULES 16-21

(a) Right to start: Rule 16

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[756] Hari Shankar v. Rao Girdhari Lal Chowdhury, 1963 AIR 698, 1962 SCR Supl. (1) 933

[757] Dattopant v. Vitthalrao, (1975) 2 SCC 246: AIR 1975 SC 1111
[758] Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri, (1987) 3 SCC 538 at p. 551
[759] Reliable Water Supply Service of India v. Union of India, (1972) 4 SCC 168
[760] Bahori v. Vidya Ram, AIR 1978 All 299
[761] Shah vsGolam (Md) 52 DLR (AD) 16

(1) On the day fixed, or on any other day to which the trial may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not discharge the appeal at once, hear the respondent against the appeal and in such case the appellant shall be permitted to reply.[762]

A partial decree is, in outcome, a decree for the plaintiff, so far as the plaintiff's case is accepted, as well as a decree for the defendant, so far as the plaintiff's case is dismissed and if it is not attacked either in appeal or by way of cross examination, cannot be challenged in the appellate court, JagarvsDhirendra. 30 DLR 240.

APPEAL AND REFERENCE[763]

- A right of appeal is a right conferred on the suit, while the authority of reference is divest in the court.
- Reference is always made to the High Court, while an appeal is preferred to a superior court which need not essentially be High Court.
- The grounds of appeal are brooder than the grounds of reference. It is made in a pending suit, appeal or execution proceeding in order to facilitate the court to arrive at a correct conclusion, while an appeal is preferred after the decree is passed in the court.

CONCLUSION

The phrase appeal has not been defined in the Code of Civil Procedure 1908. It is an application to appeal superior Court for the consideration of the decision of appeal by lower court. It is appeal proceeding for review to be carried out by appeal higher authority of appeal decision given by appeal lower authority. Appeal is a creature of statute and right to appeal is neither an inherent nor natural right. Appellant aggrieved by appeal decree is not entitled as or right to appeal from decree

As soon as judgment given against party, right to appeal comes into force. Right to appeal doesn't come into force when adverse decision is given, but on the day suit is instituted i.e. proceedings began, right to appeal get conferred. Thus, it can be said the Right to appeal is appeal substantive right given to parties from the date suit is instituted.

[762]Sk. PirvsAminuddin. 11 DLR 345
[763]ibid

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DEPENDENCY ON CYBERSPACE: A BOON OR A RISK?

- SAHANAA SUDHAKAR

INTRODUCTION

The cyberspace world had precipitated during the 1960s which resulted in a momentous change in the society. The phrase "cyberspace" was formulated in a book named Neuromancer by Ford William Gibson a sci-fi writer[764]. Cyberspace captures the entire world into one platform, by utilizing communication technologies also known as the internet. In simple words, cyberspace helps people from different places across the globe to communicate with each other. Cyberspace includes communication by text, phone calls, and video calls.

The emergence of the social media platforms and the new technology in the 20th century urged people towards the cyberspace, which granted individuals with numerous possibilities. The capacity of cyberspace to provide individuals a platform to express their views and ideologies on different affairs of a country, seek information in a jiffy for research purposes, currency exchange and indulge in online trade practices with the help of the new technologies.

People completely rely on cyberspace these days, since anything and everything is just a click away. Especially during the current pandemic circumstances, cyberspace is the only mechanism that helps to connect people and even run the elements that determine an economy of a nation. Despite these advantages, we come across cyber criminals like hackers meddling with our private data's causing serious menaces. To protect the internet, domains, and networks, cybersecurity expert – John McCumber had developed three dimensions of cyber security[765]. The dimensions are:

- The first dimension concentrates on information security. Information security diagnoses the CIA Triad - the availability, confidentiality, and integrity.
- The second dimension fixates on data protection. The protection of data is important since; data may include important files, photos, PIN numbers, card details, etc. The occurrence of such data leakage would result in a grave loss. So hence the data is protected during data transit, data in process, and data at storage.

[764]Maria Popova, *"How William Gibson Coined Cyberspace"*; Available from: <https://www.brainpickings.org/2014/08/26/how-william-gibson-coined-cyberspace/> Last Accessed: June 25 2020

[765]LlaiyaGolovatenko, "The Three Dimensions of the Cybersecurity Cube" [Dec 13 2018]; Available from: <https://swansoftwaresolutions.com/the-three-dimensions-of-the-cybersecurity-cube/> Last Accessed: June 25 2020

- The third dimension focuses on analyzing suitable prowess to provide protection. The cybersecurity professionals rely upon skills and discipline to protect the cyberspace. The skills by cyber professionals to dodge the cyber criminals, use products that help to secure system information, devices, create policies and procedures for the users.

This article analyses the current technological advances, the dependence of human beings on these and the risk associated with it. The research paper further critically analyses these issues legally and suggest reforms that can be incorporated legally, technologically and socially

DEVELOPMENT OF CYBERSPACE IN INDIA

To provide profitable IT solutions for the Government of India, the Indian cyberspace emerged in 1975.To associate with various Government bureaus, three networks were introduced, NIC discovered the "INDONET" which was used to resort IBM board installations which enabled India's computer infrastructure. An interstice terminal called "VSAT" was introduced for the benefit of the public sectors and also to create a bridge between the State Governments, Central Government, and to administer the District regime. For providing research assistance and academic benefits – "ERNET" had been structured[766].

Internet regime

In the year 1986, the internet was applicable only for academic usages and research purposes (ERNET) via emails. VSNL chaired by Videsh Sanchar Nigam, set up in 1995, was an Indian-based company providing network communications at an international level. The company launched ERNET to reach the public[767]. Subsequently, Wireless internet connection with high frequency was established for public access. The New Internet PoliciesRegulations were introduced in November 1998 leading to an increasing number of internet users in India[768].

[766] UK Essays, "*Indian Cyberspace and Indian Cybersecurity in India*" (November 2013); Available from: <https://www.uniassignment.com/essay-samples/information-technology/indian-cyberspace-and-cyber-security-initiatives-information-technology-essay.php> Last accessed: June 26 2020

[767] Leslie D'Monte, "*Evolving Internet in India*" (August 18 2017); Available from: <https://www.livemint.com/Opinion/gzWbpGZVD83W3iq3uOLD7O/Evolving-Internet-in-India.html>Last accessed: June 26 2020

[768] Open Net Initiative, "*India*" (August 09 2012); Available from: <https://opennet.net/research/profiles/india#:~:text=Until%20the%20late%201990s%2C%20the%20Indian%20government%20had,domestic%20long-distance%20networks%20of%20the%20Department%20of%20Telecoms.> Last accessed: June 26 2020

With the existence of internet, the Government of India initiated projects like Digital India, Startup India, Bharat India, and Make in India[769] for the benefit of the public. At present India is ranked as the second highest number of internet users in the world[770].

Social media regime

The reason behind the inception of social media was to connect with friends, families and peers across the globe. The first social media platform to step foot in India was "Orkut" in the year 2005. This platform was developed to bring friends together across the globe, helping to associate with long lost friends, creating committees and groups[771]. The social media platform gained massive popularity among the youngsters. After the booming result of Orkut, Facebook had entered India challenging its competitive Orkut. Facebook faced a speedy popularity growth by introducing the concept of "page". People from all over the world post their photos, videos, comments, like and share each other posts, and market their products; this practice inculcated a sense of closeness among people[772].

Subsequently, the emergence of Twitter popularized the concept of "blog" were people from all over the world can follow each other and post current affairs on their blog page. Later on social media platform in India expanded by introducing WhatsApp, telegram, Instagram, hangouts etc.., as a way to connect people across the globe.

Block chain regime

Bitcoin is the logic behind the development of Blockchain Technology. In India the Blockchain Technology was introduced in January 2009. The Blockchain Technology is a system that stocks up digital information in the database[773].The mechanism of the Blockchain Technology is to store the bitcoins and is also used for transactions, buying and selling products in the digital market.

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[769] Wikipedia, "*Internet in India*"; Available from: <https://en.wikipedia.org/wiki/Internet_in_India> Last accessed: June 26 2020

[770] Jessica Dillinger, "*List of countries by internet users*" (September 06 2019); Available from: <https://www.worldatlas.com/articles/the-20-countries-with-the-most-internet-users.html> Last accessed:June 26 2020

[771] Mahua Venkatesh, "*Orkut, the site where Indians made "Frandship" before Facebook*" (June 02 2019) available from: <https://theprint.in/features/brandma/orkut-the-site-where-indians-made-frandships-before-facebook-came-along/244499/> Last accessed: June 26 2020

[772]AurangMehra, "*Evolution of social media*" Available from: <https://blogs.siliconindia.com/a2anuragmehra/Evolution-of-Social-Media-in-India-bid-7PZ8vuDN20048653.html> Last accessed: June 26 2020

[773] Nathan Reiff, " *Blockchain Explained*" (Feb 01 2020) ; Available From: <https://www.investopedia.com/terms/b/blockchain.asp> Last accessed June 26 2020

SOCIETY'S TRANSITION AND DEPENDENCE

In today's world, an individual's perceptions and outlooks are mirrored by cyberspace. The emergence of cyberspace has granted immense exposure of the outside world to people by providing innumerous information's within a jiffy, through various search engines like Google, Binge and Wikipedia accessed by using computers, phones and, tablets. Psychologically, these days cyberspace has become a part of man's life, suppose any person who wishes to research on a specific topic, reach a destination, startup a business, order food or clothes, or accessories, make money transactions etc.., directly depend on cyber space.

Internet

Earlier people used to send postcards and letters to communicate with each other, the evolution of internet resulted in a great transformation from sending out postcards and letters to communicating with each other through emails. People found emails to be more efficient to communicate important matters within just a "click" of a button from the sender and immediately within a juncture the receiver receives the mail. Emails were the first step for India to transform into a digitalized society. Presently, the internet domain has diversified itself by providing other options for people like Google Chrome, Opera, and Firefox. These domains work the same as the internet domain by providing search engines for their user in a more advanced and updated version.

The internet not only provides information for research purposes or educational purposes but also provide story books and novels available in many languages for people to read them online. The introduction of E-Books was started in the year 2000, people can download or purchase their favorite books and novels and read them in a digitalized form[774]. Kindle application is one of the most popular forms of E-book, adopted by book readers. Even though few book readers opt for going to the libraries, many of them prefer to sit at home leisurely and read books online.

The evolution of digital signatures and E-certificates in the 20th century has demonstrated a tremendous development in India by entering the digital world. Primarily the E- signature simply means a person's signature in an electronic form[775]. Users can obtain the E-signature only from a prominence Certified Authority, in a form of a digital certificate. An electronic

[774] Bob Hoover, "*Evolution of E-BOOKS*"(December 24 2000); Available from: <https://old.post-gazette.com/books/20001224ebooks2.asp#:~:text=Sunday%2C%20December%2024%2C%202000.%20By%20Bob%20Hoover%2C%20PostGazette,mankind%27s%20perfect%20designs%2C%20surviving%20essentially%20unchanged%20for%20centuries.> Last Accessed: June 28 2020

[775] Panda Doc, "*Overview of electronic signature law and its legality*"; Available from: <https://www.pandadoc.com/electronic-signature-law/india/> Last Accessed: June 28 2020

authorization given to a person, to secure and protect his information while transferring them over the internet using a public key is known as digital certificate. With the help of this digital signatures, business deals across the globe are successful without the hassle of travelling from one place to another.

Social Media

In the 20th century social media, inculcated a sense of dependency on the minds of people. India, being a democratic country, has a wide edge over the social media. Applications like Facebook, Twitter enable people to express their views and dogmas across the globe by posting their thoughts over these applications. To reach and connect with friends and relatives, WhatsApp, Instagram, Telegram etc.., help people to connect with each other.

Recent updates developed in these applications introduced the concept of phone calls and video calls. These updates permit individuals to make phone calls or video calls to people living across the globe. With the help of these applications, people found it to be easier to communicate with people living across the globe and giving them an opportunity to visually see one another, this mechanism bolstered people to eradicate the ISD and STD expenses.

Instead of going to banks waiting in a long line to transfer money or deposit cash, banks have initiated applications for the benefit of the people. Each bank has their own websites and applications that allow people to make transactions relating to transferring money into the bank or to another a/c, to check passbook statements etc.., via online mode, acts as a useful mechanism by reducing the waiting time[776].

In the last few years, applications like Google Pay, Paytm, Amazon Pay has become the most popularized form of making payments[777]. People will have to register their bank details with these applications, once the registrations is completed individuals can buy , receive money or transfer money by just swiping or scanning the QR. These applications are used by people during shopping online and ordering food online.

Blockchain Technology

A new age technology, called the Blockchain Technology has captured the eyes of many countries including India. The banking sectors, Government, and the public companies have adopted this Blockchain Technology. Indian companies and various other sectors are figuring out opportunities to use this technology for the benefit the economy. The Blockchain can be

[776]Sylvine, "*Importance of Cyberspace For economic Growth and Development*" (September 4 2016); Available From: <https://blog.ipleaders.in/importance-cyberspace-economic-growth-development/> Last Accessed: June 28 2020

[777]Raviraj Parekh, " *Google Pay Digital Payment App – Benefits and Features*" (May 2 2020); Available From: <https://moneyexcel.com/22036/google-pay-digital-payment-app/> Last Accessed: June 28 2020

called as a public ledger, wherein different virtual currencies (bitcoins) transactions are stored forming a chain. As newer transactions occur the length of the chain gets longer[778]. Blockchain maintains high level of endurance, anonymity and accountability. Blockchain Technology safeguards every bitcoin transactions. The public ledger can be accessed through torrent sites and API.

Blockchain Technology develops the society by reducing the usage of papers and making sure online transactions are safe to use. International transactions and trading can be done smoothly and effectively using this technology. India has not fully adopted the Blockchain Technology; they still have few questions and face few issues with the concept of cryptocurrency. The 2019 and 2020 blockchain Technology and Cryptocurrency Regulations by the Government of India has inculcated a sense of hope in the minds of business professionals to use this technology. In the year 2019, many of the startup Indian companies have involved themselves in projects relating to Blockchain -reported by Nasscom Blockchain Report 2019[779].

LEGAL REGULATION OF CYBERSPACE

Cyberspace is governed under Information Technology Act 2000to regulate cyber terrorism and to provide cybersecurity. The act deals with providing legal concession with respect to electronic documents, digital signatures, online defamation. National Cyber Security Policies, 2013 are formulated to synchronize the standards by providing encryption, to make sure cyberspace is safe from online threats and attacks. This policy is propounded by the Ministries of Electronics and Information Technology[780]. The word "cyber law" has not been clearly described under the IT Act, 2000 or under the National Cyber Security Policy, 2013. Laws circumscribing cyber space in India are:

- Intellectual property laws – The Copyright Act 1957
- Protecting Data and Privacy of Individuals
- Governing Digital Signatures and E-certificates from Cyber Terrorists
- Regulating of Cyber Crimes.

Internet censorship

[778]LetsNuture, " *Blockchain Technology: Opportunities and Challenges in India*" ; Available from: <https://www.letsnurture.com/blog/blockchain-technology-opportunities-and-challenges-in-india.html>Last Accessed: June 28 2020

[779]Samriddhi Malhotra, " *What does the future hold for Blockchain Technology*" (February 24 2020); Available From: <https://forkast.news/what-does-the-future-hold-for-blockchain-in-india/> Last Accessed: June 28 2020

[780]Vinitverma, "*Importance of Cyber Law in India"* Available From: <http://www.legalserviceindia.com/legal/article-1019-importance-of-cyber-law-in-india.html> Last accessed: June 26 2020.

In India internet censorship is a trickster. The Indian Constitution, 1950 under Article 19(1) provides limited authority to the government to censor contents[781]. Censorship and freedom of expression are two opposites of a same coin. Freedom of speech and expression allows a person to express his views and ideologies without any restrictions, while censorship laws restrict people's contents, which are deemed to be unsafe against the public morale or national security. Section 69A of the IT Act, 2000 provides the regulatory authority a right to block unsafe, obscene contents that deviates the public attention[782]. Examples like posting fake videos and, fake messages, uploaded in the social media. Section 79 of the IT Act, 2000 allows the government to assign emissaries to observe the internet[783]. These mediators keep an eye on any pornographic or sacrilegious or obscene posts, videos or photos are being posted over the internet. If they find any of these, they have a right to censor or delete such contents as per this section.

Social media laws

The significant laws governing social media in India are Information Technology Act, 2000, the Indian Penal Code Act, 1860, the Official Secrecy Act, 1923 and the Copyright Act, 1957, Privacy laws and, the Constitution of India, 1950. Posting or commenting any statements or any information by downgrading an individual's reputation in the social media platform shall be imprisoned and fined under Section 66A of the IT Act, 2000[784]. Unfortunately, due to the serious violation of Article 19 of the Indian Constitution with relation to online restriction, in SheryaSingal v Union of India[785]case the Supreme Court of India struck down section 66A of the IT Act, 2000.

Section 499 of IPC punishes any person who defames the reputation of another in social media. Pornography videos and photos posted on the internet shall be imprisoned under section 292,292A, 293,294 of Indian Penal Code, 1860[786].

Disclosure of any sensitive government documents or information posted on the social media platform will result in violating the Official Secrecy Act, 1923.

If any person infringes another individual's idea or literary work[787] shall be protected under section 13, 14, and 17 of the Copyright Act, 1957. Article 19 of the Indian Constitution, 1950

[781] The Indian constitution; *refer*….Article 19 cl 1 cl 2
[782] The Information Technology Act, 2000; *refer*... Section 69A
[783] The Information Technology Act, 2000*;refer*…Section 79
[784] The Information Technology Act, 2000*; refer*... Section 66A
[785] A.I.R 2015 S.C 1523 (India)
[786] The Indian Penal Code, 1860; *refer*... Section 499,292,292A, 293,294
[787] The Indian copyright Act, 1957; *refer*.... Section 13,14,17

provides citizen to express their views and ideologies in social media platforms along with certain restrictions under Article 19(2) of the Indian constitution 1950.

We live in a highly digitalized society where transaction, documentations, income tax returns and much more activities take place in the online platform. To protect such confidential information, privacy laws were adopted to supervise the personal information's of people. Earlier privacy laws were not given separate prominence; it was only recognized as a right to life and liberty under the Indian Constitution[788]. Kharak Singh v State of UP[789] case gave rise to the perception of privacy laws in India. Every application has its own privacy terms - while downloading an application from the Play Store or by any other mode it is an essential part for every person to read through the application's privacy terms and conditions before using the application. By doing so, people can be protected from cybercriminals.

Blockchain Regulations

Blockchain Technology is an ongoing topic in India. We make transactions, share assets through digital platform, to each other unaware whether such documents are fabricated or hoax. The Blockchain Technology provides guidance to people by solving these issues without the help of a mediator[790]. Bitcoins are fictitious in nature i.e. they are not real coins but are bitcoin abodes. Holders of the Bitcoin are not notably identified, but all the transactions are visible to the public in theBlockchain. Blockchain Technology is used by bankers, investors, traders. Albeit the fact Blockchain transactions are not anonymous, all the confidential information's are bound by their digital signatures. Blockchain Technology is quite difficult to hack, since each transaction appear to be the same hence transfers information through the networks would be difficult to wield. Hackers will have to manipulate all the transactions of the Blockchain[791]. The Dalima petition[792] and the Bhowmick petition[793] against the Union of India are the landmark cases that expound the legality of cryptocurrencies. The grounds of the petitions were concerning the accountability and lack of regulation for Bitcoin trading, financial implications not being checked, changing the bitcoin into foreign exchange does not fall under the ambit of the RBI Regulations and, concerns relating to cyber attacks. The Supreme Court in 2019 instructed the Government of India, by giving them a four-week window period to come up

[788] The Indian constitution 1950; *refer*... Article 21
[789] AIR 1295 1964 SCR (1) 332
[790]MeghaMehdiratha, "*Implementing Block chain in India*" (June 19 2018) Available from: <https://www.investindia.gov.in/team-india-blogs/implementing-blockchain-india> Last Accessed: June 27 2020
[791] Nathan Reiff, "*Block chain technology explained*" (February 01 2020); Available from: <https://www.investopedia.com/terms/b/blockchain.asp> Last Accessed: June 27 2020
[792] Vijay Pal Dalima and SiddarthDalima v Union of India writ petition 1071 , June 2 2017
[793]DwaipayanBhowick v Union of India writ petition 1076, November 03 2017

ISSN: 2581-6349

with regulations governing Blockchain and cryptocurrencies. This gave rise to the Blockchain and Cryptocurrency Regulation 2019

Recently the Government of India introduced regulations for Blockchain Technology – Blockchain and Cryptocurrency Regulation 2020[794]. This regulation covers the following aspect:

- Taxation
- Sales Regulations
- Laws with respect to money transmission
- Virtual currency Regulations
- Licensing and ownership requirements.
- Border declarations and restrictions
- Mining
- Requirements for Reporting
- Testamentary succession and Estate Planning

CRITICAL ANALYSIS

The progression of cyberspace has directly persuaded the growth of the economy. Cyberspace is presumed to be a knowledgeable tool that provides information's within a fraction of a second, making an individual's work easier and effective. Nowadays storing of information, create, transferring of data are done using electronic form by consumers, businesses, professionals, and students. This electronic form is an alternative to mechanism of using traditional paper. An advantage of electronic form is that this mechanism is much cheaper than traditional paper documents, effortless to create, recapture the information easily and communicate hastily.

Paper-based records and oral testimony are generally governed by the Evidence Act. Electronic commerce eliminates the need for paper-based transactions and such E- evidences are regulated under the Information Technology Act, 2000.

Despite these advantages contributed by the cyberspace, cyber terrorism executed by cybercriminals is the risky factors faced by users while using this technology. Different kinds of cyber terrorism are virus, worm attack, hacking, email spoofing and email bombing, tampering with computer source documents, publishing of information which is obscene in

[794] Global Legal Insights, "*Block Chain Laws and Regulations 2020"(*October 23 2019); Available From: <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations> Last accessed: June 27 2020

ISSN: 2581-6349

electronic form, sending threats or rumors through e-media, abetting such activities. To subdue these issues, the regulatory authorities have formulated the Information Technology Act, 2000 that protects users from the cybercriminals. Cyber law has become one of the necessary area of study, that educates regulatory measures by helping the users to tackle such cyber-attacks and also provide preventive measures like downloading anti-virus, clearing up unwanted information in the computer, making sure the sites you web are secured and safe, protect the computer by installing firewalls etc,

Internet

Cyberspace governance aims to foster in administering multi stakeholder's collaboration, international treaties, strengthens cyberspace regulations and, substantiate the significance pre-existing international law in non-conventional sectors of global governance. Cyberspace space governance is initiated to fixate the conflicting and existing rules, under take developing measures to increase its propagation and implementation strategies, reinforce legally binding rules, acquiescing with the international legal obligations.

During this pandemic the Government officials have recorded more than 40,000 cyber-attacks. To eschew from this issue, the Government has formulated certain recommendations to improvise cybersecurity governance in India – (Cybersecurity Strategy, 2020).No person in today's generation can avoid internet or social media; it has become a part of every individual's life. Cyberspace is much needed for the development of the economy as it enables the society to improve their standard of living. Considering the risk factor, it is evident that individual must make sure they acquire ample amount of knowledge about cyberspace. By doing so, users will become more cautious while using the internet.

People nowadays set-up online businesses, they market their business through social media, they get orders from users online, get paid from users online. Such online businesses and trade practices are regulated by E-governance. The Information and Communication Technology helps the government and their employees to communicate in amore fast and efficient manner, along with raising their level of satisfaction by providing perquisites and add-on benefits like E-payroll, E-benefits, E-Training, Maintaining records of personal information, and so on. According to my perspective, dependency on internet improves and supports all tasks performed by the government department and agencies, because it simplifies the task on the one hand and increases the quality of work with each other.

Social media

Social media is a boon for the society, as social media platforms make a person's life less stressful. Rather than waiting for the morning newspaper or searching books to refer for

ISSN: 2581-6349

research purposes, or market products door to door, social media provides a solution for such tedious process by utilizing one particular platform that provides all the information required for people. Social media gives opportunities for people to showcase their talents to the outside world. In this pandemic scenario where everyone are in closed doors, it is the social media platforms that helps people by providing them insights regarding the current issues, making sure students do not lag behind their academics by conducting online classes though various applications like Zoom, Microsoft teams, G-meet, Hopin etc.., delivering of essentials for people in order to avoid the spread of Covid -19 with the help of various applications like Amazon, Zomato, Swiggy, Dunzo etc.. Without social media, it would become difficult for the government to coordinate with each other and provide instructions to the public regarding the preventive measures, for people to satisfy their basic needs without stepping out. Many of the business transactions were finalized during this pandemic with the help of social media platform.

Discussions foresighted to desist from cyber terrorism were analyzed by the parliament in the year 2018, after thorough examining the issues relating to cybercrime, the Intermediary Guidelines were revised by the Ministry of Electronics and Information Technology. The revised plan formulated in the draft amendments, 2011 had amended the conditions required for diligence. The draft highlights on "public health and safety", the revised rules give the intermediaries power to censor contents relating to alcohol, tobacco, nicotine and other harmful products. If the intermediaries receive any order from the court, to take down an unlawful content from the social media, then such content must be deleted within 24hours of time. According to the Draft Rules, the intermediaries, notified by the government or has more than fifty lakh users must enroll themselves under the Companies Act 2013 i.e. incorporated in India. With such stringent Rules and Regulations governed by the Government of India, makes the social media platform less risky for the users.

Blockchain technology

The emergence of Blockchain Technology will show a prosperous growth in the banking sectors, financial sectors, and real estate sectors, healthcare, etc… the Indian Government recently has taken various steps in enforcing Blockchain. The state of Kerala, has established a Blockchain Academy, where they mould the students by training them and teaching them about the Blockchain. The Blockchain Technology makes sure your transactions are secure from being hacked as it is encrypted. Blockchain are transparent, auditing can be done smoothly, and it fends off data tampering. Many of the banking companies have adopted the Blockchain Technology for trade. In financial institutions, Blockchain mechanism allows the

customers to see their transactions in less than ten minutes. Blockchain Technology helps to transfer huge amount of funds from one institution/ individual to another. The Blockchain Technology adopts newer methods for real estate trade by facilitating trading platforms and virtual market platforms to reinforce real estate transactions predominantly. Blockchain Technology may also be used for reducing corruption as this technology helps in figuring out black money transactions and eradicates money laundering. Blockchain Technology helps the publishers and creators to trail and safeguard their intellectual property rights and their ownership. This technology also helps people to invest capital by purchasing coins; in turn it results in providing direct link between the individuals and the enterprises

To iron out the government and business inadequacy the Government of India has formulated two strategy documents to limelight on the application of Blockchain Technology. The first strategy formulates the escalation of PoCs and pilots and ensuing selective pilots and PoCs by NITI Aayog. The Government of India had recommended few policies and regulations to validate Blockchain ecosystem in India as the second strategy towards Blockchain. The recommendations are focusing on the promotion of research and development with the use of Blockchain for research purposes, measures adopted for the government agencies to use Blockchain, developing infrastructures for Blockchain solutions, concerns about exchanging Indian Rupee into crypto currencies and questions regarding the facilitation of initial coin offering market in India. Such strategies and recommendations prove that Blockchain would be the next reverberating technology after social media.

CONCLUSION

Notwithstanding an increase number of cyber terrorism, the regulations provided under the cybersecurity laws and applications being constantly upgraded may not have eradicated cyber terrorism at a whole, but these regulations have proved a significant decrease in the number of cyber terrorism. Without the world of cyberspace, it would have been impossible for the world to develop and deal issues like cross–border transactions, connecting people across the globe, signing off deals, bringing out unknown facts and information's to the outside world etc… during this pandemic. Cyberspace (internet) presumes to be a backbone for India to develop its economy at fast pace by turning all the transactions and trades to a digitalized form.

In India the rural areas have shown an immense development after the emergence of social media. Social media has resulted in a great success compared to traditional media. People, who generally don't read newspapers much, are now inquisitive to know what's happening around the world via social media platform. The social media provides live information's in a jiffy,

and also helps people to express their views and ideas by doing so; people will start taking part in various decisions relating to the growth of our economy.

The Blockchain Technology makes it easier for India to convert them into Digital India. The development of the encrypted cryptocurrencies, helps to avoid fraudulent activities, making transactions across the globe in a secure manner, and they are not easy to hack. Bitcoin contracts generally approve the third party or eliminate them if required, gain references from externals complete purchase transactions of assets within a fraction of time. Blockchain technology are decentralized since numerous data are jointly managed by one database, as more transactions take place, the chain becomes longer.

From this it is evident that, dependency of cyberspace is a boon but must not turn into an addiction. The suggestions for improving the cybersecurity under these domains include

- Every individual must be aware of all the preventive and privacy measure while using the cyberspace to avoid becoming a pray to the cybercriminals.
- Privacy policies, guidelines must be constantly updated and make sure the public are aware of the privacy policies and terms.
- It is essential for every individual to download anti-virus software's and build firewalls to protect their confidential details from being leaked.
- The Government must regulate the cybercrimes by changing the punishments provided in the present to a more strict and stringent manner. So the thought of committing a cybercrime must inculcate a fear in the minds of cybercriminals.
- Since Blockchain Technology is a new concept, the Government and the Reserve Bank of India must formalize and constantly amend the regulations to secure the users and safeguard the Blockchain Technology from being misused.

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SIGNIFICANCE AND NEED OF TRANSPARENCY IN JUDICIAL APPOINTMENTS AND TRANSFERS

- **TUSHAR AGARWAL**

INTRODUCTION

"With great power comes great responsibility." The Supreme Court holds a unique role within our constitutional scheme and is endowed with great powers by constitution. The Supreme Court is responsible to maintain the democratic values of this nation and preserver of the fundamental rights of the citizens. To maintain this, Supreme court needs to preserve itself from any possible encroachment in its power by legislature and executive. Hence, Judicial independence is one of the central pillars of any healthy democracy that needs to be safeguarded.

Judicial appointment is a key aspect when it comes to the independence of judiciary. In India, judges in Supreme court and High court are appointed and transferred through collegium system. This system was developed in 90s following a number of cases popularly known as 'judges cases' and has been followed since then. This system is basically a group of judges appointing judges without any external aid. This has led to many accusation and controversies around the appointment of judges as the whole system lacks transparency. There is a widespread protest by activists, lawyers and sometimes even judges themselves over appointment or transfers.

For instance, in September 2019, the transfer of the Chief Justice of the Madras High Court, Justice Tahilramani, to the Meghalaya High Court has brought to the spotlight a long-standing discussion on the workings of the 'Collegium' of judges issuing appointments and transfers in the higher judiciary. Justice Tahilramani forwarded her resignation after the Collegium of the Supreme Court denied her request for reconsideration of the transfer and responded by saying that they have 'cogent reasons' for the transfers. The bar associations members in Tamil Nadu demonstrated against this decision and held "a one-day court boycott." In fact, about 2,000 lawyers boycotted court proceedings in Maharashtra's Latur to protest the transfer.

This is one instance of many where judges openly protested against their transfers. These instances bring forth direct questions in the integrity and transparency of judiciary. As such, the lack of transparency has intensified suspicions of nepotism and judge promotion based on personal connections and past favours, rather than competence or seniority.

ISSN: 2581-6349

The Collegium System- background, evolution and function

The college is now more than 3 decades in practice for appointments and transfers in the higher judiciary. The Collegium of Judges is an innovation of the Supreme Court. It does not appear in the Constitution, which says the President appoints judges of the Supreme Court and High Courts and speaks of a consultation process as per Art.124 and Art.217. It is, in effect, a system wherein judges are selected and appointed by an institution consisting of judges. Under this, the Supreme Court 's five senior-most judges decide on the appointment and transfer of judges to the higher court. Decided names are then sent to the government, which may either approve the recommendations or reject them once, but not the second time. The current system of appointment of judges is the involves a series of landmark cases which are popularly named as First judges case, Second judges case, Third cases and very recent Fourth judges (the NJAC judgement) case.

First Judges case (*S.P. Gupta v. Union of India, 1981*)[795]

The whole case arose when the President did not extend the term of an additional judge relying on the advice of the Chief Justice of Delhi High court and not the Chief Justice of India. So, the question was whether the President was bound by the advice given by the CJI.

The court, by a majority of 4:3, maintained that the non-extension is correct because is no primacy of one authority over the other, i.e. the advice given by CJI is no more important than the chief of the High Court under Article 217. The majority decided that the meaning of the word 'consultation' in art. 124 of Constitution of India is not 'consent' and the power remains purely and entirely with the President.

This decision was criticized because it stripped away the little independence that had established by consulting the CJI, the High Court Chief Justice and the Governor as a custom. The defend-side was that the Executive is ultimately responsible directly to the people but the judiciary is not.

The Second Judges Case (*Supreme Court Advocates-on-Record Association v. Union of India, 1993*)[796]

The First Judges Case referred to a nine-judge bench again in 1993, hearing petitions regarding court vacancies. In this case, the court by 7-2 majority overruled the First Judges Case, arguing

[795] *SP Gupta v. Union of India*, [1981] Supp SCC 87.
[796] *Supreme Court Advocates on Record Association v. Union of India*, [1993] 4 SCC 441.

that in the case of conflict between the President and the CJI over the appointment of Judges, then the CJI's view would have primacy and would be definitive in this matter. The SC not only regained its authority from the government in the 1993 ruling, but granted itself the upper hand over the other two branches as well.

The court in this case interpreted the word 'consultation' in art.124 means 'concurrence' and consequently gave birth to the collegium system in India. The case of the second judge was highly regarded as it overturned the effects of the case of the First Judge which restricted the independence of the judiciary.

The Third Judges case (*In re- Special Reference 1 of 1998*)[797]

In 1998, when the President of India was KR Narayan, he asked the SC to clarify the definition of the term "consultation" in order to draw finer lines on the appointment of judges. The SC affirmed its 1993 decision and enlarged the Collegium to include, the CJI and the four senior-most judges next to CJI.

The Fourth Judges case (*Supreme Court Advocates-on-Record Association v. Union of India, 2015*)[798]

The National Judicial Appointments Commission (NJAC) was undoubtedly the most significant effort by government to overhaul the Collegium System. The NJAC was a body consisting of the CJI, two senior judges, the Law Minister, two eminent persons appointed by the Prime Minister, Leader of the Opposition and CJI. The purpose behind it was to make higher-judicial appointments more transparent. Decisions of the collegium have been a guarded secret and beyond public scrutiny. The decisions of the collegium were kept out of the Right to Information Act's purview. Parliament enacted it as the 99th Constitutional Amendment Act in 2014. Nonetheless, ten months after it obtained the assent of the President, a 4-1 majority struck down the NJAC as unconstitutional by the SC. The SC regarded the Commission as a clear violation of judicial independence and a breach of the separation of powers. Even though NJAC Bill was also passed and ratified by more than 16 states (it is a federal subject), it was declared null and void by the Supreme Court.[799] Hence the Collegium System has been restored and continues to be in place.

[797] 1998 Supp 2 SCR 400.
[798] *Supreme Court Advocates on Record Assn v Union of India*, [2016] 5 SCC 1.
[799] **Harleen Kaur**, "All you need to know about NJAC" <https://www.livemint.com/Politics/rcsu24yGQ0frdanyQ9fVVL/All-you-need-to-know-about-NJAC.html> accessed on 27 June 2020.

ISSN: 2581-6349

The SC Collegium, headed by the then CJI JS Khehar, dismissed the Centre's plea to reconsider its hold on having the last word in court appointments in March 2017. The court reasoned out that SC and HC are independent entities free of any interference from the executive, which will remain the same.

Procedure followed by Collegium

India's President appoints judges to the Supreme Court and High courts. As for the CJI, its successor is recommended by the outgoing CJI. In practice, since the 1970s supersession controversy, it has been strictly by seniority. The idea is proposed by the CJI for other Top Court judges. The CJI shall consult the remaining members of the Collegium, as well as the court's senior-most judge hailing from the High Court to which the person recommended belongs. The consultees are required to record their views in writing and this will be part of the file. The Collegium gives the proposal to the Law Minister, who will forward it to the Prime Minister to advice the President. High Court Chief Justice is appointed according to the practice of having Chief Justices from outside the respective states. The Collegium takes the final call on elevation. A Collegium consisting the CJI and two senior-most judges recommends the judges of the High Court. However, the suggestion is proposed by the appropriate High Court chief justice in consultation with two senior-most colleagues. The proposal shall be submitted to the chief minister, who shall advise the governor to send the proposal to the Union Law Minister.

The College further recommends the transfers of Chief Justices and other Judges. Article 222 of the Constitution states that a judge shall be transferred from one High Court to another. Once a CJ is transferred, a substitute for the same High Court must always be sought simultaneously. For a High Court there can be an acting CJ for no longer than a month. For transfers cases, the CJI's decision "is determinative," and the approval of the judge concerned is not necessary. However, the CJI should take into consideration the views of the appropriate High Court CJ and the opinions of one or more SC judges who are in a capacity to do so. All transfers must be made for the good of the people, that is, "to enhance the administration of justice."

Criticism of Collegium System

The collegium system has been criticized as its functioning lacks transparency and accountability. The central executive and the higher judiciary have repeatedly disagreed over the decisions of the Collegium on various grounds. Several contentions included that selected names by Collegium represented a strong case of nepotism, non-compliance with even the

basic requirements and lack of judicial expertise and competence. The collegium is also accused of favouritism and the preferential treatment in appointment as judges of their own relatives and family members. In June 2013, the Madras High Court Advocates Association (MHAA) gave a representation to the High Court Chief Justice on a list of 15 judges proposed by the collegium. The MHAA said, "It appears that the names have been proposed on extraneous criteria such as caste, religion, office affiliations, political considerations and even personal interests."[800]

In addition, the collegium recommendations have also been found to be skewed in favour of upper castes, with lesser SC, ST, OBCs and minority candidates. Moreover, also in lower courts, only 27 percent of women were judges, which is getting worse up with 11 percent in high courts and 9 percent in supreme courts. In February 2020, A K Sikri, former Supreme Court judge and member of the 2018–2019 Collegium, said that far from a "scientific study" of candidates, "most of the time we (the Collegium) go by "our impression" when appointing judges [to the Supreme Court and High Courts]."[801]

Many have criticized the structure, not only because the constitution makers saw it as something unexpected, but also because of the way it works. Opaqueness and the scope for nepotism are often cited. Justice Ruma Pal, retired Supreme Court judge, once said, "The mystique of the process, the small base from which the selections were made and the secrecy and confidentiality ensured that the process may on occasions, make wrong appointments and, worse still, lend itself to nepotism." Even the dissenting judge, Justice Chelameswar in the NJAC judgement termed the whole collegium system as 'inherently illegal.' The majority judges in the NJAC judgement also admitted that there is a need to overhaul the present appointment system but there has been no significant change till now.

Reforms by the Supreme Court

The court after striking down the NJAC amendment ensured that it would bring more transparency in the functioning of the collegium. In a landmark effort to ensure transparency of judicial appointments in 2017, the Collegium of the Supreme Court have started publishing reports of every judicial appointments, transfers and elevations of Apex court and High courts for public viewing on its website. The details posted online can likely include

[800] Prasad, Nagasaila, Suresh, "The costly tyranny of secrecy" <https://www.thehindu.com/opinion/lead/the-costly-tyranny-of-secrecy/article4881975.ece> accessed on 28 June 29, 2020.

[801] Murali Krishnan, "Collegium System requires reconsideration" <https://www.hindustantimes.com/india-news/collegium-system-requires-reconsideration-former-supreme-court-judge-justice-ak-sikri/story-2lnTcE5V1wLxowpjqCN7FP.html.> accessed on 1 July 2020.

specifics explaining reasons for naming or rejecting a judge. Then CJI Dipak Mishra said that "The resolution is passed to ensure transparency and yet maintain confidentiality in the Collegium system."[802]

But this reform is not very much effective as giving reasons for transferring or rejecting a particular judge may question the integrity of that judge. This may give rise to public controversies and the lawyers in the destination court may charry of the transferred judge.

The Way Forward

Apparently, the reforms made by the Supreme court are not enough and there are central issues that are needed to be addressed. This section will identify those issues and the probable measures that are needed to be taken.

- **Remove the Opaqueness and Unaccountability from System**- The most persuasive criticism of the college system is the lack of information regarding the appointment of judges, including the criteria upon which collegium make its choice. The collegium system cannot have the credibility and integrity for it to be recognized by all stakeholders within the legal community without a transparent process of appointing judges. Transparency cannot be formed merely by announcing that the Collegium members shall behave in a transparent manner. The process adopted by the judiciary in the selection of judges will need to demonstrate that. Lack of transparency and lack of formal criteria have multiple worrying consequences. There is actually no formal procedure for determining whether a judge appointed by the collegium has any conflict of interest. This is significant when there are many types of allegations afflicted on collegium. The college urgently needs to introduce a detailed set of rules and regulations that will regulate the determination of conflict of interest among the collegium members involved in the selection of judges.
- **Social Background of Judges-** The collegium often prefers practicing lawyers rather than selecting and promoting 'subordinate judicial judges' who also have a large pool of applicants. This process prevents a diverse selection of judges. As a result, the demographic representation of the high courts practically is overwhelmingly male, upper-caste, practising lawyers. It works its way into the structure deeper, as this is the field from which judges of the Supreme Court are chosen. The collegium system,

[802] Krishnadas Rajagopal, "Now, SC Collegium to make judges' appointment transparent" <https://www.thehindu.com/news/national/sc-collegium-to-make-its-recommendations-public/article19807802.ece> accessed on 3 July 2020.

therefore, has a systematic propensity to support upper-caste males, and is far from being representative of society for which it seeks redress.

The above-mentioned are just the key issues. There are other issues as well which are needed to be kept in mind while deciding anything related to appointment process. The judicial integrity and faith are needed to be maintained at all cost if democracy needs to survive. It is high time that Supreme court should step in and find an amicable solution to this.

CONCLUSION

The existing system for appointments and transfers has put considerable doubts on judicial impartiality. There is a perception that the system of the Collegium, which has no mention in the Constitution and is a mechanism established by the SC itself, portrays the democratic deficit that ravages the Indian justice system. Judiciary is important in order to keep democracy intact in a nation and for that people must have faith in the judiciary. The present appointment system in the higher judiciary has various loopholes which directly questions the integrity of judiciary. The Supreme court must take cognizance of the same and should try to find a way which fills those loopholes.

The collegium system should not consider itself as being above the transparency, accountability and safeguards that conform to the principles of democracy in India. The judiciary draws its strength and authority from the fact that it is viewed as an unbiased arbiter, a role that must be preserved. While the concerns are evident and the executive's interference is undesirable, an innovative solution is now upon the apex court itself.

The purpose of this article is only on transparency and openness in the appointment procedure and on the need for to provide relevant principles and guidance. Almost all democracies are shifting rapidly towards an open democracy and the right of an individual to know — an international norm that is progressively backed up by judicial decisions. In addition, the right to know is part of the freedom of speech and expression and the existing model of secrecy as implemented by the collegium violates this fundamental right. Surely, a judiciary that considers the rule of law to be part of its core idea must abandon the culture of secrecy that encompasses the current appointment process.

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ANALYSIS OF THE PERSONAL DATA PROTECTION BILL, 2019

- AYESHA MAJID

INTRODUCTION

Data protection and privacy have been under darkness in India for a very long time. It took a long time for India to declare that right to privacy is a fundamental right and is guaranteed under the constitution of India. It all started after the coming of Aadhar judgement in 2012 and later the stance on right to privacy was cleared in 2017 after the 9-judge bench of supreme court of India declared that it is a guaranteed right under Article 21 of the Constitution in the Justice K.S. Puttaswamy & Anr. v. union of India[803] judgement.

Before the coming up of this bill, all issues relating to data protection were dealt under the Information Technology Act of 2000 and the IT Rules of 2011. But the IT act of 2000 only applied to companies and not to the government thus it was lacking a very important thing which has now been overcome by the 2019 bill which applies to companies incorporated in India along with the foreign companies that deal with personal data of individuals in India and also the government. Also, this bill incorporates the idea of establishing a Data Protection Authority. Thus, this Bill tries to overcome the lacunae that had been existing till date because of the nonexistence of a statute to govern and protect personal information of the citizens.

BACKGROUND

India is the country with the 2nd largest internet users in the world but still India did not have any legislation to regulate the privacy, data transfer and cyber security for a long time. Moreover, with the concept of Digital India, safety and security of personal data of individuals became an important concern. In order to bring a revolutionary change to the legislation regarding the internet, Justice Srikrishna Committee was set up to analyse and bring a report for the formation of new statute on this matter.

The Personal Data Protection Bill of 2019 was first presented in the parliament on December, 11 of 2019 by the Ministry of Electronics and Information Technology. It will further be analysed by the joint parliamentary committee. The Bill has been drafted after taking references from the General Data Protection Regulation, 2016 (GDPR).

[803] (2017) 10 SCC 1

The IT Act was not sufficient. Section 43 and 43-A of the Act were not adequate to deal with the vast amount of concerns and issues relating to data protection and security.

FEATURES OF THE BILL

The new bill of 2019 clearly defines what is personal data as, *"*personal data means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include inference drawn from such data for the purpose of profiling*"*[804]

Also, now the individuals can ask for correction of inaccurate, incomplete personal data and can also get data transferred to another entity under certain conditions.[805]

The new bill of 2019 also categorises personal data into further two categories which are critical personal data and sensitive personal data respectively. The main feature of this categorisation is that the sensitive personal data can be shared across borders of the country but shall be stored in India only but critical personal data cannot be shared outside the country[806]. It is kept within the country so that the citizens can share control over the data but in certain cases it can be shared outside the country but only with legible restrictions. Thus, there is no absolute bar on the data sharing. Further, personal data can be processed only for specific, clear and lawful purposes with explicit consent of the individuals. The critical personal data can only be stored and processed in India and RBI has also given guidelines with regard to this.

The data can be classified as:

1. Non-personal data – this includes the anonymised personal data that does not give identification of the person and is very ordinary and easily available.
2. Personal data which is sensitive- this includes the data that is personal and is sensitive and reveals the identity of an individual, such as medical records, financial records etc.
3. Personal data which is critical- this includes the data that is very critical and cannot be shared easily across the borders of the state.

Based on the type of data, different security measures are set up. Such as higher level of restrictions is imposed when a data is a sensitive personal data such as explicit consent unlike the safeguards used for the non-personal information. Also, it emphasises that consent needs to be obtained as soon as the processing begins.

[804] Section 3 (28), The Personal Data Protection Bill, 2019
[805] Section 18, The Personal Data Protection Bill, 2019
[806] Section 33, The Personal Data Protection Bill, 2019

This bill adds additional responsibility on the data fiduciaries as now they are required to implement security safeguard such as grievance redressal mechanism to address complaints of individuals. They are also required to institute mechanism for age verification and parental consent while processing personal data of children, since the sensitive personal data has now been divided for children and adults. Thus, the child's personal data can only be processed after obtaining consent from their parents or guardian[807]. Also, the Social Media Fiduciaries are now defined as intermediaries who primarily or solely enable online interaction between two or more users and now they must provide voluntary user verification mechanism for users in India. However, the entities that are involved in the commercial or business-oriented transactions or are in the nature of a search engines or email services are not included in the definition of Social Media Fiduciaries.

CONSENT MANAGERS

The Bill introduces Consent Managers as the type of intermediaries which help the data principles in giving, withdrawing or managing consent with regard to the data fiduciaries and also help them to exercise to their right under the law such as the right of correction, erasure etc. The Bill is however unclear on stand on what would be the liability of the Consent managers.

DATA FIDUCIARIES

Data Fiduciaries are now required to use the data only for lawful, clear and specific purposes in a fair and reasonable manner. It is obligatory for them to provide notice to the data principle at the time of collecting data even if such is not being collected by them directly. They are not allowed to store the data beyond a limited time once the work is done. They are mandatorily required to provide with privacy policy document that gives the details on how the data will be used and how it will be processed[808]. Also, transparency in processing the data is required. The fiduciaries are now made to employ enough safeguards like encryption for the protection of the data of individuals. The data fiduciaries are expected to maintain records of important operations in the data life cycle, periodic review of security safeguards and other necessary aspects required[809]. Generally, data fiduciaries appoint data protection officers to monitor and provide advice and to maintain inventory of records.[810]

[807] Section 16 (2), The Personal Data Protection Bill, 2019
[808] Section 22, The Personal Data Protection Bill, 2019
[809] Section 28, The Personal Data Protection Bill, 2019
[810] Section 30, The Personal Data Protection Bill, 2019

ISSN: 2581-6349

Also, in case any data breach occurs, then the fiduciary should immediately inform the authorities about the data breach[811]. The notification must include all the necessary details such as who is affected, what information has leaked, nature of information and steps taken as remedy.

DATA PROTECTION AUTHORITY

The bill provides for the formation of the data protection authority. It performs various functions such as it has regulatory nature when it deals with the regulation and monitoring of the provisions of the bill. It also performs the promotion and innovation functions but continuously working on to devise new methods and practices to protect data. It also plays a major role in curtailing fake news. It also performs the administrative and adjudicatory work. The authority also has the responsibility to notify some data fiduciaries as significant data fiduciaries based on the sensitivity of information they hold, their annual turnover, technologies used, and other relevant factors[812].

Also, in order to ensure that the authority works in the best way possible the qualification for the officers has been given in the bill which includes a) Cabinet Secretary who shall be the chairperson, (b) the Secretary to the government of India in the Ministry or department dealing with legal affairs, (c) the Secretary to the government of India in the Ministry or Department dealing with electronics and information technology.[813] Any person who is not satisfied with the orders of the authority can appeal to the appellate tribunal and if still he is unsatisfied then he can go to the Supreme Court.[814][815]

PENALTIES

The bill provides for imposition of penalties for processing or transferring personal data in violation of the provisions of the bill, with a fine up to Rs. 15 crore or 4% annual turnover of the fiduciary, whichever is higher[816]. The re-identification and processing of de-identification of personal data without consent is punishable with imprisonment of up to 3 years or fine or both.[817]

[811] Section 25, The Personal Data Protection Bill, 2019
[812] Section 26, The Personal Data Protection Bill, 2019
[813] Section 42 (2), The Personal Data Protection Bill, 2019
[814] Section 67, The Personal Data Protection Bill, 2019
[815] Section 75, The Personal Data Protection Bill, 2019
[816] Section 57, The Personal Data Protection Bill, 2019
[817] Section 82, The Personal Data Protection Bill, 2019

ISSN: 2581-6349

EXCEPTIONS

The Bill provides with certain exceptional situations when the obligation of consent can be done away with such as medical emergency, legal proceedings or where state need to provide benefits to individuals. In addition to this government can exempt any agency from the provisions of the Bill in the interest of the national security and safety, public order or sovereignty.[818]

CRITICISM OF THE BILL

This bill has been revolutionary in the nature as it is a step forward towards protecting the data of individuals but it still lacks on certain aspects. Such as:

- The bill does not give idea as to who owns the data. Thus, the idea of data ownership is still unclear.
- Also, this bill provides a blanket privilege to the government to use and process the data without consent.[819]
- Also, the idea of data localisation raises concerns of surveillance and endangers the open nature of the internet.
- There is no definition of critical personal data in the bill. So, it is still unclear as to what all can be referred to as the critical personal data.
- There is lack of surveillance reforms.
- In case of any data breach, there is the provision for the fiduciary to inform the authorities but there is no provision to inform the individual in case of the data breach. Thus, there is no provision to notify the individual that his data has leaked.

REASONS FOR SHORTCOMINGS

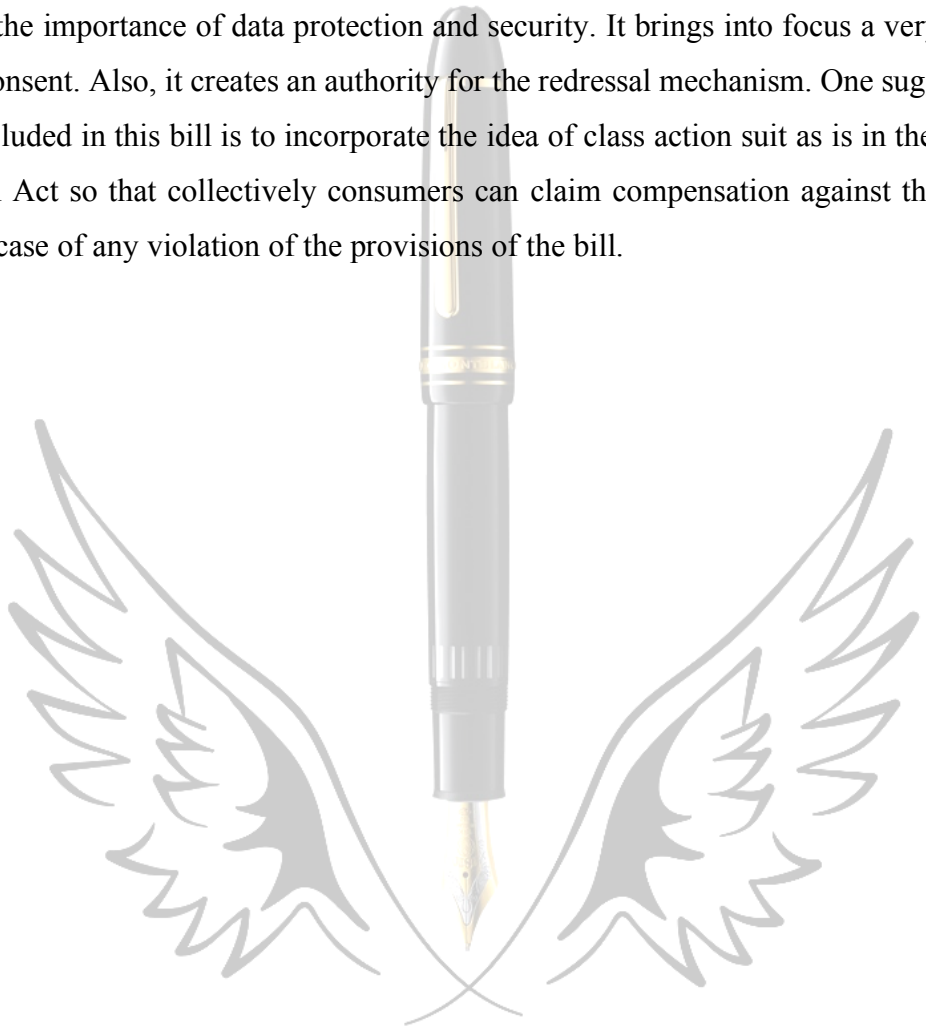
This bill provides a path forward in the way of creating such legislations for the protection of personal data but it also received a lot of criticism because of its shortcomings. One of the major factors for the lacunae is the lack of civil society participation in the process of making. The committee majorly comprised of all the governmental employees thus it did not have a vast idea from every field. Also, it had very weak public consultation and also had lack of transparency in its making.

[818] Section 35, The Personal Data Protection Bill, 2019
[819] Section 12, The Personal Data Protection Bill, 2019

ISSN: 2581-6349

CONCLUSION

Thus, this bill brought a new array of light I the Indian legislative practices by bringing into limelight the importance of data protection and security. It brings into focus a very important issue of consent. Also, it creates an authority for the redressal mechanism. One suggestion that can be included in this bill is to incorporate the idea of class action suit as is in the Consumer Protection Act so that collectively consumers can claim compensation against the corporate bodies in case of any violation of the provisions of the bill.



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IS MEDIATION A BETTER ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN INDIA?

- **PRATEEK MISHRA**

INTRODUCTION

The Justice delivery system in India is very much technical. Its procedures and structure cause delay in resolving disputes. This delay in justice delivery undermines the credibility of entire judicial system of the Nation. Due to this the people start settling disputes on their own, which leads to mob justice and it reduces the confidence of people in the 'rule of law'. To secure the 'rule of law' and people's belief in the Court we need a speedy justice system. But when there is already a huge pendency of cases in the Courts, it becomes more difficult to provide speedy justice to citizens through Courts.

In addition to the Courts the Indian Legal System have some other appropriate methods to decide disputes, such as arbitration, conciliation, Lokadalat, etc. These methods are known as Alternative Dispute Resolution and are less formal. They encourage disputant to communicate and participate in search for solutions, focus on the root cause of dispute and savings of time and money.

Mediation is one of these alternative methods of speedy justice system. In India it received legislative recognition through the Industrial Dispute Act, 1947. Under the Section 4 of the Act the Conciliation Officer was charged with the duty to resolve the dispute by mediating and promoting the settlement of Industrial dispute. The Indian Parliament also enacted the Arbitration and Conciliation Act 1996. Further the Parliament passed the Code of Civil Procedure (Amendment) Act of 1999 inserting Section 89 in the Code, providing for reference of cases pending in the Courts to Alternative Dispute Resolution. In this regard the Supreme Court of India has also constituted Mediation and Conciliation Project Committee in 2005, which later in 2005 started pilot project on judicial mediation in Tis Hazari Court in Delhi. Mediation is a voluntary process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. In this method a mediator do not impose a solution but creates a conducive environment in which disputing parties can resolve all their disputes. Mediation is tried and tested alternative method of dispute resolution. It has proved great success in various leading cities. Mediation is a structured process of facilitating specialized

communication and negotiation techniques in resolving disputes. In other words, mediation is a settlement process whereby disputing parties arrive at a mutually acceptable agreement.
The process of mediation begins with introduction of parties with the rules and with process, further proceeds with the joint and individual sessions and ends with the binding agreement of settlement. In this process, other than parties to dispute, various people take place; like- Mediator, Referral Judges, Lawyers, etc. Mediation is an informal process, which do not follow any strict or binding rules of procedure. In today's time mediation is much more satisfactory way for resolving disputes. There is no appeal or revision in a mediated case and all dispute get finally settled through free will of parties.

What is Mediation?

Protracted litigation is not in the interest of either party, not only due to the time and high economic costs involved but also because of the emotional cost associated with the public forum.[820] Mediation provides an alternative, which saves time as well as it is cost effective and it also enables parties to work together to solve disputes amicably. In mediation both parties play an active role in resolving the dispute, while in the litigation parties are not allowed for open dialogue or conversation. In addition to it several indirect costs of litigation such as time, the relationship, and loss of faith between parties, are to be paid by the parties. Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict of disputes with the consent of the participants and assists them in negotiating a consensual and informed agreement.[821] The most important characteristic of mediation is that it provides with a solution, which both the parties have agreed and not like a verdict imposed by a Court. In it both the parties are involved in suggesting possible solutions to the conflict. Mediation is based on the voluntary cooperation and good faith participation of all parties, the mediator cannot force the parties to resolve their differences but he can help the parties to reach a solution agreeable by both of them.

Mediation is voluntary and the parties retain the right to decide for themselves. In case the Court has ordered to parties to go for mediation or the terms of a contract provides for mediation, the decision to settle and the terms of settlement rest with the parties. Mediation is also a party centered negotiation process. It encourages the active and direct participation of the parties. Mediation is not governed by rule of evidence and rule of procedure. Mediation is

[820] Harry T Edwards, *Alternative dispute resolution: Panacea or anathema?* , 99 Harvard Law Review (1986)
[821] Anil Xavier, *Mediation is here to stay!* , Indian yearbook of International Law and Policy (2009)

a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them in negotiating a consensual and informed agreement. It can also be said as a confidential process of negotiations and discussions in which a "neutral" third party or mediator assists in resolving a dispute between two or more parties.[822]The mediation is based on the participation of all parties in good faith and therefore, the mediator cannot force the parties to resolve their differences. One thing we need to understand here is that mediation is different from counseling, therapy or advocacy. It focuses on the future and not on the past. In mediation the parties considers the solutions to resolve the conflict. Mediation does not supersede the available judicial relief neither it replace the need for legal advice when the rights of party in a situation are the concern.

Advantages of Mediation

As already discussed that mediation is a voluntary process and less formal. It is uses less time and is cost effective. In most cases participants reaches to agreement or they lay grounds for future communication. In a suit the Court grant only that relief which was sought but in mediation all the issues are being settled by the parties. Some of the advantages of mediation are listed below:

- Control: The parties of mediation have control over the terms of settlement
- Participation: The parties get opportunity to present their case in their own words and negotiate.
- Voluntary: Parties are free to reach out the settlement or opt out at any stage.
- Simple and Flexible: Mediation do not follow strict procedure of law and the scheduling according to each other let the parties do their day to day activities.
- Speedy and Efficient: Mediation follows informal procedure, which makes it much more speedy and cost effective.
- Fair Process and Confidential: It is impartial, neutral and independent.
- Communication: The mediation facilitates better and effective Communication between the parties and improves, restores and maintains relationships between the parties.
- Mutually Beneficial Settlement: It is the focal point of the mediation process that it benefits both the parties.

[822] *Ibid.*

- Creativity: In mediation process the parties can go for unprecedented solutions, which satisfy their interests.

The mediation need not to be viewed as a process only but as a way through which the people themselves communicates with other party and solve their dispute.

How Mediation process works: Stages and Techniques

Mediation are of two types, Court referred and Private. When a case is pending in Court and it appears to the Court that there exists elements of a settlement which may be acceptable by the parties, the Court would refer to resolve for mediation under Section 89 of the Code of Civil Procedure, 1908. In private mediation, qualified mediators help the people to resolve their disputes. The mediation process has specifically four stages. First Introduction, thereafter Joint and Separate sessions and then Closing.

Stage 1: This is the beginning of the mediation process therefore parties to the dispute are introduced and clarified about the process. The mediators develop support, gains confidence and motivate the parties. The objective of this mediation is also decided at this stage. The mediator commences with the opening statement. The professional ethics, which are to be followed, the mediator ensures that everyone is aware of them. The mediator provides all relative information to the parties, which ought to be provided, and then he confirms that the parties have understood the process.

Stage 2: Once the mediation started the mediator invites the parties to narrate their cases, explain their perspective and express their feelings. First the plaintiff explains their case then their counsel presents the legal issues involved in the case. Thereafter the defendant explain their case and then their counsel presents the legal issues. The mediator during mediation should encourage and promote communication and harmony between parties. After hearing from both parties the mediator summarize the facts. The mediator during hearing also identifies the area of agreement and disagreement of parties.

Stage 3: After the completion of joint session, the mediator may separately meet each party with their Counsel. In this way the mediator tries to understand the dispute at a deeper level and provide a forum for parties to further vent their emotions. In separate session parties may disclose confidential information, which do not wish to share with other parties. With the help of separate sessions the mediator get to know the reality and it understand the interest of the parties and their mood towards solution. At this stage mediator encourage the parties to generate options and find terms that are mutually acceptable.

Stage 4: The parties may reach to a settlement through the mediator or the negotiations may fail. Where there is settlement the mediator ensures that the terms of agreement are reduced to writing and parties signed it. Then mediator affixes his signature on the signed agreement and a copy of signed agreement is furnished to the parties. A signed and certified copy of agreement is sent to the referral Court for passing appropriate order in accordance with the terms of agreement. Where there is no settlement between the parties could not reached, the case would be returned to the Court and no report regarding the reason for non-settlement will be sent.

Mediation is just not a dispute resolution method but it is communication skill based method. A mediator, who has great command over his communication and convincing skills, can lead the dispute to settlement. Thus the techniques of mediation are important part of a mediation process. There are basically two techniques, which are followed during the mediation, one is facilitative and the other is evaluative.

A. **Facilitative style of mediation-** In facilitative mediation, a professional mediator attempts to facilitate the negotiation rather than making recommendations or imposing a decision on the parties. The mediator encourages parties to reach out the solution voluntarily. In this technique the mediators create an environment in which the parties work together collaboratively as problem solver. Thus the mediator's mission is purely facilitative.

B. **Evaluative style of mediation-** The evaluative mediation stands in contrast with facilitative mediation. In this approach the mediator gives his opinion on the case. His suggestions and recommendations are used as a tool of settlement. An evaluative mediator does not primarily focus on the interest of parties but more likely assists them on the legal merit of their argument and make fair determinations. Evaluative mediators are often experts in the area of disputes and are used in Court mandated mediation.

C. **Transformative style of mediation-** In transformative mediation the mediator tries to encourage the parties to the dispute to recognize each other's need and interest and resolve dispute in accordance to that. This approach of mediation is rooted in the tradition of facilitative mediation.

D. **Court mandated mediation-** In cases where the Court has referred the dispute to mediation it is known as Court mandated mediation.

As the time changes other techniques also evolves; like- Med-Arb, Arb-Med, E-mediation, etc. It seems all the mediation techniques are same but in reality they all are different approaches,

use of which depends upon the type of conflict. In mediation a trained mediator tries to help the parties in resolving the dispute but it is also based upon the method that he uses.

Why mediation is better ADR in India then others?

The less effectiveness of justice delivery system in India is the result of time consuming, laborious and cost effective process of Indian Courts. An acute lack of competent institutions capable of training adequate numbers of accomplished lawyers has resulted dearth of quality legal professionals.[823] The inherent inadequacies in the legal aid system in India have compelled prospective litigants to seek out a small clique of established lawyers. This in turn increased the workload of these lawyers, and has resulted in incessant delays and substantial increase in charges.[824] Due these factors many people undergo certain grievances and chose to resolve their disputes only as a last resort. While a dispute persists, parties choose not to approach the formal dispute resolution mechanism, as the only option they perceive is litigation. Additionally, there exists numerous structural barriers such as income, age and status that have rendered the Indian Courts away from a large segment of society. Another problem is that litigation is often regarded as the sole mode of dispute resolution. In such a disappointing condition the judicial system of India need transformation and it is also necessary to robust the alternative mechanism.

Mediation is not a new concept to India. Centuries before India had a system called *Panchayat*. The five noble persons called *Panch Parmeshwar*, with the assistance of elders in the Village used to resolve the disputes of their Village. Such kind of mediation is still in practice in various parts of India. This method of mediation is somehow different from today's mediation because in *Panchayat* the *Panch* have control over the proceedings over the settlement and most of the decision were based on the Religious texts, ethics and morality. Other than this there is also a process called *Lok Adalat,* which was an ancient method for dispute resolution. It reintroduce by the Legal Services Authorities Act, 987.

Today ADR includes arbitration, neutral evaluation, conciliation, mediation, JSM, Lok Adalat etc. Arbitration and neutral evaluation are adjudicatory forms of dispute resolution. Whereas Lok Adalat can be adjudicatory and non-adjudicatory, dependent on the Sections 19 and 22B of the Legal Services Authorities Act, 1987. But mediation is a non-adjudicatory form of dispute resolution. Mediation as an alternative dispute resolution method is informal in

[823] *Improving legal education in India,* The Hindu, September 29, 2016.
[824] Robert L. Kidder, *Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India,* 24(1) Law and Society Review182

ISSN: 2581-6349

nature and it does not follow the strict procedure of law. Alternative dispute resolution methods have been proved quick and efficient, especially arbitration and mediation.

According to a report on Court connected mediation shows how effective mediation can be. The Karnataka High Court referred 31441 cases, from 2011 to 2015, for mediation to Bangalore Mediation Centre, out of which 16379 cases were settled, 8606 cases were not settled and 4751 cases were not mediated due to various reasons. The Delhi High Court referred 13646 cases, from 2011 to 2015, to Delhi High Court Mediation and Conciliation Centre, out of which 7644 cases were settled, 6809 cases were not settled and 2040 cases were not mediated due to various reasons. The Allahabad High Court referred 11618 cases, from 2011 to 2015, to Allahabad High Court Mediation and Conciliation Centre, out of which 2855 cases were settled and 8298 cases were not settled.[825] The records show that there is a wide possibility of mediation to bring a boost in the dispute resolution mechanism.

The modus operandi of mediation makes it more acceptable then other modes of dispute resolution. The basic principle of mediation provides an opportunity to parties to converse and arrive at an amicable agreement, whereas other modes do not provide such an opportunity. The importance and faith in ADR can be seen from the Code of Civil Procedure (Amendment) Act, 1999, which inserted Section 89. The Constitutional validity of Section 89 was upheld by the Supreme Court in **Salem Advocate Bar Association, T.N. v. Union Of India.**[826] Apart from the Section 89 of Code of Civil Procedure, 1908, mediation is also recognized dispute resolution mechanism under the Industrial Disputes Act, 1947, the Companies Act, 2013 and to some extent in the Arbitration and Conciliation Act, 1996. The Supreme Court as an effective dispute resolution mechanism time to time to time to time accept the success of mediation, and therefore, the Supreme Court has created the Mediation and Conciliation Project Committee (MCPC) in 2005. This committee has conducted several training programs to train mediators and referral Judges. It has also conducted awareness programs. Many other related courses and programs to refresh experiences, learning and knowledge on mediation are being run for mediators.

The efforts done by the Parliament and the Supreme Court shows that mediation is the key to reduce the burden of judiciary. The present India is facing corruption, dowry death, rape, murders, terrorism, suicides, drugs which are more concerning offences in comparison to those which can be termed as disagreement between to parties. Due to the same thought the Supreme

[825] Vidhi Centre for Legal Policy, *Strengthening Mediation in India: A Report on Court-Connected Mediations,* December, 2016
[826] (2003) 1 SCC 49, (Para: 9,10 & 11)

Court have advocated the settlement of Ayodhya Babri case for the mediation. The Law Commission of India recommended in its 129th report that it should be made obligatory for the Court to refer disputes to mediation for settlement. The Supreme Court in **Afcons Infra Ltd. v. M/S Cherian Varkey Constructions**[827] held that all the disputes related to commerce, trade, contracts or even tortious liability could be settled through mediation. Following this in several other judgments the Supreme Court have favored the mediation in cases of such disputes. Even after so many efforts, the mediation did not reach to its maximum possible application. The reasons behind it are subject to consideration. The lack of awareness, lack of public confidence, the role of referral judges, the role of mediators or the role of lawyers in advising their clients are some of the causes of mediation not becoming a more preferential way of resolving the dispute in India.

RECOMMENDATIONS REGARDING IMPROVEMENT IN MEDIATION PROCESS

As we have observed in the above discussion, there are certain measures need to be taken for mediation to work in full potential in India. These measures are related to Institutional and management reforms as well as legislative reforms.

- **Quality mediators-** Well trained mediators are the basis of any settlements. Therefore there should be as many as possible training courses and programs to train quality mediators.
- **Comfortable infrastructure-** Infrastructure is one the most important aspect. There are not so many mediation centers available today. We need to construct mediation centers where people can sit, have board meeting and conferences.
- **Awareness-** People need to be informed about the efficacy and other benefits of the mediation. This can be done through the campaigns, press (electronic and print), social media and awareness camps in villages.
- **Role of lawyers-** A lawyer has fiduciary relationship with his client and it his duty to advice his client well. The lawyers if they thinks that the dispute of their clients can be resolved through the mediation then they should advice them for mediation, and they can also aware other lawyers about the mediation in whole.
- **Law school curricula-** The upcoming generation of Judges and legal practitioners is in the law colleges and universities. Mediation as a subject can be taught to them.

[827] (2010) 8 SCC 24

Renowned experts in mediation can directly be connected to them train them in the mediation practices and techniques.

- **Training of Judges-** There is a need to train and improve the understanding of mediation to the Judges. To make them convince the parties to go for the mediation in the cases where it is possible to settle dispute through mediation.
- **Incentives and remunerations-** The mediation practices are performed by very less members of Bar. To make more members opt for the mediation there should be provisions for a great amount to be offered. This can be done under the direction of the Court to ensure that such mediators get reasonable amount for investing their time and effort.
- **Autonomy-** The mediation centers can be under the supervision of the High Courts but the mediation process should be independent from the control of Courts and as well as the mediators. Being voluntary and informal is essence of the mediation process.
- **Financial support-** Mediation process as any other ADR process requires some financial assistance. The State and Central Government can create a mechanism to support the mediation.
- **Referral judges-** There should be some to legislative measures to prescribe for the reference of matters for mediation. The cases should be categorized for mandatory mediation and discretionary mediation for the referral by judges. The judge then should refer the cases in accordance with the law.
- **Ethics-** A code of conduct, transparency and accountability of mediator must be prepared. The decorum of the floor of meetings should be taught to the mediators and must be explained to the parties.
- **Enforcement-** The agreement of settlement should be enforced through the Court in accordance with the terms so agreed, to such extent as much legal, moral and valid.
- **Private mediation-** The private mediation should also need to be promoted. The family disputes are need to solved through this type of mediation. Well regulated and professionally conducted private mediation will definitely help the Court to reduce their burden. Also it should not be understood as counseling.
- **Panchayat-** They can be known as community mediation. There are always many issues in a village, which can be resolved within the village. Under the supervision of Administrative authorities some matters should be given to this kind of mediation.

There can be more suggestion when we will try to systemize it as the recommendation. There is already a good system of mediation exists, we only need to improvise it on some points. In India, which is not unknown to mediation, only some modern techniques, structure, functions and administration need to be added.

CONCLUSION

India has huge potential to become a great leading nation across the globe. India is a big economy with second largest population and biggest democracy. This makes a country with all necessary sources. But still we are under the category of developing country even after the independence from British. There can be many answers to this question. One the answer is underdeveloped judicial and legislative system. By saying this, it does not mean that India has lack of legal experts or imminent jurists or lawmakers. It means the problem lies with administration of law. Those who are responsible for the execution or enforcement of law do not perform their duty and dispute arises. However they cannot be blamed alone for the failure of execution of law. The parliament sometimes took too long to make legislation and how many cases are pending in the Courts in India we have already discussed. So the solution to all these problems do not arises by repeatedly counting the problem but we need to find it.

The Courts are overburdened from cases and somehow that too is the reason of underdeveloped India. To reduce this burden the Parliament and the Judiciary together need to find a way. Various Tribunals, Fast-Track Courts, Labor Courts, Alternative Dispute Resolution Mechanisms, Lok Adalat etc. are the one of the solution. The parliament as well as the Supreme Court of India understands the need of these justice delivery systems.

Mediation as the dispute resolution system can help beyond expectations. “Resolving conflicts; promoting harmony” is the core idea of mediation. A system, which is least formal, less procedural, time saving and also cost efficient, for parties to the dispute would definitely attract the parties to resolve their minor as well as major issues. Mediation needs only be promoted among lawyers and people. Mediation is much more effective then other modes of justice delivery systems. In the words of Joseph Grynbaum “An ounce of mediation is worth a pound of arbitration and a ton of litigation.”

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CONSTITUTIONAL AMENDMENT PROCEDURE IN INDIA AND USA: A COMPARATIVE ANALYSIS

- HEMENDRA SINGH

ABSTRACT

In this paper an endeavour has been made to examine various stages in the amendment procedures of Indian and US Constitution. The US Constitution provides a procedure which is more in conformity with the federal principles since states have been given an option to initiate proposals for amendments. On the other hand, Indian Constitution does not provide such option to states. Both the Constitutions uncover that Parliament is not the only institution having a role in amending the Constitution. Both the amending procedures include more than one phase which guarantees a proper check against the enactment of arbitrary and hasty Amendments. In both the Constitutions several significant provisions concerning the states have more rigorous procedure as compared to other provisions. US Constitution has given a key role to states both in the initiation and ratification of Amendments while Indian Constitution provides protection to states' interests under Article 368 by making special procedures for matters affecting states. Although both the amending procedures are not identical in nature but they have some key similarities. For example, both the constitutions provide adequate protection to states by making state participation in the amendment of the Constitution mandatory. This cure in the hands of states is one of the most effective means for remedying any arbitrary exercise of power by the central legislature and also safeguards federalism.

INTRODUCTION

The constitution is termed as the fundamental law of any country. Since it is a fundamental law the procedure to amend the same has to be different from the ordinary law. A constitution has a very special legal status as it sets out the basic framework and determines the essential purposes of different organs of any government. In India and USA, both the countries having a federal constitution, the constitution is supreme and it has been given a special status. Countries like Britain, where the parliament is the supreme, can amend the constitution by ordinary law making process, so it can be said that in terms of the amendment procedure the constitutional law stands on an equal footing with other laws in Britain.

Countries having a written and rigid constitution place the constitutional law on a different footing as compared to other ordinary laws. In these countries constitution is supreme in the sense that in terms of status it is placed on highest pedestal and all laws in force in the country get their validity and sanction from the constitution. As the life of a nation changes with political, social and economic changes taking place the constitution should also be changed to meet the needs of the society.[828] Recently, the Indian legislature realised the need for reservation on economic basis so it had to come up with special provisions for economically weaker sections of the country. The GST law was also introduced to meet the needs of changing time.

1.1.Nature of the 'amending process'

In a layman's understanding a constitutional amendment can be said to be an improvement, a revision or a correction to the original text. Amendment is to 'amend' or to 'change' the constitutional provision(s) usually by a special procedure enshrined in the constitution itself. The amending power under the constitution, also considered as the *constituent power,* can only be exercised by that body and in that method which is enshrined in the Constitution. This proposition finds support in Article V of the American Constitution and in Article 368 of our constitution.

1.2.Significance of the constitutional amendments

A constitution which was drafted in one era may become inadequate in another era. So there arises a need for some kind of mechanism which can adopt the constitution according to the changing needs of the time. It has been largely accepted that a constitution which does not provide means for change is left without any means of survival. The ideals and beliefs of the country also undergo changes with time so there is a need for inclusion of these ideals and beliefs in the constitution. One example is, India added 'socialist and secular' words in the preamble in 1976 by way of amending process. More than hundred constitutional amendments by Indian parliament show the need of provisions related to the amendment procedure in India. In United States the American Constitution has also undergone various significant changes from its very inception.

D.D. Basu speaks about the need of 'amending process' and goes on to say that the provisions related to the constitutional amendment is provided to secure orderly change in the constitution. These amendments seeks to provide remedy for the defects that are disclosed in the working

[828] Gregory A. Caldeira, *Constitutional Change in America: Dynamics of Ratification under Article V*, 15 PUBLIUS 29 (1985).

ISSN: 2581-6349

of the constitution or defects that occur due to the unforeseen circumstances which could not be guarded against at the time of the enactment.[829] Therefore, the task of finding out the gaps in the constitution is left to the legislature. The author is of the view that no one generation has a monopoly over wisdom. Humans are fallible but they do learn from the experiences and must be empowered to change the constitution as per the exigencies of the time.

Constitutional Amendments in India and USA

India and United States both have a federal constitution. The American amendment procedure is more in consonance with the federal principles as it provides to the states special methods for initiation of constitutional amendments. At the very outset it can be said that both the constitutions reveal that union parliament is not the only body which has the power to amend each and every provision of the constitution without the involvement of the states. Both the constitutions provide for multiple stages of approving any constitutional amendment which works as an inherent mechanism to ensure checks and balances against the hasty constitutional amendments.

In both the constitutions some of the constitutional provisions are subject to rigorous methods of amendment involving state consent. There are also some limitations provided in terms of amending key provisions of the constitution (In India, it can be understood by the 'basic structure doctrine'). The role of states in the amending process can be said to be a safeguard for the federal constitutions. States ensures that this power is not exercised in an arbitrary manner by the central legislature. Although both the amendment processes are not identical but they have some fundamental similarities in terms of providing ample protection when it comes to states' rights.

2.1.Modes of Constitutional Amendment

In India some scholars argue that there is only one mode of amendment and that is provided under Article 368. Whereas some argue that there can be two modes of amendment which are there. First is the formal method and second is the informal method of constitutional amendment. Formal method is the one which is provided in the Constitution under Article 368 whereas informal method can be said mean judicial interpretations. These scholars argue that, in such cases, although the constitutional text is not subject to any change but the meaning and the context undergoes a drastic change. Article 21 of the Constitution of India, by means of

[829] D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (2012).

series of the Apex Court decisions, has been given a wide meaning by the Indian Supreme Court.

The American Constitution deals with constitutional amendments under Article V of the constitution. United States of America also has two methods of constitutional amendment like India. As far as the informal method is concerned, the United States uses 'judicial creativity' instead of the phrase 'judicial interpretation' as a means of amendment. The American Constitution as we know is skeletal and not a detailed one. Being a brief constitution it gives a lot of scope for judicial creativity. The American Apex Court endeavours to adopt the constitution according to the varying time by providing the right interpretation of the constitutional provision.

The Apex Court of United States while dealing with first constitutional amendment,[830] related to freedom of speech, held that there can be no right without limitation. Therefore, the American Supreme Court had taken the task to elucidate the limitations on the exercise of freedom of speech. The first ten constitutional amendments or the American Bill of Rights have also been given correct interpretation by the Supreme Court.

2.2.The Amending Procedure

Article 368 of the Indian Constitution gives amending power to the parliament and it also provides for the procedure of a constitutional amendment. Article 368 provides that a constitutional amendment can only be introduced by way of a Bill in either house of the Indian Parliament. It basically means that the rules which govern the initiation, consideration and passing of other Bills are also relevant when it comes to amending Bills. This Bill is required to be approved by each House - either by simple or by special majority.

Simple majority here means that the Bill is mandatory to be approved by majority votes of the members who are present and voting in each house of the parliament. Special majority here means that the Bill is required to be passed in both the houses of parliament by a majority of total membership and by a majority of not less than 2/3rd of the members who are present and voting. Once the Bill is passed by each house of the parliament it has to be necessarily presented to the president for his assent.

In America the amendment procedure initiates with the 'proposal of constitutional amendment' introduced in either House of Congress. The proposal has to be assented either by a vote of two-third of each House of Congress or by a constitutional convention called by the Congress.

[830] Brandenburg v. Ohio, 395 U.S. 444 (1969).

The constitutional convention can only be called by the Congress upon an application of 2/3rd of the state legislatures.

It is pertinent to note that all the constitutional amendments in the United States have been initiated by the proposal approved by a vote of two-third of each house of the Congress. The second method, which is by calling the constitutional convention, was rarely used in actual practice. Although such a provision in the hands of the state legislatures ensures checks and balances and is in line with the principle of federalism.[831]

2.3.Ratification by the States

Article 368 of the constitution also grants a special status to some of the constitutional provisions. By special status we mean that these constitution provisions can only be amended after getting state ratification. This provision was added with a view to keep the separate existence of the states in federal structure. Clause 2 of Article 368 says that if the amending Bill tries to make any change in the Articles 54, 55, 73, 124 - 147, 162, 214 - 231, 245 – 255, Fourth Schedule, Seventh Schedule and Article 368 itself then that Bill cannot be presented to the President until the Bill is ratified by one-half of the states. The ratification is done by passing a resolution to that effect by the state legislatures.

In American constitution ratification by the states is essential after the initiation of proposal. The ratification of a constitutional amendment can be done by two methods provided under Article V of the American constitution. These methods are: (i) ratification by 3/4th of the state legislature; or (ii) constitutional convention of 3/4th of the states. It is the discretion of the Congress to determine the method of ratification. Once the ratification takes place the proposed amendment to the constitution becomes effective.[832]

2.4.Assent of the Constitution Head

In India the assent of the constitutional head, which is the president, has to be taken before the Bill gets converted into a constitutional amendment. The words used in Article 368 are 'shall be presented' undoubtedly means that the assent is mandatory and not only directory. It is also important to note that the Bill having been passed in accordance with Article 368 leaves no discretion to the President to reject the Bill. In light of the above statement it could be inferred that assent of the constitution head is a mere formality.

In United States as far as the assent of the constitutional head is concerned, there is no formal requirement as such. This is a unique feature of the American constitution. In light of the same

[831] Hugh Evander, *The Doctrine of Amendability of the United States Constitution*, 7 INDIANA L. REV. 457 (1932),
[832] William Marbury, *The Limitations upon the Amending Power*, 33 HARVARD L. REV. 225 (1919).

ISSN: 2581-6349

the initiation and the ratification of the Bill are the only essential constitutional requirements for any constitutional amendment to be valid. Once the amendment Bill gets the ratification of the states the Bill gets a life.

2.5.Final Adoption

In India after satisfying all the essentials of Article 368 which are: (a) initiation of Bill in either House; (b) passing the Bill by simple majority, special majority or special majority plus ratification by the half of the states (which depends on the nature of the amendment sought to be made); and (c) after getting the assent of the president, the Bill deemed to be finally adopted. The constitution of India, accordingly, stands amended.

On the other hand the United States constitution stands finally adopted on the date ratification of the states is given. Ratification is given by way of vote of three-fourth of the states or by the constitutional convention of the states. This indicates that the procedure adopted by India is lengthier as compared to the American procedure. Also, the American procedure seeks to limit the procedure to two important steps and gives due recognition and participation to the constituent units.

Limitations on the Amending Power

Under the Indian Constitution certain limitations are imposed on the amending power of the parliament to amend the Constitution. There are certain provisions of the constitution which are protected under different doctrines of law. These doctrines provide valid reasons for restricting the amending power of the Parliament or Congress. These doctrines are based on the preposition that the Parliament (Congress) and the Constituent Assembly cannot be placed at equal footing and be given same *constituent power*. Like Indian constitution the American constitution also has some inherent restrictions when it comes to the Amending power. One such limitation can be seen in the provisions related to the 'right of the states to equal suffrage in the Senate'.

3.1.Doctrine of Basic Structure: A limitation on Amending Power

It all started with the issue that whether fundamental rights under Part III can be modified using Article 368 of the Constitution. This question came up for first time in the landmark case of *Shankari Prasad* v. *Union of India,*[833] the court while dealing with the constitutional legitimacy of first constitutional amendment held that even part III can be modified by the procedure provided under Article 368. However, the Supreme Court overruled this decision in *Golak Nath*

[833] Shankari Prasad v. Union of India, AIR 1951 SC 458.

v. *State of Punjab*,[834] and laid down that the parliament has no power to modify part III of the Constitution.

"The principle of Basic structure thus developed in the historic Kesavananda Bharti case[835] wherein the Apex Court held that Article 368 do not grant power to the Parliament to alter the basic framework (structure) of the Constitution. Article 368 cannot be used to 'damage', 'destroy', 'abrogate' or 'alter' the basic structure or framework of the Constitution. Hence, the Golak Nath case[836] stands overruled after Kesavananda Bharti. It was also reaffirmed in the case of *Indira Gandhi* v. *Raj Narain*[837] and other later cases. The Supreme Court has time and again used this doctrine to save certain basic provisions of the Constitution. This has ensured that the power granted to the Parliament under Article 368 is not used in a way to abuse such power."

3.2.Express and Implied Limitations in America

As discussed earlier, the American Constitution also has some inherent limitations on the amending power. As far as the express limitations are concerned, the only limitation which the American Constitution provides is that "no state will be deprived of its equal suffrage in the Senate without its consent."[838] Implied limitations are provided by the Supreme Court in its judicial decisions. In National Prohibition case,[839] it was held by the Court that there are certain basic or vital provisions in the American Constitution which cannot, in any case, be modified by the procedure enshrined in Article V of the American Constitution.

It is argued that, Article V is merely a safeguard for correcting minor flaws which were left unnoticed. If ample power is given by way of this provision it would result in a 'constitutional revolution'. On the contrary, if we go through the decisions in National Prohibition case and *Laser* v. *Garnett*,[840] it can be safely concluded that the implied limitations as discussed earlier seems hypothetical. In light of the same the only limitation on the amending power under American Constitution is the express limitation provided under Article V of the Constitution.

CONCLUSION

[834] Golak Nath v. State of Punjab, (1967) SCR 762.
[835] Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461.
[836] *Supra* note 7.
[837] Indira Gandhi v. Raj Narain, AIR 1975 SCC 2299.
[838] George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICHIGAN L. REV. 213 (1920).
[839] National Prohibition Cases, (1920) 253 US 350.
[840] Laser v. Garnett, (1922) 258 US 130.

In this comparative study I have dealt with two amendment procedures provided in the respective Country's constitution. It is made clear that even though USA and India are democratic countries but their way of functioning, making laws and amending power are different as compared to each other. The Constitution of India has borrowed some features from other countries after testing their suitability to our country. It can be said that there are so many differences between the amending procedures among the compared countries that the similarities are less than the fingers. Almost every country's Constitution provides provisions for the constitutional amendments. These provisions become a need in light of the changes that occur in a dynamic society. Flexibility is, therefore, considered a good feature in any constitution. A constitutional amendment is also considered as the means of achieving social as well as political change.

In Constitutional Amendments the role of a state is very restricted in India but in America, the constituent units (states) have been given a key role. States in United States are given the power to even initiate any "proposal for amendment of the Constitution". But Indian states are not given this power in terms of initiation of proposal for amendment. Under the Indian Constitution an amendment which passes the test of Article 368 becomes a part of the Constitution only if the assent of the Constitutional Head is obtained. But in the United States of America, the Constitutional Head is not given this status and therefore provisions prescribing the assent of the President do not find any place in the American Constitution.

If we compare the two Constitutions, we will find that it is very difficult to amend the United States Constitution as compared to the Indian Constitution. The rigidity of the United States Constitution is evident from the fact that since 1789 around thousands of amendments were introduced in the United States Congress but only 33 could be adopted and sent to the states for getting ratification. Ultimately, only 27 amendments could pass.[841] Article 368 gives Indian Parliament supremacy in some matters to amend the constitution but then in some matters it necessitate approval by not less than one-half of the states. The notable point is that both in Indian Constitution and the United States Constitution no time limit has been provided for ratification.

Lastly, it can be said that the Indian Constitution is more flexible than rigid. This statement finds support in the fact that only a few of the Constitutional amendments require approval from the state legislatures and even then ratification by one-half of the states would suffice. The remaining provisions of the Indian Constitution can be modified by a special majority of

[841] Erwin Chemerinsky, *Amending the Constitution*, 96 MICHIGAN L. REV. 1564 (1998).

the Indian Parliament. Whereas, the United States has a rigid constitution and it can only be modified by the United States Congress by way of an extraordinary procedure enshrined in the United States Constitution for that purpose.

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FREE LEGAL AID: A RIGHT OF ACCUSED NOT STATE'S CHARITY

- **BHAVYA GUPTA**

ABSTRACT

The right to Free legal aid and equal justice has been enshrined under the Indian constitution and it is a toll to achieve just, fair and reasonable justice. This right to free legal aid has been given to citizens who fall under the particular criteria. This right can also be accessed under the Criminal procedure Code, 1973 where accused is provided with advocate at the expense of the State for his defense if he is not able to defend himself or to arrange advocate for himself. This article has focused upon the aspect where the judiciary has also pointed towards this and how this right should be utilized and applied. This is a fundamental and basic principle of democracy and rule of law. The right to free legal services is clearly an essential ingredient of "reasonable, fair and just, procedure" for a person accused of an offence and it must be held implicit in the guarantee of Art 21. It serves the principle upon which the constitution is based that is equality and justice in all frames that is social, economic and political. Through times it has become a mandatory provision through the judiciary. This right is very essential as it holds great value for getting justice from impartial, independent judiciary.

EQUAL JUSTICE & FREE LEGAL AID

The equal justice and free legal Aid in India is of recent origin[842] as the concept of free legal aid was not in the original constitution rather it was added through constitutional amendment. Legal Aid is really nothing else but equal justice in action.[843] The delivery of social justice is legal aid. The equal justice and free Legal Aid to the poor was inserted in Article 39-A of Constitution of India as one of the Directive Principles of State Policy. It promotes justice on the basis of equal opportunity which means everyone is entitled for free legal aid if that person fulfils the criteria.

An accused is also entitled to free legal aid.[844] The principle of Legal aid is a part of the Directive Principles of State Policy. And overtime, it has become a mandatory provision to be followed by the Courts, rather than just being a directive. Equality of justice should be given

[842] Rao, Bathula Venkateswara, The Process of Legal Aid in India, 65 (1993).
[843] Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar (1980) SCC 1 98.
[844] Khatri II v. State of Bihar (1981) SCC 1 627.

to everyone.[845] The necessity of legal aid has arisen because of agonising gap between the ideal of equal access availability of legal justice has reached almost break down point in our country. The reality is that law in our country is in the hand of rich people and has gone beyond the reach of poor. It has become discriminatory against them.[846] So, the concept of free legal assistance is required to serve justice to everybody.

It is a constitutional right given to every accused who is enable to engaged advocate and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and then State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.[847] The constitutional duty to provide legal aid starts from the time when accused is produced before the Magistrate for the first time and continues whenever he is produced for remand.[848]

It becomes not only the right of the accused to have free and competent legal aid for his defence for fair and free trial, but it becomes mandatory for the Court to provide competent legal aid to the accused in defence, when he is found disabled to procure service of a private Advocate for his defence or, in a case, where, he himself embarks upon conducting the trial, and who, is an ignorant, illiterate, unsophisticated villager or even a literate who is not a legally trained person, and more so, when he is going to be visited with minimum sentence of 10 years or to consider alternative of engaging services of lawyer under the concept and philosophy of 'amicus curiae'.[849]

Apart from sec 304 of Criminal Procedure Code, 1973 free legal right in criminal law is a human right. The founding father of the Indian constitution right from the beginning has followed the principle of equal justice which can be observed from plain reading of the preamble. Justice should be social, economic and political. Free and competent legal aid assumes higher degree of importance as it covers protective as well as preventive aspects. Every act of injustice will destroy the foundation of democracy and the rule of law if the legal assistance mandated by Articles 14, 21 and 39-A was not given to the indigent accused.[850]

[845] Indira Gandhi v. Raj Naraian (1977) SCC 2 159.
[846] Gangrade, K.D., Social Legislation in India, 265 (1978).
[847] Criminal Procedure Code, Section 304, 1973.
[848] Khatri II v. State of Bihar (1981) SCC 1 627.
[849] Dineshbhai Dhemenrai v. State Of Gujarat (2001) GLR 1 603.
[850] Sheela Barse v. State of Maharashtra (1983) SCC 2 96.

The State is held to be under a duty to provide lawyer to a poor man and it must pay to the lawyer as fixed by the Court.[851] Article 39-A is one of the Directive Principle of State policy. Part-IV of the Constitution of India "contains a list of directives and instructions to be followed by the government of the country irrespective of their political complexion. They reflect the ambitions and aspirations of the framers of the Indian Constitution regarding the welfare State in India based on social, economic and political justice. They contain the aims and objectives which are required to be achieved by the government. Therefore, these Directive Principles deal with positive duties cast upon the States to achieve them because they are fundamental in governance of the country. Thus the directives have been incorporated in the Constitution to supplement Fundamental Rights in achieving a welfare state in India based upon social, political and economic justice.[852]

Failure to provide legal aid to an indigent accused, unless it was refused, would vitiate the trial. It might even result in setting aside a conviction and sentence.[853] If there was no opportunity given to accused to defend him/ her then it will amount to unfair trial and fair trial is a fundamental principle and bedrock in criminal Justice administration and in functioning of judiciary. The Indian constitution has provided for judicial which is impartial and independent and the courts are given power to protect constitution and safeguard the right of citizen irrespective of their status.

The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society irrespective of their sides (complainant or accused). Public awareness, equal opportunity and deliverable justice are the most important factor due to which this act came into existence. The principal objective of NALSA is to provide free and competent legal services to the weaker sections of the society and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The objective behind free legal services for the poor is to ensure equal and uniform justice.

There is no justice unless there is a sure uniformity about it and it can be achieved through serving all citizens equally by providing equal opportunity to everybody to achieve justice.

[851] Madhav Hayawadanrao Hoskot v. State of Maharashtra (1978) SCC 3 544; Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar (1980) SCC 1 98.
[852] Bajwa, G.S., Human rights in India; Implementation and Violation, 230 (1995).
[853] Suk Das v. Union territory of Arunachal Pradesh (1986) SCC 2 401.

Legal aid is a movement that envisages that the poor have easy access to courts and other governmental agencies. It is a constitutional policy which is given to citizens and State is under the obligation to follow the same. Indian constitution has the concept of constitutionalism which means sticking and functioning as per the principle established under the constitution and India as a State is just following the same which eventually means that it is duty of the State and not its charity.

The focus of the legal aid is on distributive justice, effective implementation of welfare benefits and elimination of social structural discrimination against the poor. State is under the obligation to render effective justice through a uniform means which means everybody should be given a chance to speak which eventually is a natural justice principle. Providing legal assistance to accused who is poor means to follow the principle of natural justice i.e. providing everybody to present his/ her case and this can be achieved by providing legal assistance.

It is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, one would be provided legal aid at the expense of the State.[854] it is the public duty of the state to obey the rule of law and make rules to give effect to the provisions for legal aid to the poor, as given under CPC.[855]

Legal aid is an essential part of administration of justice. Access to justice for all is the motto of the authority. The Supreme Court in the case of *State of Maharashtra v.* Manubhai Pragaji Vashi[856] has widened the scope of the right to free legal aid. The right to free legal aid is guaranteed fundamental right under art 21 and art 39Awhich provides equal justice and free legal aid. The State must encourage and support the participation of voluntary organization and social action group in operating the legal aid programme.[857] If the accused does not have sufficient means to engage a lawyer, the court must provide one for defence of the accused at the expense of the State.

[854] Ajmal Kasab v. State of Maharashtra (2012) SCC 9 1.
[855] State of Haryana v. Darshana Devi (1979) SCR 3 184.
[856] *State of Maharashtra v.* Manubhai Pragaji Vashi (1995) SCC 5 730.
[857] Centre of Legal research v. State of Kerala (1986) SCC 2 706.

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RIGHTS OF ARRESTED PERSONS IN INDIA

- **TEJASI KULKARNI**

In a free democratic society like India, law is impelled by the individual freedom of each person. The law does not tolerate the detainment of any individual without lawful authorization. This individual freedom granted, is also a fundamental human right recognized by the United Nations in its Universal Declaration of Human Rights. On the same note as the United Nations, the Indian laws also give crucial importance to this fundamental human right, under various statutes.

Wrongdoers are arrested for the offence committed by them, but are innocent until proven guilty. This forms the base of the Indian Legal System. It believes that even when the guilt of a person is proven; it does not change the fact that he/she is a human being. The hypothesis behind such rights guaranteed to an arrested person is that; the state has a lot of resources which supplement prosecution. This might result in misuse of power leading to unlawful or arbitrary arrest. The person arrested; guilty or not; has to be protected against the whimsical acts of the state.

WHAT IS MEANT BY 'ARREST'?

The Indian Laws do not provide a compiled definition of the word arrest. Over the time, its meaning has been established by different precedents. According to the Farlex legal dictionary, the word arrest is described as, "*a seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge*." The word was first defined in 1962 in the case of *R. R. Chari v. State of Uttar Pradesh*[858], as the act of being taken into custody to be formally charged with a crime. It further stated that, in the constitutional sense, it meant the seizure of an individual. In the case of *State of Punjab v. Ajaib Singh*[859], the court laid down that, "arrest is the physical restraint put upon an abducted person in the process of recovering and taking that person into legal custody with or without any allegation or accusation of any actual or suspected commission of offence."

[858] 1962 AIR 1573
[859] 1953 AIR 10

With the passage of time, the legal definition of the word 'arrest' has evolved and has taken several shapes. But the basic elements still remain the same.

ELEMENTS OF ARREST

The key elements necessary to constitute an arrest were laid down by the Madras High Court in the case of *Roshan Beevi v. Joint Secretary to the Gov. of Tamil Nadu*[860]. They are:

- There must be an intention to arrest under legal authority.
- There must be seizure or detention of an individual.
- The individual must be in the lawful custody of the arresting authority.
- Actual confining of the person and not just oral declaration of arrest.

TYPES OF ARREST

Under the Indian laws, arrest is of two types:

a. Pursuant to a warrant by the Magistrate.
b. Arrest without such a warrant.

The rights available to the person arrested are same under both types and article 22 (2) of the Indian Constitution mandates the arresting authority to present the arrested individual before the nearest magistrate within 24 hours of his arrest; excluding the time taken for the journey from the place of arrest to the magistrate and no such person shall be detained in custody beyond the specified period without the authority of the magistrate[861].

TYPES OF RIGHTS AVAILABLE TO AN ARRESTED PERSON

The rights available to an arrested person can broadly be divided into two categories:

- Rights during the time of arrest.
- Rights during trial.

Let us now individually focus on each of these rights.

1. <u>RIGHT TO KNOW THE GROUNDS FOR HIS/HER ARREST</u>
   - Pursuant to section 50 (1) of the Cr.Pc, an accused being arrested by the competent authority, without any warrant, has an undeniable right to know every detail of the offence he/she is being arrested for. The authority making the arrest is duty bound to furnish the accused with such details.

[860] 1984 (15) ELT 289 Mad
[861] State v. K. N. Nehru, 2011

- Section 50(A) requires the arresting authority to inform a friend or relative of the person being arrested, of such arrest. The authority should also let the arrested person know that he has a right to inform any of the family members, friends or relatives regarding the whereabouts of the arrest.
- Section 55 of the Cr. P.C. confers upon the arrested person, a right, to be informed of the written order against him, supplementing the arrest. Along with this, the offence as well as the reason for arrest must be made clear. If not, the arrest is illegal.
- In cases where the arrest is being made under a warrant, section 75 of the Cr. P. C. declares that, the content of the warrant must be specified to the arrested person by the person making such warrant, or show the person being arrested, his warrant. In case if the notification of the substance of a warrant is not made, the arrest stands unlawful.
- Upheld in benchmark cases like *Joginder Singh v. State of UP*[862] and *D. K. Basu v. State of West Bengal*[863], the constitution of India recognizes this under article 22(2)[864], stating that the arrested person be informed of the grounds of his arrest as soon as it is possible. This has been given the tag of a fundamental right too.

2. RIGHT TO BE PRODUCED BEFORE THE NEAREST MAGISTRATE WITHOUT UNNECESSARY DELAY

- Whether the arrest is being made under a warrant or otherwise, the arresting authority is prescribed by law to present the arrested person before the nearest judicial magistrate without needless delay. This is provided in section 56 of the Cr. P.C.
- Section 76 states that, the arresting authority is required to present the arrested person before the magistrate within 24 hours of his arrest, excluding the time needed for travel, from place of detainment to the magistrate court.
- This is enshrined under article 22 of the Indian Constitution as a fundamental right.

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[862] 1994 AIR 1349

[863] 1997 (1) SCC 416

[864] *No person who is arrested shall be detained in custody without being informed, as soon as possible, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.*

- If the arresting authority fails to present the arrested person within 24 hours of arrest, it shall be held guilty for wrongful detention.

3. INFORMATION ABOUT BEING RELEASED ON BAIL
   - Section 50 (2) requires that, if a person has been arrested without a warrant for an offence which is not non-cognizable, he/she must be provided full information about his entitlement to be released on bail, so that he can arrange for sureties on his behalf.
4. NO UNNECESSARY RESTRAINT
   - The Cr. P.C., vide section 49 says that, There should be no more restraint than is necessary to prevent escape, i.e. there should be, if necessary, use of reasonable force for the purpose; but there must be an arrest before a person is kept under any form of restraint. Restraint or detention without arrest is illegal.
5. SEARCH OF AN ARRESTED PERSON
   - Personal search of an arrested person is permitted by section 51[865] of Cr. P.C. With regard to the provisions of this section, reference may be made to Article 20(3) of the Constitution of India, which guarantees the accused against self-incriminating testimonial compulsion. Although the accused cannot be forced to produce any evidence against him, he or she may be seized by a search warrant under the legal procedure from the custody or person of the accused. It is also worthy to note that the section 51 (2)[866] clearly provides that in case of the arrested person being a female, she has to be strictly searched, in person or her custody, by a female officer only.
6. RIGHT TO BE EXAMINED BY A MEDICAL PRACTITIONER

[865] (1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the Person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail, the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing- apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

[866] (2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

- Section 54 enumerates this right and states that, an arrested person can be medically examined by a qualified person on his request. When the arrested person, Whether on charge or otherwise, alleges at the time when it is brought before the Magistrate or at any time during which he is detained in custody, that the examination of his body will provide evidence that would disprove the commission of the offense by the person accused or would establish the commission of the offense by any other person against its body. The magistrate can order for the examination of his body by a registered medical practitioner.

Some rights with the arrested person during the process of trial are:

1. RIGHT TO REMAIN SILENT
   - Originating as a part of the common law, right to remain silent or right against self-incrimination states that courts or tribunals of law should not believe or be encouraged to believe; by parties or prosecution; that a person is guilty, merely because he chooses to remain silent over certain questions. As presented by the Justice Malimath Committee, this is an essential element in a society where anyone can be arbitrarily held guilty for any charge.
   - In the Indian law sphere, this right is guaranteed by article 20(3) of the Indian Constitution, which states that no person, accused of an offence, shall be compelled to be a witness against himself. This was reiterated in the case of *Nandani Sathpathy v. P. L. Dani*[867].
   - With the evolution of technology and introduction of newer ways of getting the truth out of a person, like, Narco analysis, Brain mapping and detector test, the Supreme Court held that these are against the spirit of article 20 (3) of the Indian Constitution.
   - It was for the purpose of protecting the accused that a clause is contained in the Indian Evidence Act, which says that the statements made to the police are not admissible in the courts of law.
2. RIGHT TO A FAIR TRIAL
   - Article 14 of the Indian Constitution confers upon the people a right to equality before law and equal protection of law. following this spirit, the Cr. P.C makes it a necessity that the trial should be carried out in an open court because every

[867] 1978 AIR 1025

individual has a right to a 'fair trial' and closed door trials can instill a feeling of impression within the mind of the parties.

- In certain circumstances, where open court trials are not at all a possibility, the court proceedings should be held in camera.

3. RIGHT TO A SPEEDY TRIAL
   - Though this right is not exclusively mentioned in the Indian Constitution, this was established by the apex court in the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*[868], that the investigation in any trial should be conducted as expeditiously as possible without any unnecessary delay.
4. RIGHT TO CONSULT A LEGAL PRACTITIONER
   - Every individual who is captured has a right to choose and consult a legal practitioner of his choice. This right has been mentioned in article 22(1) of the Constitution of India. Further, section 50(3) of the Code of Civil Procedure also crowns the accused with the same right.
   - It is also stated in law that, this right begins from the time he/she has been taken into arrest. This setup; accused meeting his lawyer; can happen within the sight of the police officer but has to happen beyond the scope of his listening ability.
5. RIGHT TO FREE LEGAL AID
   - It is stated by the Indian Constitution that in cases where the accused is unable to hire a legal practitioner of his choice, due to any probable reason, the state is under constitutional mandate to provide him with a legal personnel to ensure a fair trial.
   - This was first enshrined in the case of *Khatri v. State of Bihar*[869].

LANDMARK CASES

1. *Nilabati Behara v. State of Orissa*[870]
   - It was held by a three Judge bench of the Supreme Court that, "It is an obligation of the State; to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody.

[868] 1979 AIR 1369

[869] 1981 SCR (2) 408

[870] (1993) 2 SCC 746

ISSN: 2581-6349

- It was further also established that, the precious right granted by Article 21 of the Constitution of India cannot be refused to convicts, under trial or to any prisoners in detention, except in compliance with the process laid down by law.
- The police or prison authorities have a great responsibility to ensure that the citizen in custody is not deprived of his or her right to life. His liberty, in the very nature of things, is circumscribed by the very fact of his confinement, and therefore his interest in the limited liberty left to him is rather precious.
- The duty of care on the part of the State is stringent and does not allow any exceptions. The wrongdoer shall be responsible and the State shall be liable whenever the individual in custody of the police is deprived of his life, except in compliance with the protocol set down by statute.

2. *Joginder Kumar v. State of UP*[871]
   - The problem before the three judge's bench was 'whether the private interests of a person superseded the security of society.' In consideration of the rise in violence and civil rights abuses by means of illegal detention, the Hon'ble Court found a way to find a compromise between the two. It was stated that a practical solution to the issue was necessary.
   - It was believed that an arrest should not be made merely because some particular authority was bestowed upon a police officer. There remained a difference between the power of arrest and the justification for the exercise of that power.
   - The mere allegation of an offense is not a good enough reason to arrest the person. Similarly, a reasonable belief is not sufficient for a citizen to be detained by a police officer, keeping in mind the constitutional protections accorded to the individual. It was also held that Articles 21 and 22(1) of the Constitution should be preserved and accepted as such.
   - In addition, the Third Report of the National Police Commission was referred to which mentions power of arrest as one of the main sources of corruption in the police and suggested that an astounding number of arrests (almost 60 per cent) were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 per cent of prison costs.
   - Furthermore 11 guidelines were laid down by the court of law which would be strictly adhered to in all cases of arrest and detention.

[871] 1994 AIR 1349

ISSN: 2581-6349

CONCLUSION

The great political philosopher Bolingbroke once said, "Liberty is to the collective body, what health is to every individual body. Without health no pleasure can be tasted by man; without Liberty, no happiness can be enjoyed by society."

In spite of the various provisions of the Cr. P.C and the Indian Constitution, the power of arrest vested upon the police is largely misused. India faces a huge problem of illegal arrests as well as custodial deaths that are largely caused by illegal arrests. Such issues contradict both the content of Article 21 of the Indian Constitution and the basic human rights that are open to us under the Universal Declaration of Human Rights. Very recently we have seen the death of two men in Tuticorin; father and son; in police custody. The arrest had been made owing to the fact that they had kept their shop open for 15 minutes past the scheduled time for closure amid the COVID-19 lockdown. The two were tortured by the police men and eventually killed. This shows nothing but sheer abuse of power by the police personnel.

It is the obligation of the police to ensure privileges to the society, but over the period of time we have encountered several instances where the opposite behavior has been showcased by the officials. There have been endless reports on custodial brutality in the past decades. This is nothing but clear denial to the arrested people, of their rights. Along with this, the stipulations issued in various cases are also not being held to. This will lead to nothing but a sense of fear from the police men, whose duty is to make the society a safer place to dwell in.

There is a need of the hour to seek full enforcement of the regulations and recommendations given, which would undoubtedly yield positive outcomes, and will hopefully serve to minimize the amount of unlawful arrests and the subsequent custodial deaths.

ISSN: 2581-6349

OVERVIEW OF SHIP DISMANTLING INDUSTRY IN INDIA

- APOORVA CHANDRACHUR

INTRODUCTION

When a ship surpasses its expected life and no longer is in operation, the shipowner attempts to reclaim its expenditure from the market value attributed to the ship's remains in the form of scrap metal. The Ship recycling industry highlights both the potentials and the risks of an ever more globalized world. To a certain extent, shipbreaking can be called a "green" industry since almost a hundred percent of the ship is being recycled.[872] The OECD study on the scraping of ships in 2001 stated that "*Vessel demolitions eliminate from the fleets huge quantities of obsolete tonnage, recycles most of the shipbuilding products and is a significant employer in the major ship breaking industry*."[873]

The recycling of ships is a labor-intensive industry, an essential steel supply for construction at a fair price, but shipbuilding is considered to comprise of a hazardous, environmentally harmful process. Nevertheless, many of the global shipwrecking events take place on beaches with a total absence of infrastructure, manual work by labor force intensively and are often discrete of environmental issues.[874] With time there has been an increasing debate concerning the scrapping of vessels in developing nations and the environment and public health implications of such practices.

Given the emerging trends in the ship breaking industry, potential standard guidelines for safety measures in the sector is one of the main topics disputed in International Forums. Such monitoring mechanisms are not anticipated over the coming years, although a range of steps and interventions may be done in order to handle the challenges more efficiently.[875] Accepting these guidelines and initiatives would, therefore, rely on developing countries' ability to see through the financial advantages that the ship recycling sector may offer.

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[872] Where do the, International Federation for Human Rights (2020), https://www.fidh.org/en/region/asia/ bangla desh/Where-do-the-floating-dustbins-end (last visited July 8, 2020).

[873] Report on Ship scrapping, Directorate for Science, Technology and Industry - Maritime Transport Committee of the OCDE, September 2001, DSTI/DOT/MTC (2001)12, p. 6.

[874] Ilo.org (2020) ,https://www.ilo.org/wcmsp5/groups/public/---edprotect/---protrav/---safework/documents/ pub lication/wcms _110357.pdf (last visited July 4, 2020).

[875] Shipbreakingplatform.org (2020), https://www.shipbreakingplatform.org/wp-content/uploads/2018/11/Sustaina lytics-Shipbreaking-Report-April-2013.pdf (last visited July 8, 2020).

OVERVIEW OF THE SHIP BREAKING INDUSTRY

- **THE SCRAPPING MARKET**

As per the past trend the nation who manufactured the ships used to do the recycling work of such vessels once they are not useful anymore.[876] Throughout most of the 1970s, ship scrapping sector shifted to South and Taiwan's shipyards, then in India, Burma, Pakistan, and China.[877] Shipbreaking activities have now been decreased to a minimum in the West. Across Europe, there are several small fishing ships and other small boats that are presently dismantled, but only Belgium, Italy, and the Dutch that have minimal dismantling ability.[878] Turkey is the only Participant of the Organization for Economic Co-operation and Development (OECD) that can scrap greater amounts of tonnage and dismantling of huge vessels.

There have been four major forces behind the ship recycling industry's transition from the developed West to Asia. Firstly, the inflated expenditure for the processing of ships in certain countries seemed higher because of the introduction of tougher environmental regulations in the developed world. On the flip side, the emerging ship scrapping countries are not adequate or unenforced by environmental regulation. The second factor is Asia has access to cheaper staff, which considerably reduces their expenses. The third factor is high demand and more supply needed in the shipbreaking countries for scrap metal, and there is a second-hand sector for parts originating from containers.[879] Hence, the selling of material and equipment acquired from the scrapping phase, ship recycling makes a good amount of income. Last but not least, the coasts of the Asian nations are suitable to scrap vessels as the tides enable the ships to drive straight up on the shores and thereby discourage docks from being required. These allow Asian scrap yards to make money out of defunct vessels.[880]

THE PROCEDURE OF SHIPBREAKING

[876] Dodds, D., Breaking up is Hard to Do: Environmental Effects of Shipwrecking and Possible Solutions Under India's Environmental Regime, Pacific McGeorge Global Business & Development Law Journal, Vol. 20, 2007, p. 215.
[877] Langewiesche, W., The Shipbreakers, The Atlantic Monthly, Vol. 286/2, 2000, p. 33.
[878] COM (2007) 269, p. 6.
[879] Ship recycling in Alang, India (2020), https://safety4sea.com/ship-recycling-in-alang-the-changing-scenario/ (last visited July 8, 2020).
[880] Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships adopted by the Sixth Meeting of the Conference of Parties to the Basel Convention on 13 December 2002, pp. 29-30. (Hereinafter "Technical Guidelines").

ISSN: 2581-6349

In the ship scrapping business, there are two options available to the shipowner. One choice he can make is to directly sell the ship to the dealer in the recycling facility. During this condition, the owner is commonly obliged to ship the vessel to the scraper. An alternative to this is to sell the vessel to a cash buyer, who then offers it to the ship breaking agent. Brokers are most frequently employed to operate to handle the transaction between parties.[881] These are common arrangements between scrapping, although they are seldom used.[882]

The purchaser of a defunct ship pays a price per Light Displacement Tonnes (LDT)[883], which is essentially equal to a vessel's steel weight. A segment of a vessel that is constructed from steel differs, although the steel quantity in certain vessels is roughly ninety percent. LDTs are used as the metric that gives a reasonable estimate of the material amounts that can be produced when the vessel is demolished.[884]

The price charged by Asian shipbreakers per LDT differs due to variables like demand and availability in the industry, the size of the container, steel quality and quantity, on-board machinery, and domestic duty on tonnage scrapping. Whether or not the toxic materials on the container impact the price is questionable.[885] The scrap yards' quality varies between the five largest ship-breaking regions. Dock-like facilities have been used in China. Lack of these services results in ships pulled ashore at the beach. This is called Beaching. In India, Bangladesh and Pakistan beaches are mainly used. Here, the high tides help the vessel to be fixated in proper high shore and make it more accessible for the workers. At the shore, workers break the ship piece by piece.[886] To smash the ship's steel into portable pieces, basic devices, including gas torches and iron cutters are used.

Wood and glass wool and hardware, like fridges, television and electric motors, are assembled in addition steel.[887] Tools and materials from a disassembled vessel could either be offered for sale, rebuilt, or reprocessed. Fully intact steel and untouched oil, are manufactured again and recycled equipment is sold in the local markets. Recycled Scrap steel is mostly used in the steel

[881] Section 2.5 to 2.7, Industry Code of Practice on Ship Recycling, developed by ICS and other industry organisat ions, (2001), www.marisec.org/recycling (last visited July 7, 2020).
[882] See Gorton, L., Problem i samband med försäljning av fartyg till upphuggning, MARIUS, No. 208, 1994 ,p. 289.
[883] Shipbreaking in OECD, Working Report No. 18, 2003, Danish Environmental Protection Agency, p. 14., www2.mst.dk/common/Udgivramme/Frame.asp?http://www2.mst.dk/Udgiv/publications/2003/87-7972-588-0 /html/default_eng.htm (last visited May 14, 2020).
[884] Mikelis, A Statistical Overview of Ship Recycling, p. 2.
[885] COM (2007) 269, p. 5.
[886] Sawyer, p. 546.
[887] See the list in: Note on Shipbreaking, issued by India's Supreme Court Monitoring Committee on Hazardous Wastes, www.scmc.info/special_issues/note_on_shipbreaking.htm(last visited July 4, 2020).

sector as a raw material. For example, Bangladesh lacks domestic iron and thus relies on ship metal for steel factories in the country. Ship recycling proves to be a significant resource for raw material.[888]

INTERNATIONAL LEGAL REGIME PERTAINING TO THE SHIPBREAKING INDUSTRY

1. BASEL CONVENTION

The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989 ('Basel Convention')[889] is the first detailed international environmental protocol for the control of toxic waste products. The Basel Agreements find all transboundary transfers to be unlawful when it is performed without agreement or breach of the "prior informed consent" principle which requires the importing state to consent to the acceptance of hazardous waste in writing to the exporting state of such waste.[890] The convention directs the states to develop and achieve sound management of environmentally hazardous waste.[891]

The process of ship recycling was not the ultimate goal of the convention which created technical difficulties, with regard to the application of the definition of "waste" and "state of export" laid down in the Convention. Employers in the ship breaking yard started utilizing the loophole and stopped announcing their intention to send recycling ships to departure ports from which ships are sailing, but to international waters or territorial waters where their vessels are to be scrapped so as not to be bound by the clause. The breakdown of ships has been a polluting practice, mostly because the effects of dismantling are not taken into account by ships while manufacturing it.[892] In December 2005, the IMO 24th Conference approved a decision insisting on the MEPC to create "*a new, legally binding mechanism for the processing of vessels" to regulate the manufacturing of vessels, the design, development and make sure the entire process is environmentally sustainable*".[893] The Hong Kong Convention or the Hong Kong

[888] Sawyer, p. 547.
[889] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989, 1673 U.N.T.S. 126 ('Basel Convention').
[890] Basel Convention, Art. 4(1)(c).
[891] Basel Convention, Art. 9(1).
[892] Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, May 19, 2009, SR/CONF/45.
[893] See IMO Resolution A. 980(24), Doc A. 23/Res. 980 (February 3, 2006).

International Convention for Safe and Environmentally Friendly Ship Recycling was written down and implemented in Hong Kong.

2. HONG KONG CONVENTION

This Convention sets out how to scrutinize and certify ships[894] and authorize recycling facilities[895]. Further, it requires states to prohibit and/or limit the installation and use of dangerous materials as listed in Annex 1 of the Convention relating to ships flying their flags or in ports, ship repair yards, or offshore shipping facilities.[896]

Countries must impose penalties, on the ships and shipbreaking facilities for contravention of the Convention's requirements.[897] The rules appended to this Convention often contain a description of the various provisions which must be complied with, e.g., a schedule on the disposal of boats, the existence on board the vessel of inventories of dangerous materials, etc. Nevertheless, there have been critiques of the Hong Kong Convention's divergence from numerous existing concepts of environmental law and trade law. For example, the 'prior informed consent' requirement was diluted which was a sine-qua-non for the export of dangerous substances according to the Basel Convention.[898]

Even the principle of polluter's pay is not being stipulated like the shipowner is not liable to meet the obligation for pre-cleaning of ships neither he is liable to bear the cost arising out of the effluents released during the ship voyage.[899] The technique of the process of beaching is not being prohibited by nations, this necessitates to practice a safe and effective ship breaking procedure best suited as per the region.

NATIONAL FRAMEWORK GOVERNING SHIP DISMANTLING INDUSTRY

India had first witnessed concerns regarding ship dismantling when two heavily toxic French vessels were dispatched to India for dismantling of ships. The dispute emerged when a French air carrier named Clemenceau commenced for the dismantling process to India.[900] A conflict

[894] Hong Kong Convention, Art. 5.
[895] Hong Kong Convention, Art. 6.
[896] Hong Kong Convention, Reg. 4.
[897] Hong Kong Convention, Art. 10.
[898] Saurabh Bhattacharjee, From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back Tradelawdevelopment.com, (2020), http://www.tradelawdevelopment.com/index.php/tld/article/view/1%282%29%20TL%26D%20193%20%282009%29/22(last visited July 8, 2020).
[899] Hong Kong Convention, Reg. 17.
[900] Marcos Orellana, Shipping and Le Clemenceau Row, (2006), https:// www.asil.org/insights/volume/10/issue/4/ shipbreaking-and-le-clemenceau-row (last visited July 4, 2020).

was raised by a nonprofit organization named Greenpeace, to prevent the Clemenceau from dumping toxic wastes in the Indian waters.[901] In the case of Research Foundation for Science, Technology and Natural Resource Policy v. Union of India,[902] the Apex Court decided that the vessel should be barred from proceeding until further orders, and ordered a panel of professionals to assess its dangers. The ship was called back by the French Government before any actions could take place.[903]

In 2007, another French vessel, Blue Lady passenger line issue was brought before in the case of Research Foundation for Science, Technology, and natural resources policies v. The Indian Union. [904] Our Apex Court recognized several environmental principles in many environmental cases, such as the precautionary doctrine, the polluter pay norm, and so on. However, the Court disregarded and permitted the dismantling of the ship at the shipyard of Alang in this case.[905] The court had a justification for taking this stand by emphasizing that the ill effects of the environmental concerns would be equated by the commercial opportunities as anticipated. The court said that dismantling the vessel would provide employment to seven hundred laborers and produce a massive amount of steel which would be around forty-one thousand metric tons It should be observed that before the final judgment only, the Blue Lady was beached on humanitarian grounds because of stormy waters" – in reality, the court has faced complicit actions and can be assumed to be compelled to allow a ship break up.[906]

Nevertheless, to create a complete code for regulating the breaking business the Court took the extraordinary step forward. The Supreme Court released its recommendation providing various guidelines that seemed the best possible outcome for the scenario. The court stressed that a specific systematic plan was needed to specify the breaking process for each ship. The Court also set out guidelines for each phase of the shipbreaking process, as well as different clearings that needed to be put into place for health and safety purposes. Keeping in mind these

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[901] Greenpeace, Victory: Toxic Warship Clemenceau Turned Back to France, February 15, 2006, available at http://www.greenpeace.org/international/en/news/features/clemenceaushipbreakingvictory150206/ (last visited on July 4, 2020).

[902] Research Foundation for Science, Technology and Natural Resource Policy v. Union of India, WP (C) No. 657 of 1995, order dated 17-2-2006. See generally Research Foundation for Science, Technology and Natural Resource Policy v. Union of India, WP (C) No. 657 of 1995, order dated 14-10-2003 (the Court expressed concerns over the environmental damage caused by the shipbreaking industry and laid down guidelines for promoting safe ship-recycling).

[903] BBC News, French 'Toxic' Ship Returns Home, May 17, 2006, available at http://news.bbc.co.uk/2/hi/ europe/ 4988664.stm (last visited July 5, 2020).

[904] Research Foundation for Science, Technology and Natural Resource Policy v. Union of India, (2007)15 SCC 193.

[905] Frederico Demaria, Shipbreaking at Alang (Sosiya): An Ecological Distribution Conflict, eCologiCal eConoMiCs 9 (2010).

[906] Tesisenred.net (2020), https://www.tesisenred.net/bitstream/handle/ 10803/405364/fede1de1.pdf?sequence = 1&isAllowed=y (last visited Jul 8, 2020).

ISSN: 2581-6349

recommendations there was a formulation of the Ship Breaking Code, 2013 by the then central government.

SHIP BREAKING CODE, 2013 FROM WORKER'S PERSPECTIVE

The Code has identified the standard facilities that should be made available at yards to ensure worker well-being, such as-access of appropriate equipment, appropriate open space, adequate storage area for fire-fighting equipment, sandboxes, and water hoses, personal safety equipment, etc.[907] It also prescribes detailed guidance on the professional development of workers[908] and directs issuing identity cards as well as keeping records of the workers' details.[909]

The employer hiring workers in the shipyard as per the Code should arrange for appropriate respiratory equipment and primary assistance to reach the sealed areas of ships where there is oxygen deprivation or flammable environment.[910] Additionally, it specifies that hazardous substances such as asbestos are handled by highly trained workers. To avoid injuries that are prompted by the collapsing of the workers and the materials, the regulation specifies that employers should make sure there are proper fencing and barriers.[911] In consideration that most employees in shipbuilding yards are not educated, the Code includes the use of indications and warnings to alert staff about the danger.[912] It specifies that the employer shall enforce housekeeping infrastructure and eliminate all the waste in an environmentally friendly fashion to upgrade working standards.[913] The Code also includes the introduction, of a system called Occupational Health and Safety (OSH) keeping in check the standard dismantling activity by continual assessment, preparation, and operation.[914] The goals of OSH are to avoid work-related injuries and diseases in two ways: Firstly, by the development of emergency management measures[915] and secondly, by introducing a mechanism that involves reporting, recording, and notification of work-related accidents.[916]

[907] The Shipbreaking Code, 2013, ¶6.1
[908] The Shipbreaking Code, 2013, ¶5.2.5(iii), ¶6.1.8(a), ¶6.3.2(ix).
[909] The Shipbreaking Code, 2013, ¶6.3.
[910] The Shipbreaking Code, 2013, ¶7.15.
[911] The Shipbreaking Code, 2013, ¶7.13.
[912] The Shipbreaking Code, 2013, ¶7.16.
[913] The Shipbreaking Code, 2013, ¶7.11.
[914] The Shipbreaking Code, 2013, ¶7.2.1.
[915] The Shipbreaking Code, 2013, ¶7.4.
[916] The Shipbreaking Code, 2013, ¶7.5, ¶7.6, ¶7.7.

The Code also allows the Labor Secretary to ensure the minimum salaries of employees are dealt with by statute.[917] The Regulation makes it mandatory for the person who is hiring workers for shipbreaking activity to re-employ workers in the less risky jobs in the sector to secure the livelihoods of workers affected because of workplace accidents and disease. The Code regulates the employment conditions of workers by importing provisions from various labor protection legislation, apart from prescribing the Guidelines for the safety of the workplace.[918]

ANALYSIS OF THE GENERAL ISSUES FACED BY WORKMEN IN THE SHIP DISMANTLING INDUSTRY

1.THE OMISSION OF THE APPLICATION OF SIGNIFICANT LABOR LAWS

The Code applies the principles given in The Factories Act, 1948, without specifying the yard locations to meet any quantitative or numerical criteria as provided for in the Law.[919] Moreover, it does not refer to other significant workers' welfare regulations, such as The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 ('Inter-State Migrant Workmen Act') and The Trade Unions Act, 1926 ('Trade Unions Act'). One contention is that its application within the shipbreaking industry would be difficult without direct importation of rights under these Code laws, mainly because of the high numerical thresholds and definitional requirements to be met.

With this in mind, the Legislation must have explicitly entitled such workers of the standard rights in compliance with the Inter-State Migrant Workers Act.[920] The relevance of this Statute would provide the migrants employed in the shipbreaking industry with the required protections because they lack trade authority and power in an unfamiliar atmosphere while they are at work. The Code should, therefore, provide for a restriction on the employment of migrant workers who are not registered[921], the obligatory requirement to obtain a license for the

[917] The Shipbreaking Code, 2013, ¶6.2.1(i).
[918] The Shipbreaking Code, 2013, ¶6.12.2.
[919] The Factories Act, 1948, §2(m) (the Act defines factory as a premise whereon ten or more workers if the manufacturing process is carried out with the aid of power, or whereon twenty or more workers if the manufacturing process is carried out without the aid of power, are working).
[920] The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, §1(4) states – "It applies— (a) to every establishment in which five or more interState migrant workmen (whether or not in addition to other workmen) are employed or who were employed on any day of the preceding twelve months; (b) to every contractor who employs or who employed five or more inter-State migrant workmen (whether or not in addition to other workmen) on any day of the preceding twelve months" ('Inter-State Migrant Workmen Act, 1979').
[921] Inter-State Migrant Workmen Act, 1979, §6.

recruitment of such workers by contractors.[922] The contractors' obligation to issue workers with passbooks with details of the working period, basic salary rates, etc.;[923] the employer should be responsible to pay the displacement and journey allowances[924] and if he fails to pay the workers the principal employer should pay.

The lack of job security in the workplace is an addition to the issue of relocation, as the owners attempt to abandon employees overnight without fair justification. The absence of a trade union is a major cause behind the jeopardized work environment, leaves are not paid, unjustified deductions, and delay in the payment of wages.[925] Hence, it is advocated for the collective bargaining system to be set up that is given in the Trade Unions Act without any mandate of numerical headcount this would prove to be beneficial for this industry.[926] In efforts to progress the object of a trade union, the immunity of not being liable for civil suits should be given to formed trade unions because the act induced some other person to break a contract of employment, etc.[927] Additionally, to state punishment for criminal conspiracy with the consensus of members[928]as formulated by the Trade Unions Act.

2. EMPLOYMENT OF ADOLESCENT LABOR IN THE SHIP BREAKING INDUSTRY

Besides, the Code does not forbid the jobs of adolescent workers between fifteen to eighteen years old, in the shipbreaking yards, even after recognizing shipbreaking as a hazardous procedure.

Under Article 3 of the Minimum Age Convention, 1973[929], which states: "The minimum age of admittance to all kinds of jobs or jobs that by their definition or by the conditions under which they are done may jeopardize the health, welfare, and protection of adolescent shall not be less than eighteen years, there is a need for a prohibition of employment of adolescents in the toxic work environment. The employment of children under the age of fourteen in harmful

[922] Inter-State Migrant Workmen Act, 1979, §8.
[923] Inter-State Migrant Workmen Act, 1979, §12.
[924] Inter-State Migrant Workmen Act, 1979, §15.
[925] NGO ShipBreaking Platform, Dire Working and Living Conditions in Indian Shipbreaking Yards, (December 18,2014),http://www.shipbreakingplatform.org/platformnews-dire-working-and-living-conditions-in-indian-ship breaking -yards/ (Last visited November 4, 2020).
[926] Trade Unions Act, 1926, §4 states – "[...] no Trade Union of workmen shall be registered unless at least ten per cent or one hundred of the workmen, whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration: Provided further that no Trade Union of workmen shall be registered unless it has on the date of making application not less than seven persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected [...]".
[927] The Trade Unions Act, 1926, §18.
[928] Id., §17.
[929] Convention Concerning Minimum Age for Admission to Employment, June 19, 1976, C-138 I.L.O.

workplaces is not permitted under Article 24 of the Indian Constitution. The Child Employment Law, 2016 (Prohibition and Regulation) prohibits the involvement of children (under fourteen years of age) and adolescents (under eighteen years of age).

Given the rapid employment of adolescents and the danger to their lives and health in the ship-breaking industry, it is alleged that the Law must have included its interpretation of the meaning of child labor without waiting until national legislation tackles the issue and controls this industry.

3. HAZARDOUS WASTE CAUSING VARIOUS POLLUTION

The method of ship recycling produces numerous hazardous waste that contains asbestos, sprayers, heavy metals, paints, sludge, glazing, and ceramics. The vessel-breakers are accountable for the disposal of this material. The waste produced by the ship recycling yards must be adequately managed and disposed of. The ship dismantling method adds to water contamination and the resultant wastewater affects crop production. There have been growing concerns over oil spills that are caused by oil trade, this contaminates the groundwater resources. Noise pollution is yet another concern, especially for the residents in the neighboring shipyards.

4. WELL BEING AND HEALTH OF THE WORKMEN

Smoke and pollutants generated by the process of shipbreaking hampers the wellbeing and increases the risk of respiratory problems. The residents often complain of throat burning induced by groundwater poisoning from oil. The unhygienic work environment is the number one cause for rapid disease spread as the stagnant potable water tanks are not washed properly and causing diseases like malaria. Unveiled water tanks built for the employees may even be contaminated by industrial waste. Generally, the workforce and employees have limited health awareness and knowledge. Workers just don't get paid holidays and miraculously hope for a fast recovery. Employees sometimes get medications with expired dates, improper medication, and nonsterile hypodermic needles because of their illiteracy because of this malpractice they undergo through adverse situations.

5. LABOR LAWS AND WAGES AWARENESS

Lack of awareness among the workforce as to its rights and the corresponding responsibilities as shipbreakers is the trickiest impediment for the application of labor law. Again, from the employees' point of view, the most important issue has been the pay regulation. Only in selected plots were proper wage laws enforced but are not uniformly complied with. A similar issue was a lack of comprehension of the Provident Fund (a kind of pension). The Provident Fund was founded by shipbreakers. After two years of permanent service, membership is obtained.

ISSN: 2581-6349

The master card or the identity card has to be assigned that Includes a signature, stamps, and the number of the plot to which the employee has been allotted. The updating of the identity cards are troublesome as staff frequently switch through various plots. That often causes difficulties with monitoring all wages and shipbreakers' contributions to the Provident Fund.

The work time at the yard is 8:30 to 18:00 including a 1-hour break for lunch and 1 1 1/2 hour break for tea six days per week, with Sunday off. The employees are engaged for 12 to 14 hours a day if the workload is higher than normal. No overtime payment or holiday benefit is applicable. Specific pay levels can vary from plot to plot based on the degree of the risk for various types of jobs. Employees generally do not receive any payslips and just sign for their salary. Shipbreakers do not often keep payment databases. The availability of secure jobs at the yard is a basic issue for employees. Although few workers have served there for many years, uncertainty is high because an employee may be replaced at any moment. This sometimes results in staff switching between plots in pursuit of better-paying jobs. This tends to create an uncertain atmosphere with rare continuous work cases on the same plot for a long period. Therefore, vessels cannot be dismantled throughout the year, thereby growing the inconsistency in the availability of jobs.

There are three big barriers to the activation of popular opinion. They are the absence of a common culture and language, the employees' reliance on a regular wage, and the requirement to establish very strong connections with their direct bosses to keep their work safe. Furthermore, some employers prevent communication between employees from various states and lack of local political organization, labor union, or NGOs have a clear lack of support.

CONCLUSION

The ship dismantling process produces both the potential of the economic development opportunity and the threat of adverse effects. The business sector is a high-risk sector, with a danger of harm, accidental deaths, and negative health effects. A ship constructed twenty-thirty years ago used various products that are now prohibited from usage. This results in exposure of labors to Hazardous contaminants such as heavy metals, carcinogens such as polychlorinated biphenyl (PCB), asbestos[930], etc.

[930] Ec.europa.eu (2020), https://ec.europa.eu/environment/integration/research/newsalert/pdf/ shiprecycling _red ucing_human_and_environmental_impacts_55si_en.pdf (last visited Jul 8, 2020).

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Till 1970's shipbreaking operations were focused on developing countries. In the 1970s the ship dismantling activities were restricted in developed countries but with globalization presently the sector has moved to emerge markets due to stringent environmental regulations in developed countries. In the industry, the practices currently observed are essential not only because of operations but also to safety.[931] Contamination and environmental degradation are caused by the processes used to gather the values generated by scrap metals. The security of the environment and the health of employees are quite critical concerns.

Ocean, soil, land, and groundwater and air are all being polluted. The emission of pollutants from reduction and breakage practices poses a danger to the ecosystem and particularly to exposed workers. Economically backward regions are in desperate need of job opportunities of unskilled workers this id the key factor of employers ignoring the detrimental effect of ship recycling operations, not just on the climate, but on the maritime ecosystem.

There are various positive changes, especially in India, owing to a clear commitment by the Supreme Court to reform, to the usage of protective equipment, training and awareness, wages, work conditions, water supply, lighting, and basic amenities, etc. but the other problems like shanties workers' housing, sanitation, medical care, and education, remain bad and unchanged.

RECOMMENDATIONS

The almost utter absence of waste management facilities underlines the necessity to further tackle the waste problem produced by the rapidly growing ship-recycling sector. The latest or planned policy focuses on environmental problems and emission reduction. In the regions addressed there appears to be little focus regarding the topic of working practices and the problem of general public well-being.

- Government agencies with inadequate technological and financial resources could pursue foreign organizations who can include the far-needed assistance in establishing the required guidelines for enhancing ship-discharge protection practices.
- The employees should be adequately sheltered by providing them with housing facilities and providing healthcare by arranging health camps as they are subjected to hazardous chemicals throughout their term of employment.
- In view of the service they render, the workers should be provided with additional nutrient supplements that will ensure their wellbeing.

[931] The Problem - NGO Shipbreaking Platform, NGO Shipbreaking Platform (2020), https://www.shipbreaking platform.org /our-work/the-problem/ (last visited Jul 8, 2020).

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- A detailed database should be created and each injury and death because of an accident should be recorded in this database. To encourage such function, an identity card should be mandatorily be issued as given in the provision.
- The municipal bodies should routinely be inspected and keep the yard under surveillance

ISSN: 2581-6349

THE PM CARES FUND UNDER RTI: AN ANALYSIS

- **SANJOLI VERMA**

The Chinese city (Wuhan) originated disease COVID-19, as named by WHO, has became a global pandemic & terrorized the world to the extent that it is now termed as the second name for "death". The WHO gave it a temporary name new/novel coronavirus 2019. It was necessary as without any official name the danger arose of people giving it names likes the china/Chinese virus. Its outbreak was so sudden that the scientists named it as virus: SARS-COVID-2 i.e, the severe acute respiratory syndrome as it has some similarities with the SARS pandemic which occurred between 2002-2005. According to the Press Information Bureau of India, the first case of the Novel Coronavirus in India was identified on 30th January 2020 in the state of Kerala. But eventually, the infection spread with a continuous chain of patients across India, and today there are more than 2.5 lakh cases in India. Though the deaths are around 7000 thus making a recovery rate of more than 47% with a number of 1.28 lakhs. Since the 24th of march 2020 the country was under a complete lockdown (with just few hours of notice) in phases which kept extending again and again. COVID-19 puts contradictions, complications, superstitions, and mass strain on economical, social, and political spheres, by affecting the primary sector ; labourers of both organised and unorganised sector of the urban centres. Million lost their jobs and had hardly anything to eat. These people out of fear started migrating in the worst conditions possible. They also makes up 60% of the total population of India.

ROLE OF GOVERNMENT AND THE AIM OF PM CARES : -

The government of India took reigns in their own hands and provided all the free medical health to the patients initially and provided many financial relaxations, as it is well established in the preamble that India is a welfare state. This pandemic brought people together with empathy and people showed generosity by donating food and other essential items to the needy people and donated money to provide financial help. The government was also not far behind, the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) was made on 28th March 2020 to provide relief during this pandemic. It helps in combating and containment efforts against this outbreak of coronavirus and other emergency situations. The Prime Minister of India is its ex officio chairman and its trustees include other ministers of the cabinet. The fund was open to all citizens who willingly wanted to donate

including the government, it's staff, and agencies (By cutting donations from their salaries automatically)[932] The donations could be made by using digital payment apps such as Paytm and google pay.The minimum donation was 10 INR and the maximum was in lakhs. These donations are exempted from all taxes & falls under corporate social responsibility by an order of the ordinance. On 20th may 2020 the fund had approximately INR 10,000 Crores. Under section 80G of the Income Tax Act, any contribution to this fund before 30th June 2020 would qualify for a tax deduction. The first allocation of the fund was disclosed the public on May 13th, which said that approximately out of 3,100 crores, some 2,000 crores were spent on the purchase of 50,000 ventilators[933], 1000 crores for the support of migrant workers and the rest 100 crores for support for the funding of COVID-19 vaccine research and development.[934]

THE FUND AND ITS DONATIONS :

"Sunlight is the best disinfectant"- judges of India have used this quote to cite advocacy and transparency. Theoretically and practically the fund aims to extend the availability of quality treatment and encourage research to eliminate coronavirus. The PM urged all to donate, but eventually, after two months the amount stood at approximately 10,000 crores, which was collected upon the soul strength and prestige, which was lent by the Hon'ble Prime minister's office.[935] But eventually, a question began to arise in people's minds, that when there is already a Prime Minister's National Relief Fund, then why do we have another fund. The fund lakes transparency. In PMNRF too some donations were being made along with PM CARES funds. Moreover, the PMNRF had a pre-existing amount in it beforehand. The people began to question the composition and objectives of PM CARES fund. The PMNRF (Prime Minister National Relief Fund)was established in 1948 by the then PM Mr. Jawaharlal Nehru. As the corpus has been created by the largely from the donations of the general public at large and public sector undertakings, central and state ministries, contributions from state and central government itself and departments and even the form the salaries of armed personnel force, all civil servants and members of the judiciary and other organs of the government, it is their right to know about the funds collected.

[932] it is termed as "compulsory donations".
[933] https://indianexpress.com/article/opinion/columns/narendra-modi-pm-cares-covid-19-relief-fund-6451071/
[934] https://www.pmindia.gov.in/en/about-pm-cares-fund/
[935] https://indianexpress.com/article/opinion/columns/narendra-modi-pm-cares-covid-19-relief-fund-6451071/

THE HIGH TURN OF QUESTIONS :

Finally, on April 1, 2020, a RTI petition was filed by Harsha Kandukuri an LLM law student from Azim Premji University Bengaluru. Apart from his also any other RTIs were filed by other people. He said that even the victims of COVID-19 have a right to know about the information of this fund as they needed funds to fight this fatal pandemic and who can not position themselves to enforce their fundamental rights of getting medical treatment which comes under Article 21 of the Indian Constitution and being financially supported. Thus it is felt necessary to know the information on this fund.

He seeks to attain copies of the trust deed of the fund and all other relevant government orders, circulars, and notifications related to its functioning and formation. When Mr. Khandukuri did not receive a response within 30 days, he appeared before the High Court of Delhi, wanting better transparency not he PM CARES Fund by bringing it under the horizon of the Right to Information Act. Another applicant Vikrant Togad filed an application under the RTI act and sought for the reply on all his 12 points. The PM on 6 days sent a reply refusing to disclose any information saying that the applications contain requests on many and varied topics of which the information is confidential and hence could not be shared with the general public. [936]

The supreme court of India earlier dismissed a PIL filed by Manohar Lal Sharma as misconceived, which questioned the legality and constitutionality of PM CARES Fund. The plea asked transfer of donations to the Consolidated Fund of India. It was claimed that the fund is not a 'public authority' within the ambit of section 2(h) of the RTI Act 2005. But here it can give rise to a contradiction that if the fund is not a public authority does the PM means that the PM CARES fund is not created by the government? and the government does not control it? This seems to be highly improbable. Moreover many of the states have audited their state funds then why does the centre seems to have a problem on doing the same thing ? The nature of the firm as defined by the PMO is inconsistent with the provisions of Article 266,283 and 284 of the Indian Constitution as it directs all the other money (for except the other than consolidated and contingency fund of India) received by or on the behalf government is entitles to the Public Accounts of India. Here the parliament or the president needs to ensure that these

[936] https://www.thehindu.com/news/national/coronavirus-pm-cares-is-not-a-public-authority-under-rti-act-pmo/article31712146.ece

provisions are not just violated on the whims of personal interest. A large amount of contribution was made by PSUs, but the government refuses to disclose the name of the donors.

In the case of National Stock Exchange of India Limited v. Central Information Commission the court held that even if one the three given conditions i.e,- owned, substantially financed and controlled are present then it would be sufficient to call it a public authority. Evedentally, it is possible that the fund is not a public authority on the ground that it financed or owned by the the government but it shall come under the definition of public authority on the ground that government exercises substantial control over it.

Incidents have come up where frauds were booked by Delhi Police for making various fake SBI accounts of PM CARES. The aversion and reluctance of trustees in providing pieces of information on the management of the fund raised serious questions, suspicion, and apprehension since the fund is for a public cause. The Comptroller and Auditor General's office earlier clarified that it wouldn't audit PM CARES as it stands as a charitable organization. Moreover, the office said that PMNRF too can not be audited by CAG but can be done by an independent auditor outside of the government.[937] But even section 19 of Indian Trusts Act says that a trustee is bound to keep clear and accurate accounts of the trust-property and to furnish the beneficiary at all reasonable times with accurate and true information of the amount and state of that property.[938] The division bench of the Delhi High Court had a differing opinion that whether PMNRF is a public authority under the RTI Act of not. But while advocating all its nature it should be deemed as a public authority. PMNRF has been recognised as a 'trust' under Section 10 of the Income Tax Act and is exempted from paying taxes under Section 139 of the act. [939]PMThe matter has been forwarded to the chief justice of the court and wherein the decision is pending. The bigger question arises is why the judiciary behind a step ? It is the guardian of transparency and upholds spirit of democracy. If the Courts of the country does not stands up to protect constitution's spirit then it will be considered to have dependency and dominance by government.

[937] **Private vs. Public Nature of the Funds**
[938] https://scroll.in/article/963376/here-is-why-pm-cares-should-be-scrutinised-by-the-cag-not-by-independent-auditors
[939] https://www.jurist.org/commentary/2020/05/anshika-saini-pm-cares-fund/

The term controlled sis not defined under the Act. In the matter of Thalappalam Service Coop. Bank Ltd. v. State of Kerala the supreme court stated that "The mere "supervision" or "regulation" as such by a statute or otherwise of a body would not make that body a "public authority" within the meaning of Section 2(h)(d)(i) of the RTI Act. In other words…the control of the body by the appropriate Government would also be substantial and not merely supervisory or regulatory." Again the court held, while relying on Thalappalam's case said in DAV College Trust v. Director of Public Instruction that 'substantial' under RTI Act means a considerable or large value and it does not need to mean majority or dominant.

The court said that that control over body should substantial and not just merely regulatory or supervisory. The PM heads the Fund and is empowered to appoint three of its trustees along with Minister of home affairs, the Minister of defence and the Minister of Finance as an ex-officio member of the trustee. These trustees are constitutional functionaries and hence it gives the fund impression of a public office. If we apply 'liberal interpretation' of the term 'controlled' it appears to be inconsistent with the aims & objectives of RTI Act. But even if we consider this meaning as interpreted by SC, then too PM CARES appears to be public authority because of the substantial and deep exercise of control by government. Also, advertisements which seeked contributions to the fund were made by government agencies from their budgetary allocation. Also, PM'S pictorial representation was used in all the fund's advertisements, recognition & identification.

Justice Bhat said in Bhagat Singh v. CIC that "A rights-based enactment is akin to a welfare measure, like the Act, should receive a liberal interpretation…Therefore, the meaning of the words has to be construed in their terms. Adopting a different approach would result in narrowing the rights and approving a judicially mandated class of restriction on the rights under the Act, which is unwarranted". It is well established that transparency enhances the credibility of any institutions and hence the absence of clear cut rationale and objectives behind the creation go this fund casts vantablackblack shadows all over the newly formed body.[940]

The Prime Minister's Office has denied sharing any information regarding the funds, by simply stating that the fund is not a public authority, but in actuality, it gives out another contradiction as the name, control, usage of the emblem, composition of the trust and government domain,

[940] https://www.barandbench.com/apprentice-lawyer/pm-cares-fund-a-public-authority-under-the-rti-act-2005

this all signifies that it is a public authority. The fear of the funds being misused is not uncanny. There are accusations that the fund is just a way to collect money at this time when the public is very sympathetic. The ambiguity does not stop here, as according to facts, a Russian arms firm also donated 2 million dollars to PM CARES Fund. It was stated by the PMO citing the CBSE & others vs Aditya Bandhopadhyay & others: that "indiscriminate and impractical demands under RTI Act for disclosure of all and sundry information would be counterproductive". [941]

Certainly, the PMO's response does not comply with either the law or the central information commission decisions. The PMO also wrote that "It is not open to the applicant under the RTI Act to bundle a series of requests into one application unless these requests are treated separately and paid for accordingly."[942]

Also, ex- chief informant commissioner Mr. Shailesh Gandhi stated that the given verdicts have no 'legal basis' for limiting the scope of RTI applications to only one subject or seeking any additional fees on multiple subjects.[943]

CONCLUSION

After analysing the situation it can be said that neither of the funds is perfect, but it can be surely said that in no way PM CARES is better modelled than the PMNRF. PM CARES fund lacks the constitutional explanation. As the fund has received huge amounts of donations for the good cause it is just good to hope from our side that the fund is not a meatball publicity in the name of high morale. The PMO, in contrast to the opinions of the judges of the high court and supreme court, the PM CARES fund and its trustees have preferred darkness over the sunshine. Given that the control over a body should be substantial by the appropriate government and not just merely a supervisory or regulatory effect. Showcasing such actions leads to a creation of dangerous precedent. But the manoeuvre of the fund shows complete opposite and hence if we talk factually, then the fund seems to delay or tries to hide the information which in fact shows their authoritarian and stern reluctance for transparency. Anyways it is for sure that the government need to take good constructive measures to address this issue, or otherwise it will be taken by public as either a deliberate fraud or inefficiency. This stands against the principles of Indian being a democracy and the transparent government

[941] https://thewire.in/government/pm-cares-fund-not-a-public-authority-rti-act-pmo

[942] This issue has also been resolved by judgments of **Suryakant B. Tengali vs State Bank of India** and **S. Umapati vs State Bank of India**

[943] supported by the matters of **DK Bhaumik vs SIDBI**, **Gurudevdatta VKSSS Maryadit & Ors vs State of Maharashtra & Ors and Amit Pande vs SIDBI**

here doesn't seems to be on high moral grounds as the old saying "where there is smoke there is fire".

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THE CONSTITUTION WHICH SHOULD HAVE BEEN SUPREME- THE PLIGHT OF THE CHINESE PUBLIC

- **RAUNAK CHATURVEDI**

ABSTRACT

This article has been the product of a recent incident which took place in China, where a law professor of the University of Tsinghua was arrested by pressing some 'charges', only because he has been an active critic of the Xi Jinping Government. Also, a few other examples have been cited along with this particular incident. The article aims to analyse some of the most important articles of the Constitution of the People's Republic of China and understand how the Chinese Government has been violating them repeatedly. Moreover, we will see that how due to such activities of the Chinese Government, the Constitution, which is supposed to be the Supreme Law of the Land has been simply rendered redundant and they are continuously indulging into such unconstitutional activities. Finally, we will end by assessing the plight of the Chinese people and also understand what really makes a Constitution supreme or arbitrary.

INTRODUCTION

The title of the article in itself is quite indicative. It talks about the Constitution of the People's Republic of China and the plight of the Chinese people. Although the Constitution of China is meant to be the Supreme Law of the land, it is a shame to say that the activities taking place in mainland China against activists and protestors is a clear example of its Constitutional failure. The Government of China, in an attempt to silence opposition and dissent, does not leave any instance in order to make sure that the people, who are supposed to be the controllers of everything within China as per the Constitution, stay below it and submit to its hegemony. The Constitution of China was clearly made upon the principle that it would be the people who would be the real rulers. It would be the people's will which would be taken care of. But, in reality, it is simply the opposite. In case anyone tries to say anything against the Government, or tries to draw the attention of the people towards any other discrepancy, within a matter of a few months that person is either framed or completely disappeared. Active criticism of the Government is the last thing that a Chinese can do in China. We will look into details about the various incidents which have happened in China, merely on the pretext of suppressing any uprising whatsoever and also understand how the Constitution of China has been rendered

ISSN: 2581-6349

useless by the activities of the Government which resulted in unconstitutional activities towards the citizens, who are meant to be the real controllers of the country.

Article 3: The People are the real Head-

Article 3 (2)'s of the Constitution of China reads that-

'The National People's Congress and the local people's congresses at different levels are instituted through democratic election. They are responsible to the people and subject to their supervision.'

A clear interpretation of this clause helps us to understand that the people are the real controllers of the Government, which is elected by them ultimately. The Government is not unanswerable. It definitely has an answerability which is towards the public which has elected it. Thus, we may say, also as mentioned in the Constitution, that the Government of China is guided by the principle of Democratic Centralism, where the people are at the centre. It is the people who will decide the course of the country and how the Government should function.

Article 5: The Constitution is Supreme-

Article 5(4) of the Constitution gives a very interesting reading. It says that

'All state organs, the armed forces, all political parties and public organisations, and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into.

Clause (5) of the same Article also talks about the supremacy of the Constitution. It clearly mentions that no one or nothing is above the Constitution in China. Thus, by these two clauses we may clearly understand that theoretically, the Constitution of China is supposed to be treated as the Supreme Law and everyone must follow it. Moreover, no act or provision or any other thing of that sort must contravene the provisions of the Constitution. Let us now move on to another interesting Article.

Article 38: Where the Dignity of the Public is to be Maintained-

This Article clearly lays down the condition that the personal dignity of any citizen of the People's Republic of China can't violated. The State or any other person can't insult, libel, or frame-up false charges against any of its citizens. This, indirectly means that at the instance of any person criticising the State, the State can't suppress the person by framing false accusations.

Article 41: Where the Public Can Criticize-

A very significant Article in the Constitution of China is Article 41, which expressly gives the Right to the citizens to criticize the State or any of its organs and expose their illegal activities or any non-feasance of their duties, on their part. It is also interesting to note that this Article also expressly asks the Government not to retaliate or suppress such exposures, claims, or complaints by trying to suppress such citizens, or harass them.

The Arrest of Professor Xu Zhangrun: Another Blow on the Constitution-

It is imperative for us to know about the incident of Professor Xu Zhangrun of China who had been recently arrested for posting 'criticising' and 'exposing' literature against Xi Jinping's Government.[944] The facts of the incident maybe laid down as follows.

Professor Xu was a law professor at the University of Tsinghua, Beijing, for over 20 years. He had completed a Doctorate in Law from the University of Melbourne in Australia. He had thoroughly researched upon criminology and Chinese Legal thought. However, as empowered by the Constitution's Article 41, Professor Xi in the year 2018 published an essay criticizing the activities of the Xi Jinping Government. This caused the defenders of the Government and the party to focus themselves upon him. Continuing his stance, he kept on publishing many of his works which tried to expose the real plight of the Chinese people and China as a whole, due to the various unconstitutional activities of the Government, especially President Jinping. It is extremely important for us to know that the Tsinghua University then barred him from teaching law within the same and also stopped him from researching. However, he being determined to raise his voice, kept on writing and trying to expose the various activities of the Chinese Government, although being 'warned' by the University officials, who had also threatened to give him an additional punishment. It is extremely sad to see that he was arrested on Monday morning, i.e., on the 6th of July, by the police who told him that the cause of the arrest was him 'consorting with prostitutes'. Ms. Geng Xiaonan, a friend of Professor Xu and his wife and also, a businesswoman, said that it was quite usual for the Government to use such 'vile slanders' in order to frame the people who tried to boldly raise their voices against the Government's steps or tried to expose their illicit activities.

[944] Chris Buckley, *Seized by the Police, an Outspoken Chinese Professor Sees Fears Come True,* WWW.NYTIMES.COM (July 6, 2020), https://www.nytimes.com/2020/07/06/world/asia/china-detains-xu-zhangrun-critic.html

The reason why certain Articles of the Constitution have been mentioned earlier in this article and explained is to draw an inference from this very case. Professor Xu had not done anything against the integrity or respect of the nation of China. Being inquisitive and curious regarding the steps taken by the Government, criticizing the same, all being a part of a healthy democracy. Being expressly mentioned in the Constitution, Article 3 talks about Democratic Centralism, claiming that the people of China are the real authority. However, that isn't true. From this case and many more which we will see in this article, we will understand that being curious is not allowed in China. Everyone is expected to be robotic, programmed with a limited number of functions and not to question their 'masters'. Article 5 talks about the Supremacy of the Constitution. But, we must understand one thing. The Constitution is merely a document upon which certain sentences are written. The public for which it is made, the Government which functions under it, that's what makes the Constitution either supreme or arbitrary. If the Government or the State doesn't respect the ideals of the Constitution, then, how much the people try, Rule of Law can't be maintained and incidents like the aforesaid materialize. Article 38 clearly says that false charges can't be imposed upon any citizen of China by anyone, including the State. But, as per Ms. Geng's statement, framing people for vile actions and then imprisoning them, simply because they boldly used their Rights was a normal task for the Government. Article 41, not to mention, empowers the citizens to question, criticize and advice the Government. Moreover, it also orders the State not to suppress the citizens making such enquiries or comments. However, the State always tried to suppress these activists, who were fighting for the betterment of the country.

Another person, Xu Zhiyong, who was also an academician in law and later turned into an activist, was detained for attending a campaign related to Rights' Activists.[945] Previously, he was imprisoned for organising a civic rights campaign.

In August, 2013, another prominent investor and social commentator, Charles Xue, was detained in Beijing by soliciting the similar charges of prostitution.[946] He had been actively a

[945] Javier C. Hernandez, *China Detains Activist Who Accused Xi of Coronavirus Cover-Up,* WWW.NYTIMES.COM (February 17, 2020), https://www.nytimes.com/2020/02/17/world/asia/coronavirus-china-xu-zhiyong.html

[946] David Barboza, *Chinese-American Commentator and Investor Is Arrested in Beijing,* WWW.NYTIMES.COM (August 25, 2013), https://www.nytimes.com/2013/08/26/world/asia/chinese-american-commentator-and-investor-is-arrested-in-beijing.html

part of a social media campaign that discussed about the child trafficking problems prevalent in China and also the problems faced by the underprivileged.

It must be understood from these examples very clearly that the status of the Fundamental Rights of the people and the level of importance given to them by the Government is very poor. The Chinese Constitution is the perfect example of the scenario where although it is said that the Constitution is Supreme, the authorities don't treat it accordingly. As a result, they indulge into such activities and constantly infringe the Right to Freedom of Speech of the people, the Right of the people to have the control over the State and most importantly, the principle of Democratic Centralism, upon which it is supposed that the whole system will be constructed.

CONCLUSION

The recent arrest and also the arrests made in the "People's" Republic of China earlier are clearly indicative of the disgust that the Government has for critics and inquisitive citizens. Although, the people are to be the final authority to control the State, who in turn are supposed to function according to the Constitution, neither the people, nor the Constitution, through the various hegemonic activities of the Government, are provided the status which they deserve. Democracy can't function without criticism. In a democracy, people are the most powerful assets. It is the people who make the State. People vote their representatives, people remove them and also, supervise them. At any point, the State is supposed to function as per the will of the public. However, the incidents happening are indicating towards the plight of the status of the importance of the Rights of the People and also how, a Constitution can be rendered useless. However, many may say that the people must revolt in order to get back what's theirs. To that it may be most humbly said that why should they even revolt? The Government should be diligent enough to understand its responsibilities and make sure that none of its acts are contravening the provisions of the Constitution. And even if the public revolts, there are chances of a violent suppression. Thus, electing a new representative may be the easiest way to make a change. It must be understood that the Constitution, or any of its provisions, are not just for a show. They have been made to govern the concerned land. If the State, which originates from the Constitution in itself does not follow the Constitution, then, we may simply say that it acts and has established a feudal Government, which promotes hegemonism, contrary to the views expressed in the Preamble of the Constitution of the People's Republic of China. From the examples it is clear that the Chinese Government can go up to all limits to get the curios people suppressed. The various Articles which have been mentioned are the ones which are very easily violated by the Chinese Government in the country. This leads to a

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serious problem, because if the people only don't get to voice their opinions, then, it eventually leads to the downfall of any nation, especially one which is claimed to be a democracy.

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THE MAHA (BIG)- JAN (PUBLIC) SCRUTINY

- **URMISHTHA JAGTAP**

Ever since the Supreme Court pronounced its judgment on 20th March, 2018, it has generated a wave of concern throughout the country. The 'Mahajan Judgment' as it is called, it is perhaps one of the country's first such judgment of the Apex Court that has been at the receiving end from all quarters of society – academicians, activists, politicians, lawyers, public; who have pointed cannons towards this judgment for its mistaken social matrix of jurisprudence in India i.e. 'caste'.

Why so much hue and cry about this judgment, one would wonder. The now largely 'infamous' judgment of our time as it may be called, is documented in a total of 43 pages consisting 84 paragraphs, that has managed to send crippling effects everywhere. Having skimmed through the judgment and number of writings that have analysed it critically, it can be said that although the Mahajan Judgment has been criticized by and large, it also meets support by a minor section of thinkers and professionals. The researcher can assert this based on her research and findings that will be unfolded hereunder.

The article under review titled – "Misuse of the Prevention of Atrocities Act: Scrutinising the Mahajan Judgment, 2018" is written by Dr. Nitish Nawsagaray, a faculty at the Indian Law School's Law College, Pune; and published in the Economic & Political Weekly Vol LIII No 22 dated June 2, 2018. As the title suggests, prima facie it can be perceived that the author of this article is questioning the findings and approach of the judiciary towards a protective legislation for the downtrodden and that he is all set to dissent and dissect it.

Rationale and Significance –

It is a bane to a progressive nation like India to be recording crimes against vulnerable groups, classified as such, merely because they belong to a particular Scheduled Caste (SC) or a Scheduled Tribe (ST). This can be seen no less than exhibiting an extreme form of discrimination, hence India felt the need of an enactment in the form of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. This Act had become the shield for

the SCs and the STs as numerous judgments have upheld certain stringent provisions under it against the accused, until there came the Mahajan judgment on March 20, 2018. On the other hand, the rationale behind this judgment points at the use of this Act as a sword instead, and resulted in the first of its kind uproar against a court verdict. As the title of this article under review suggests that it scrutinizes the Mahajan judgment, the researcher has reviewed this article from the points of view of the legislative intent, the judicial mind and the author's line of thought.

About the author:

A. The Academician[947]:

a. The author holds degrees like B.S.L. LL.M. and Ph.D (Law);

b. He is an Assistant Professor and Research Guide at the Savitribai Phule Pune University (having held the position of Principal at the MMCC Law College Pune, and currently a faculty member at the Indian Law Society's Law College, Pune);

c. He has a vast experience in the teaching profession spanning 16 years;

d. He holds specialization in Constitutional Law, Criminal Law, Administrative Law, and Jurisprudence;

e. His areas of interest are Jurisprudence, Criminal Law, Constitutional Law, Media Laws, Law & Social Change, among others;

B. The Writer / Researcher:

f. He has written two books (researcher was not able to find which books, within the scheduled deadline of this review), and various research articles (especially depicting the inter-relation between law and social change) in international and national journals and newspapers;

[947] ILS Law College website, available at: https://ilslaw.edu/faculty/teaching-staff/.

g. He scribes on his blog[948] named 'Change is Inevitable' (with a background of free birds - suggesting that the author thrives on hope, struggle, confrontation, fight, and empowerment) – both in Marathi and English on all the current burning issues relevant in the current state of affairs. (he is especially quick to respond to path breaking landmark judgments of the Supreme Court);

C. The Tweeter:

h. His twitter handle (@Nawsagaray)[949] describes him as a 'Law teacher and Annihilation of Caste activist, which is like a source of latest updates on his intellectual sufferings (especially with respect to the state of Dalits in the country) for him to express and share;

D. The Activist:

i. He is an activist and a fore runner, pursuing annihilation of caste which can be seen from his participation in and leading the protest against fascism demanding the immediate release of Human Rights activists (*Fascism Virodhi Elgar)* before the District Collectorate, Pune on 30th August, 2018[950];

j. He is a State Co-ordination Committee Member of the Dalit Adivasi Adhikar Andolan (DA3) (Struggle for Reclamation of Human Personality)[951] – the website hosts a sketch of a raised arm and closed fist depicting 'Protest Against Caste Atrocities' (*Jaatiya Atyacharaviruddha Elgar*). One of the press releases' uploaded on the website dated June 2014 and addressed to the then Chief Minister of Maharashtra Prithviraj Chavan, shows an attachment of the resolution of the DA3 demanding amendments in the POA Act and establishing exclusive special courts in all 25 atrocity districts in Maharashtra, etc. and which condemning the acquittal of accused in Tsundur massacre, citing various other similar instance where the courts have overlooked the plight of the Dalits. The point is, that the author was a signatory to this in his authoritative capacity of DA3.

[948] www.blogspot.com, available at: http://nawsagaray.blogspot.com/2015/09/15-2015-69_10.html.
[949] www.twitter.com, available at: https://twitter.com/nawsagaray?lang=en.
[950] Short video clip available on the author's Facebook page.
[951] www.da3.in, available at: http://www.da3.in/sample-page/.

E. The Speaker:

k. He is a staunch believer in the unfettered Freedom of speech and expression which can be seen in all his writings and his speeches (for example the speech he made three years ago on 23rd February at an open meeting on the repression of educational institutions and journalists and the misuse of the sedition law held by the People's Union for Civil Liberties (PUCL), National Alliance of People's Movements (NAPM) and other progressive organizations, which was covered by Youth Ki Awaaz[952]. The author had presented a strong case for the need of repealing the law on sedition from the Indian Penal Code, which according to him has been used as a political tool by the governments in power to curb voices of dissent);

This entire background study of the author has helped the researcher to gauge and understand the recipe to the author's personality that reflects in his style of writing, his understanding about and his authority over the subject-matter of the article under review.

ABOUT THE ARTICLE:

The genesis of the subject matter of the article is rooted in the caste system that is prevalent in India since ancient times. The degree of caste atrocities may have reduced of late, yet it sneaks out its ugly face in most parts of the country and in various forms, even today. This led to the development of a special enactment - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (POA Act) which includes certain stringent provisions against the perpetrators of crime against the downtrodden. The judiciary has been a watchdog over this protective legislation which has enabled most members of such groups to live with dignity and enjoy their human rights and freedoms. The picture was set to change with the Mahajan judgment as it laid certain guidelines that relaxed the stringent provisions in respect of FIR registration, arrests and anticipatory bail under the POA Act.

[952]www.youthkiawaaz.com, available at: https://www.youthkiawaaz.com/2016/03/peoples-union-for-civil-liberties-pucl-open-meeting/.

The judgment has been condemned by and among various quarters of society in the form of protests, speeches and writings (nonetheless, it has also managed to attract a supportive view as well, albeit from a minor section). Condemned because, the judgment is seen as one favouring the offenders and further victimizing the victims of caste atrocities. This judgment of the Apex Court is the lone one which bears the scar of nationwide public anger and protest, a one-of-its-kind public response to a Supreme Court's verdict. The developments that may take place post this judgment may be manifold – that in legislation, in enforcement, in deepening the seeds of casteism, power play and atrocities.

Based on this context, the article reflects the very sentiment and concern for the scheduled category of people. It was, thus, not surprising that the author being one of the voices' for this quarter of society, has scrutinized the Mahajan Judgment from start till the end and analysed the reason and justifications given by the Court to tone down the POA Act. The author also does not hesitate to mention that the judgment is 'per incuriam', that it is loaded with prejudiced, that it has committed incorrect interpretation of facts. This article is the product of thorough research work by an author who is well versed with law, and whose social activities involve working for this class of people. It is one among few articles that have attempted to critically analyse the judgment at length. The article has been well-received on the web-world, which is evident from the fact that the link to this article appears in the first three searches with any random combination of key words regarding the Mahajan judgment on one of the most powerful search engines' – Google.

I. About other articles/literatures of same and/or other author/s:

a. Articles / literature of other authors:

1. "Rights Groups: Supreme Court order on SC / ST Act will reverse gains" – a newspaper article written by Shalini Nair and published in The Indian Express on 21st March, 2018 the immediate next day of the judgment.

This article has highlighted the latest National Crime Records Bureau (NCRB) data showing reported crimes against SCs increased by 5.5 per cent in 2016 while crimes against STs has increased by 4.7 per cent. The author, too, makes reference to the NCRB data that a lawyer for the intervener in the Mahajan case relied upon (but which was shown in order to portray that the Act is being misused), but has also pointed out that the Court has selectively relied upon

the NCRB statistics cited by the intervener, completely ignoring the counter arguments made by senior council C U Singh appearing on behalf of another application against the appellant. The newspaper article also carries a byte of the author stating that the judgment is disturbing for the Dalit movement.

Thus, the newspaper article discusses and brings forth one of the key issues' that are raised in the article under review i.e. 'the hollow judicial reasoning for the claim of misuse of the POA Act', in line with the author's sentiments.

2. "Sending the wrong signal: SC order in SC/ST Act case: - written by Faizan Mustafa for The Hindu which was published on 29th March, 2018.

This article meets the sentiments of the author in a broader sense i.e. it does not condemn the judgment in to bits like that of the article under review. It, in fact, serves a fresh approach towards the subject matter of the article. This newspaper article throws light on the aspects like:

i. How the Court is indeed sending a wrong signal in society –

The writer briefly diverts to the facts of the case and acknowledges the readers that the accused had come to the Apex court after the High Court had refused to quash the criminal proceeding against him. The writer analysed this aspect and mentioned that the High Court had rightly noted that in spite of possibility of misuse of the SC / ST Act, its penal provisions cannot be faulted as it would send the wrong signals to the downtrodden, but sadly the Apex Court has done just that.

ii. On the low conviction rate creating an impression of misuse of the Act –

The Court loosely cited the 'low conviction rate' in cases under the POA Act as evident enough to show how the Act is being misused. On that note, the writer of the newspaper article defies the Court and mentions other reasons like poor investigation, incompetence of prosecution, witnesses turning hostile, etc that result in less convictions in such cases. The writer then continues by placing an analogy that we have low conviction rates in terror crimes as well, but will the Court similarly dilute the stringent provisions of terror laws? The writer supports his argument by the data from NCRB that shows a decline in the filing of false cases

from 2009 – 2015, and in fact the conviction rate has improved from 23.8% in 2013 to 28.8% in 2014.

iii. The writer lends a political colour to the above-mentioned contradiction by stating that it is necessary to probe why the conviction rate dropped in 2015 after the BJP came to power. On the other hand, the author has stuck to entirely legislative and judicial authorities while criticizing the judgment.

iv. Hate crimes as against ordinary crimes –

He points out that it is neither rational nor reasonable to compare hate crimes with that of ordinary crimes, indirectly implying that the discriminations based on caste are still followed in India.

v. Mischief addressed by Parliament ignored by the Court –

This is explained by the writer by presenting the very Objects and Reasons of the POA Act in which Parliament had clearly noted that when Dalits assert their rights, vested interests try to terrorise them. Accordingly, keeping in view the special nature of crimes against Dalits, anticipatory bail had been excluded. On the other hand, the author of the article under review has stuck to the express provisions of the POA Act read with those of the Criminal Procedure Code, Probation of Offenders Act, and has not delved in the legislative intent behind the Act. The researcher believes that this has been intentionally avoided by the author as his criticism itself speaks volumes of how the legislative intent has been shaken by the judgment.

vi. Lastly, the writer suggests that the government must file a review petition of the Supreme Court order, as against that of the author's point that the Court itself should have put previous judgments (cited but overturned without rationality or reasoning) under review.

3. "Supreme Court's order in the SC / ST Act may be a case of judicial overreach" written by Pranjal Kishore for Business Standard (BS) which was published on 4th April, 2018. The researcher has pointed out those aspects of the article, which serve a fresh approach to the subject matter of the article under review. Thus, the researcher feels that the author could have, if possible, added a fresh dimension to his article as well.

ISSN: 2581-6349

i. The writer in this article, draws parallels to the Supreme Court guidelines detailed in September 2012, regarding implementation of the RTI Act, none of which were envisaged by the Act. The centre immediately had sought review of the judgment and contended that the guidelines were legislative in nature, which the Supreme Court allowed and admitted to have 'read in' words in to the provisions of the Act. The guidelines were recalled. Likewise, the writer placed his contention that the Supreme Court passed the Mahajan judgment, 'reading in' wholesale changes in to the POA Act. The writer concludes by hoping that similarly, the guidelines in the present judgment are recalled which will serve the interest of genuine cases. On the other hand, the author here has concentrated only on the Mahajan Judgment and previous judgments on provisions of the POA Act. He has not shifted focus to draw any parallels with similar pitfalls.

ii. The sole portion of the judgment that the writer finds himself agreeing with was the part where the Court relied on its previous judgments in Vilas Pandurang Pawar and Shakuntala Devi to hold that the bar against anticipatory bail was not absolute. The rest of the judgment, according to the writer, is peppered with incomplete data, heresay evidence and faulty reasoning. The author of the article under review, however, does not find himself supporting any part of the judgment.

iii. The writer of the BS article sharply pointed a grave downside of the judgment by presenting the fact that the Court relied on the observations of the Standing Committee (admissibility of such reports in judicial proceedings is uncertain) on the POA Amendment Bill, 2014. The writer showcases how actually the judgment is per incuriam by presenting the timeline of events – the Standing Committee report was tabled before the Parliament on 19th December, 2014. The amendment to the Act was carried out in January, 2016 in which the recommendations of the Committee were not accepted. Rather, changes were made in order to give more teeth to the existing law.

iv. The writer specifically points out that the judgment is a specific case of judicial overreach. He rings in hope of a reversal by mentioning that in July last year, the same bench had passed detailed guidelines in order to 'curb misuse' of domestic violence laws, and that the judgment is now being reconsidered by a larger bench.

4. "A Pattern of impunity: on the SC / ST Act written by G. Sampat for The Hindu, which was published as the 'lead' article on 4th May, 2018.

Among all the articles that the researcher had found and studied, this article is one that mentions the significance of the POA Act and the Amendment Act from the point of view of the Dalits, which is not because they have been effective in protecting them from caste injustice. The Dalits cherish them, in spite of poor conviction rates and shoddy implementation in a heavily casteist society, is because of a powerful affirmation of the community's faith in the Indian Constitution.

The writer in this article further probes in to the importance of May 1, a day to commemorate the labour movement (a vast majority of the Dalits belong to the labour class). He pointed out the 'National Resistence Day' being observed on 1st May, 2018 as a make to place demands like - neutarlise the Supreme Court order through an ordinance that would reinstate both the POA Act as well as the Amendment Act, 2015 in their original form; include both these laws in the Ninth Schedule to protect them from judicial review; and release all the Dalits arrested on 2nd April when 'Bharat Bandh' was observed to protest this Supreme Court order - which were made during the protest meetings. On the other hand, the author of the article under review has not come up with any such innovative suggestions.

5. "SC / ST Act Ruling: A Balancing Act" the cover story for Lawyers Update (Magazine for Legal Professionals and Students) written by HemRaj Singh, which was published in its May 2018 issue.

By far, this is the only article that the researcher came across while browsing magazines in the college library, which views the Mahajan judgment in a positive light and that it has, in fact, made a balancing act – that of preserving the enabling provisions of the POA Act in favour of the Dalits and at the same time, protecting the non-SCs / STs from the stringent provisions of the Act barring the application of anticipatory bail as provided for in the Criminal Procedure Code and disallowing instant arrest in complaints that do not make out any prima facie case against the accused.

The writer has defended the judgment by attributing all the criticisms and a grim view of the judgment having arisen due to a 'jaundiced misreading of the judgment' (in the words of the

writer himself). He has explained the significance of the golden triangle of the Constitution (Articles 21, 19 and 14) in view of the Court's siding with the unraveling of the bar on anticipatory bail provision of the POA Act.

The writer has also placed comparative view in regard to (women) victims of sexual abuse facing a social stigma against that of any other victim who does not face a stigma. On the contrary, the writer suggests that an accused who has been arrested in any case at any stage (pre investigation or post trial) suffers humiliation of a lifetime in case his innocence is later proved. Hence, he justifies the Mahajan verdict on these lines too. If this writer and the author were to debate on the Mahajan Judgment, it would surely result in to a clash of opinions and its complete scrutiny.

The comparison of all the above articles with that of the article under review shows that all the other writers, except HemRaj Singh, confirm with the direction of the article under review and meet the sentiments of the author. It is also seen that these writers have also served a fresh approach towards subject-matter of the article. The comparative analysis has once again proved that on the actual field, there are always two sides to any case and it depends on which side you are, in order to justify your stand.

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DOMESTIC VIOLENCE UNDER INDIAN ISLAMIC LAW

- YOSHITA KUMAR & SHREYANSH LAKHTAKIA

INTRODUCTION

In Islam, marriage is considered a path to God as the Spouses help each other in obtaining the almighty. The laws relating to marriage should be known by the Muslims as an indicator to live a moral and legal life. However, the knowledge of these laws has a major impact on the civilized life of Muslims.

Marriage considered as a social, noble and sacred contract has been referred to as *Mishaqan Ghaliza* in the Holy Quran. In Arabic it's known as Nikah, in Bengal the first marriage is called *Shadi* and the second is usually called *Nikah*. Justice Mahmood stated marriage among Muhammadans as a pure civil contract. Islamic Jurist Ameer Ali termed it as an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and chastity." In the language of the law it implies a particular contract used for the purpose of legalizing generation.

Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially, no marriage is contracted to be dissolved in end but in unfortunate circumstances the matrimonial contract can be broken. One such way of dissolution is by divorce. One such ground of divorce for a women is Cruelty not only in Islam but also as per the current laws.

Cruelty, in marital relationship, is a time course of conduct of one spouse which adversely affecting the other and generally it is the women who suffers. Cruelty may be mental or physical, intentional or it can even be unintentional. If it is physical, it is an issue of fact and degree. If it is mental, enquiry must take place as to the nature and core of the cruel treatment and then as to the treatment of the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful to live with the other, is ultimately a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. That's why, it is always stated that Cruelty is different for different peoples.

Under various personal laws of different religions, cruelty is considered as a ground for matrimonial relief. Apart from that, Indian Parliament with a view to stall and prevent increasing violence and cruel treatment of the wife by her husband and in laws has inserted a new Section 498A to the Indian Penal Code.

Probably there is no material difference in Muslim law on the issue of legal cruelty, between man and wife from other prevailing matrimonial laws in India. The test of cruelty is based on universal and humanitarian standards by the husband which would cause such bodily or mental pain as to endanger the wife's safety of health.[953]

Under the traditional Islamic law which is through Qur'an states that it is the duty of the husband to take care of his wife and fulfil all her needs. But it also states that the husband has disciplinary rights over his wife and can use them to control his wife whenever he deems fit.

Instances of cruelty given in the provision of the Dissolution of Muslim Marriage Act 1939, include habitually assaulting the wife, making her life miserable by physical ill-treatment, associating with woman of evil repute, in case of bigamy treating her inequitably contrary to the Koranic injunction.

In Islamic law, the concept of cruelty (zirar) is not limited. The cruelty provision is to be interpreted in the light of the Prophet's exhortations that women are as tender as glasses (qawarir) and he is the best man who is kind to his wife. Also, under Muslim law cruel nature is a disqualification for eligibility to marry.

TRADITIONAL VIEW ON DOMESTIC VIOLENCE

Textual context of Qur'an verse 34 chapter 4

The verse thirty-four of chapter 4 of the Qur'an (hereinafter Q. 4:34) has received a great deal of attention which is commonly known as "Chapter of Women".

Q. 4:34 states "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever exalted and grand." [954]

It address the issues such as inheritance, domestic conflict, and court adjudication of marital conflict which is all set in the structure of a gendered cosmology. The plain-sense meaning supports a patriarchal reading of the preceding verse 32, it offers little potential for a gender-egalitarian reading. It starts with an unrestricted general declaration that men are qawwamun

[953] Shamsunnisa Begum v. G. Subban Basha and Anr1994 (2) ALT Cri 143.
[954] Qur'an verse 4:34.

ISSN: 2581-6349

over women which denotes authority, dominance or maintenance, clearly denoting the hierarchy between men and women.

Since men are qawwamun over their wives, they do have authority to make decisions for them as a person cannot be an effective guardian or maintainer of someone without having proper decision-making authority which also signify that there is a necessity of obedience from the other side. The Hadith comprises tradition pointing towards this obedience. Though some of these traditions are forged by the later Muslims to subjugate their women but others look authentic. At present which is difficult to ascertain. The Qur'an and Hadith not mean to command the women or obey their husbands. It is not a sin on their part if sometimes they do not listen to their husbands, it is simply considered that obedience to the husband as a desirable quality of wife.

The interpretation emphasize on a few points like the words "strike them" which means that it should be gentle, a last resort only to save the marriage. "Guarding what God has (willed to be) guarded" means guarding the husband's honour and property as well as wife's own loyalty towards him but it does not speak of loyalty of men towards his wife. "Even though out of sight (li al-ghayb)" which refers to the husband's honour and property when he is absent as well as to the wife's secret feelings and thoughts which the husband cannot perceive even if he is present. Thus, in return for their love, security and the financial support the husbands should give their wives all of this, and the righteous wives should give their husbands love, loyalty and obedience. Also, they should look after their interests with complete faithfulness and trust. "As for those women on whose part you fear nushuz..." which literally means "rebellion". But this rebellion is not of the ruled against a ruler in a sultanate or dictatorship but it consists of the wife disobeying some of their husband's commands. This is because the same word nushuz is used in case of a husband in verse 128 of the same surah 4, where it states: "If a woman fears nushuz on her husband's part..." So nushuz is something that can be feared by the husband on the wife's part or by the wife on her husband's part that is both vice versa are the possibilities. To correctly understand the meaning of this word, it must be noted that both in the verse under consideration and in verse 128 the reference to nushuz is followed by a reference to the dissolution of the marriage.[955] If this context is kept in mind, then it becomes clear that nushuz means the type of behaviour on the part of the husband or the wife which is so disturbing and disheartening for the other that their living together becomes difficult or next to impossible.

[955] Qur'an verse 35 & 130.

Nushuz is the deliberate ill-conduct by an ill-will can only be described as "Rebellion". Though what constitutes a nushuz is relative and might not be the same for everyone. That's why there is so much complications in defining this term. For this reason, the judgment that one's spouse has been guilty of nushuz is partly a subjective and personal one. The verse says: "If you fear nushuz...", "fearing" signifies subjective but a certain, knowledge or judgment about something. A behaviour on the part of one partner coming out of ill-will and seriously disturbing the other.

DISCIPLINARY RIGHTS OF THE HUSBAND

Even though a husband and a wife form a joint family and shares life, and cooperation in running the house, it can be times when they will have different opinions. A man might feel that it should be he who should decide about family matters as he has the sort of authority over the woman, when such matters arises. At the same time his wife may also object him because she thinks it is not at all right on the part of her husband.

In these situations, Islamic holy texts recommend physical punishment of the wife in just 2 cases and that to when the objection somehow violates his rights:

Case 1: A man is Islamically and lawfully allowed to seek sexual satisfaction and pleasure from his wife and to derive all sorts of enjoyment from this relationship. And his wife is lawfully duty-bound to yield to those desires. If the woman refuses then initially the husband should persuade her, if she does not listens avoid sharing a bed with her to show anger but still if she refuses then he is permitted to beat her (lightly).

The beating of wife is the final stage according to the Quran. The man is not allowed to surpass the prescribed limit and resort to oppression reminding them that:

(a) Physical punishment is for the woman to realise her mistake and not for revenge.
(b) Only hitting by hand or light wooden stick.
(c) Hitting to the extent that results in changing the colour of the skin (to blue or red) is not permitted and is punishable by the payment of a Diyah (fine).
(d) Not to hit on sensitive part of the body.
(e) Physical punishment should not be hard as to create hatred and ill-feeling between the couple.
(f) A man should remember that he is to live rest of his life with her wife and act accordingly so that it no way hampers their love for a safe future together.

(g) A man is not allowed to hit his wife if there are legitimate reasons for her non-compliance with his wishes that is, if she's menstruating, sick, or fasting in the month of Ramadan.

Case 2: A woman can go out of the house only after obtaining her husband's permission. Going out without permission is lawfully not allowed and committing it is a sin.

A tradition has been reported that the Prophet (S) did not allow any woman to go out of her house without her husband's permission. This right of men is not meant to be a show of strength or an attempt at putting pressure on their wives, but a means of preventing women from going to undesirable and unsuitable places. A man must stop his wife from going to corrupt and unsuitable places and gatherings. A disobedient woman can be punished by her husband.

REMEDY TO WOMEN UNDER TRADITIONAL LAW

There are no Islamic texts, whether any Quranic verse or any Hadith which states that women have no right to go out and must and will stay at home. Historical records even portray that women had participated in public life with the early Muslims, especially in times of emergencies including battles.

This can be seen in Surat Aal-Eimran (the Family of 'Imran) verse 195 which states that if a woman is wronged or harmed, she gets due compensations equal to what a man in her position would get.

The wordings of Quranic verse number 34 of Surat An-Nisa (Women) points out that men are to be held liable for handling the affairs of women and they are the one responsible for care of women.

"Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means". Stating this as authority from Ibn 'Abbas, men think that they have full right over the women as they are provided with the job of protecting her as given to the king and the king has right over her kingship and people in his kingdom. This is not what it states and thus the behaviour of men towards women is in no way justifiable. These protections and maintenances should be along with kindness and consultation.

According to Sheikh Salman Al-Oadah it does mean that the man has the responsibility of taking care of his woman (under his responsibility), protecting her, defending her honour, and fulfilling her needs regarding her religion and her worldly life. The reasons for that as the verse show are: "because of what Allah has preferred one with over the other and because of what they spend to support them from their wealth". This would create a problem which means that

God treats men and women according to their biological differences and therefore there are some inherent preferences of men over women and vice versa. The equality does not mean sameness. Gender equality does not demand complete similarity regardless of the inherent differences wherein a distinction between the sexes is existed.

Woman in Islam do enjoy certain privileges which man cannot. Woman, as already mentioned, is entitled total maintenance by his guardian which can be his father, or after the marriage husband. A woman does not have to work or share with her man the family expenses. As a mother, for example, a woman enjoys more recognition and higher honour in the sight of the almighty Allah. Kindness to parents (especially mothers) is next to worship of Allah.[956]

Islam stipulates the husband's right to divorce, while recognising the wife's right to ask for it. The wife can initiate divorce through a process called "khul"- divestiture. Divorce existed before Islam, but the advent of Islam made the divorce process much more favourable to women. Women's property is not divided during a divorce. Whatever a woman earns or is given before and during the course of the marriage remains her property if the marriage ends. This prevents men from taking advantage of women's property or wealth. On the other hand, woman is entitled to support and maintenance from her former husband if she requires and even his property is divided if required. Islam allows an abused wife to claim compensation under ta'zir (discretionary corporal punishment)

POST-COLONIAL PERSPECTIVE ON Q. 4:34

In the post-colonial period, the Muslim Scholars instead of either criticizing the text or accepting the fact came up with a new interpretation of the Qur'an verse 4:34 according to which each individual has his or her connections with God so women don't need men as mediators.

From early 20th century, controversies surrounded Q. 4:34 (An-Nisa) due to increase in literacy rate which further put up the question that how the god can ask its creation to have physical violence over the other.

Definition of nushūz is codified in many Muslim-majority countries and it range from general disobedience to leaving the house of husband without his permission, it is strange but in some countries such as Egypt a person can even take assistance from the police to take his wife back to his house whether wife does not give consent for it.

[956] Verse 11, 12 and 176 of *Surat An-Nisa*.

To deal with it many contemporary Muslims took a great effort to re-imagine this Qur'anic verse so it can align with the modern expectations of just God's words for ethical conducts of marriage. Trying to re-imagination the text through believer's expectation was followed but the major setback was the fundamental patriarchal nature of the Muslim society.

On the other hand, some modern scholars who wanted to bring change and still had faith that their religion can adapt to modern approach of egalitarian society went ahead criticizing Q. 4:34 stating that wife-beating can never be just and ethical.

The Muslim Scholars in present times employ various methods to achieve the authoritativeness in society but that should not be taken as hard and fast, they can be divided into 4 major broad categories: traditionalist, neo-traditionalist, progressive and reformist. [957]

The "traditionalist" approach or the pre-colonial tradition, patriarchal idea prevailing over the egalitarian thus retaining the right of husband. They justify inequality by stating that favouritism by almighty is not degrading, according to them men is superior an all-rounder who can tackle all the worldly problems, he is a guard for women and the guard can even punish in case of disobedience. This superiority also comes from the fact that they can complete all the prayers and fasting without interruptions such as child birth and mensuration.

However, they frame their arguments in particular modern way, stating that both spouses help each other to attain path of God and Q. 4:34 talks about moderate beating not on pity matters and it cannot be called as violence.

The "neo-traditionalist" also favours the patriarchal idea with an additional clause that beating of wife is to be done only in increasing restricted circumstances. They try to balance out both sides of the coin i.e., age old patriarchal traditions with gender-egalitarian values, softening the edges of patriarchy by promoting gender complementary rather than equality stating that both genders are unique. According to them nushūz means sexual disloyalty or a behaviour threatening the harmony of marriage under which the husband can discipline his wife, explaining how violence and discipline are different terminologies.

The "Progressive" form, they want to discard the wife-beating entirely but not on the cost of their inherent traditions however they seek to portray both their positions and the larger egalitarian idealized cosmology as compatible with traditional views. They even reject what is written in verse Q. 4:34, not technically what is written but the interpretation done by others who affirm that wife-beating is written in it. They never talk about dominance of men over

[957] AYESHA S. CHAUDHRY, DOMESTIC VIOLENCE AND THE ISLAMIC TRADITION: ETHICS, LAW, AND THE MUSLIM DISCOURSE ON GENDER (2013).

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women directly but states that the word nushūz written here doesn't mean disobedience as it creates hierarchy and for Allah almighty all are equal. They state that the word nushūz here means "sexual disloyalty and infidelity" which can be seen and done by both spouses so it is not patriarchal in nature but gender neutral in nature. For them the method here is consultative which they prove by showing Q. 4:19 and Q. 2:228 which instructs them to live together with similar rights.

The "reformist" wants to reorient the verse of Qur'an and for achieving it they are willing even can sacrifice any authority that might be garnered through the association with a patriarchal tradition for their egalitarian cosmology. They can be termed as the real progressive thinkers which incorporated all the modern views of gender equality. According to them the interpretation of Qur'an caused unjust and not the divine book. The word aḍribūhunna means to strike out and strike that is go for arbitration and not beating as last resort. They further rely on sunnah for authority asking that if the holy book instructs husband to beat his wife why did Muhammad not hit his wife? Because the verse Q. 4:34 is not a command to hit wives. They are also different from progressive scholars as they did not require authoritativeness of past precedents as required by the latter one.

LAWS PROTECTING MUSLIM WOMEN FROM CRUELTY IN INDIA

By looking through all the post-colonial approaches to interpret and tackle this grave problem which is incorporated in Islamic Tradition and presented by the earlier scholars as right of men to beat their wives and modern reformist and progressive approach it is be said that changes are visible in present day Islamic society.

Such as in Saudi Arabia where the lawmaker the Crown Prince according to the new law allowed women to travel free without any male guardian i.e., her father, brother or husband and even choose institutions and subjects without any interference from her male guardian.[958]

When it comes to India being home to people from all the religions of the world, it is somewhat difficult for the government to make a law which can be applied to all without hurting their religious sentiments and it is one of the main reason why there is no Uniform Civil Code except in Goa.

The first conflict regarding the personal laws arise in 1985 landmark *Shah Bano* case[959] in which Supreme Court by virtue of Section 125 of Code of Criminal Code, 1973 which states

[958] Saudi Arabia allows women to travel independently, BBC NEWS (2019), https://www.bbc.com/news/world-middle-east-49201019 (last visited Jun 20, 2020).
[959] Mohd. Ahmed Khan v. Shah Bano Begum and Ors, AIR 1985 SC 945.

ISSN: 2581-6349

for Order for maintenance of wives, children and parents, gave judgement in favour of Shah Bano stating that Section 125(3) is equally applicable on Muslims also irrespective of personal law. After which wide spread protest started forcing the government to form The Muslim Women (Protection of Rights on Divorce) Act, 1986 which in a way made this Section 125 of Code of Criminal Procedure inapplicable to Muslim Women and thus turning down the said judgement. According to it a divorced woman can ask for Mahr or even for Maintenance till Iddat period and to get maintenance under Section 125 she along with her husband has to file an affidavit under Section 5 of the 1986 Act.

As the Supreme Court stated that the criminal laws will apply over Muslim women also irrespective of Muslim Personal Laws therefore Section 498A of Indian Penal Code, 1860 incorporated in the year 1983 which states that Husband or relative of husband of a woman subjecting her to cruelty which even define cruelty and includes both physical and mental cruelty. In *A.Subash Babu vs State Of A.P.& Anr*[960] court further held that even the Second Wife is eligible to file a complaint under this section.

But before all of this there was Dissolution of Muslim Marriages Act, 1939 a part which was repealed from The Muslim Personal Law (Shariat) Application Act, 1937 and hence contains the content of it. Section 2 of this act provides 9 different grounds for dissolution of which clause vii talks about cruelty as per this law and basically covers everything ranging from physical cruelty to mental harassment and also the property matters.

Now Cruelty being a subjective term can cover everything and anything, as stated by Punjab and Haryana HC in *Iqbal Kaur Wife of S. Pritam Singh vs Pritam Singh S. Nanak Singh*[961] that Cruelty can be of various shapes and can include various factors like health, environment, education, adultery, immorality, etc.

But it also does not provide unlimited rights to wife as mere stating that no treating well as per Qur'an without some valid proof will not be acceptable in court of law. It is true that mental cruelty can't be visible as physical bruises but that not at all means that without having solid proof wife can take divorce under this clause as was stated by Bombay High Court in *Bai Fatma Alauddin vs Mumna Miranji Haji*[962] where plaintiff failed to prove that her case falls under Section 2(vii) of 1939 Act.

In 2005 Protection of Women from Domestic Violence Act was also passed and with that a question was raised about its applicability over Muslim women to which Bombay HC in *Mr.*

[960] A.Subash Babu v. State of A.P. & Anr., (2011) 7 SCC 616.
[961] Iqbal Kaur Wife of S. Pritam Singh v. Pritam Singh S. Nanak Singh, AIR 1963 P H 242.
[962] Bai Fatma Alauddin v. Mumna Miranji Haji, AIR 1957 Bom 107.

Ali Abbas Daruwala vs Mrs. Shehnaz Daruwala[963] held that this act is secular in nature and women governing under Muslim Personal law has right to recourse under this act.

Even the recent issue pertaining to Triple Talaq can also be stated as a form of cruelty over women to which SC in *Shayara Bano vs Union Of India And Ors.*[964] declared the Triple Talaq unconstitutional stating that it is cruel on part of husband to divorce her wife just by uttering word Talaq thrice, the court also stated that even Qur'an says if your wife is loyal then you can't give her divorce as some strong reason is required to give divorce to your wife.

Union of India also came up with The Muslim Women (Protection of Rights on Marriage) Act, 2019 in which they declare the pronouncement of Talaq word to be void and illegal and thus safeguarding the rights of Married Muslim Women of India.

CONCLUSION

The Qur'an came out with a thorough declaration that men and women are equal and women's rights are equal to their duties. Till today, because of conflict on the part of the ulama and jurist, this basic principle continues to be in midpoint.

The Qur'an has been interpreted according to the needs in the society. It very respectfully defines the position of a woman in the society but it's distorted with the interpretation over time. It is observed that men have twisted the meaning of the words in the Qur'an to their benefit affecting the rights of women which were originally inscribed.

Therefore, the traditional interpretation of Islamic law also changed after the colonial period where many thinkers have stated that the act of wife beating is unjust and unethical according to the Qur'an and they have tried redefining the interpretation.

With this also came the need to codify the Islamic law to an extent not just for women but for bringing uniformity in the interpretation of the Muslim personal law, Shariat act, 1937 and Dissolution of Muslim Marriage act,1939.

But after independence there came major chances and the first landmark case was of Shah Bano and then many more, the latest one being the triple talaq judgement where the court has held triple talaq to be unconstitutional and came with the latest legislature The Muslim Women (Protection of Rights on Marriage) Act, 2019.

The court has with the help of Dissolution of Muslim Marriage act granted a decree of divorce to many Muslim women on the ground on cruelty as the legislature clearly defined what all

[963] Mr. Ali Abbas Daruwala v. Mrs. Shehnaz Daruwala, (2018) 3 HLR 673.
[964] Shayara Bano v. Union of India And ors., WP (C) No. 118 of 2016.

ISSN: 2581-6349

would be included as a ground of cruelty against wife. This has given a somewhat clear image to the court though many times the courts due the constraint of no other proper codified law for Islam had to rely on the Islamic texts and also accept the arguments of the All India Muslim Personal Law Board. It is also important to understand that the religion of Islam and people's cultural traditions are two very different factors. A major pitfall for practitioners is confusing cultural practices with religious beliefs. Many attorneys make the major mistake of assuming that all of a Muslim's manners and practices are related to Islam. In fact, many Muslims are heavily influenced by their individual cultural backgrounds. Islam is an extremely culturally diverse religion.

Today, there are a larger pile of case laws on cruelty in India as well as even in abroad. Since, the human nature and conduct are infinitely diversified. No such hard and fast rule can be laid in present times which can show us what all acts or what conducts of a person will amount to cruelty and it is up to the court to decide based on the facts and circumstances of the given case. However, there is a sea change in the attitudes of the courts. There is no difficulty in holding that mere physical violence amounts to cruelty but sometimes the all that mental harassment, all that mental trauma which eventually can even lead to death cannot be neglected can be considered as a part of cruelty only. The reason behind it that mental cruelty may contain everything and anything as one can see physical bruises but can never see or even feel what all is going in the mind of a person. It can be that court even lay down some guidelines but what if new concept of mental cruelty may reveal later.

The wideness of mental cruelty can be seen by the fact that it may be subtle or brutal. It may occur by words, gestures or even by mere silence. So, it is impossible to observe and find if a person has gone through some mental cruelty or not. In deciding whether or not a particular state of affairs amount to legal cruelty, the court has to consider the social status, the environment, the education, the mental and physical conditions and the susceptibilities of the innocent spouse and also the custom and manners of the parties. Whether acts or conduct complained of, constitutes cruelty has to be construed in reference to the whole conjugal relationship and all the other relationships along with the rest of the above said factors.

By all of this one thing can be concluded that cruelty as such is a very broad topic and contains a lot of factors but this should not stop us from concluding that it is ok, no it is not ok, if men and women are created by one God how it is justifiable by one to do violence with other and justify it. Again, the new laws formed are actually a good initiative but the society need better laws and more of that one need to change the mind-set of the society to shift it from the so-called patriarchal nature to gender-egalitarian nature.

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THE STAGGERING DEFICIENCY IN THE ANTI-DOWRY LAWS

- **AKASH KRISHNAN & KUSHAGRA GAHOI**

ABSTRACT

The emergence of industrialized societies and social awareness amongst people, especially in women regarding their rights of equality and personal liberty has led to a change in the meaning of stability in the context of marriage.[965]The issues of family law reform and women's rights has been entangled in the polemics of politics. It is impossible to overlook the miseries and hardships suffered by woman of all communities. The life of a woman in our country has always been difficult, due to the social customs. But unfortunately, today the laws are such that a woman can easily misuse it to serve her benefit and purpose.[966] Dowry laws are unfortunately one of them.

In most of the civilisations around the globe, women have been oppressed since time immemorial. India is one of the oldest civilisations of the world and the roots of gender based discrimination date back to the arrival of the Aryans. The blind faith in texts such as the Dharmashastras and Dharmasutras add to the problem. Another issue that this blind faith gave birth to was the problem of dowry which can be traced back to the gotra system and the forms of 'valid' marriages of the Ancient Hindu Society. In the modern era, even though there are steps being taken to tackle this social evil, the problem is nowhere near its end. Following is an analysis of the existing loopholes in the rules which give this issue a chance to continue to be a part of today's society.

CONCEPT OF DOWRY

The Dowry Prohibition Act, 1961 defines dowry as: any property or valuable security given in or settled to be given either directly or indirectly – (1) by one party to the other party in marriage; or (2) by the parents of either party or by any other person to either party to marriage or to any other persons; at or before or after the marriage as consideration. It does not include dower or mahr in cases where Muslim Personal Law applies.[967] In spite of laws against dowries,

[965] Paras Diwan, *Modern Hindu Law,* p. 63-64, (2007).
[966] Lalsa Mohini, *Legitimacy of Section 498A of Indian Penal Code,* Cri. LJ, Vol-117, p.127, (2011).
[967] C.N. Shankar Rao, *Indian Social Problems.* S. Chand. pp. pp, pg.238, (2019).

the practice of dowry deaths and murders continue to take place all across the country, and hence they are largely criticised as being ineffective.[968]

ANTI – DOWRY LAWS AND THEIR MISUSE

The Dowry Prohibition Act, 1961 is the first legislative enactment that marked the foundation of a new legal framework of dowry harassment laws prohibiting the demanding, giving and receiving of dowry. Although this law made dowry illegal, the practice continued unchecked. So, to strengthen the law, new provisions were made to the Indian Criminal Law, namely – Section 498A to Indian Penal Code and Section 198A to the Criminal Procedure Code in the year 1983. Further, Section 304B was added to IPC, which recognised dowry death as a specific punishable offence. The Protection of Women from Domestic Violence Act was passed in 2005, which provided an extra layer of protection.

1) THE DOWRY PROTECTION ACT, 1961

It lays down a proper definition of dowry and various provisions as a measure to eradicate this evil from the society. Dowry in the Act is well-defined as any asset or valuable security given or decided to be given in relation with the marriage.[969] It consolidated the laws against dowry which were passed in certain states.[970] It awards penalty under Section 3 if any individual grants, receives or abets giving or taking of dowry. The punishment provided could be imprisonment for minimum of 5 years and a fine of more than Rs. 15,000 or the worth of dowry received, whichever is more.[971] Agreements on dowry are void *ab initio* and the dowry received should be transferred to the woman, if they are taken by anyone other than the woman.[972] The burden of proving innocence is on individuals charged and not the woman or her family.[973]

The Amendment Act of 1986 introduced Sections 8A and 8B. Section 8A states that the burden of proving that one has not committed the offence is on the person charged. However, the Supreme Court in the case of ***Balram Kumavat v. Union of India***[974] held that conviction cannot be based on such presumptions without offence being proved beyond reasonable doubt.

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[968] Purna Manchandia, *Practical Steps towards Eliminating Dowry and Bride-Burning in India,* Tul. J. Int'l & Comp. L. 13: 305-319, (2005).
[969] Section 2, Dowry Prohibition Act, 1961
[970] The Dowry Prohibition Act, 1961 repealed the earlier local laws e.g. The Andhra Pradesh Act, 1958 and The Bihar Dowry Restraint Act, 1950. S. Krishnamurthy, *The Dowry Problem: A Legal and Social Perspective, Ch. The Roots of Dowry,* Bangalore: IBH Prakashana, p.66, (1981).
[971] Section 3(1), Dowry Prohibition Act, 1961.
[972] Sections 5 and 6, Dowry Prohibition Act, 1961
[973] Section 8A, Dowry Prohibition Act, 1961
[974] AIR 1996 SC 2184.

ISSN: 2581-6349

Nowadays, more individuals especially, husbands are committing suicide fearing false complaints under this Act.

2) **SECTION 498A OF INDIAN PENAL CODE, 1860: AKA LEGAL TERRORISM**

Section 498A of IPC was specifically included in 1983 to curb the peril of dowry. It awards punishment for 3 years and a fine. Some women often use it as a weapon than to shield themselves. Supreme Court has held that matters under section 498-A, IPC are civil and private in nature.[975] Therefore, in such matters it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process.[976] The Justice Malimath Committee report says, "*The harsh law, far from helping the genuine mistreated women, has become a source to blackmail and harass husbands and his relatives. Once a complaint (FIR) is lodged with the Police under Section 498A/406 IPC, it becomes an easy tool in the hands of the Police to arrest or threaten to arrest the husband and relatives named in the FIR without even considering the worth of the allegations and making a preliminary investigation.*"

Is Section 498A IPC fit for the Indian Society?

Section 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.[977]

In the case of **O*nkar Nath Mishra v. State* (*NCT of Delhi*),[978]** the SC recognised that "Section 498-A IPC was introduced with the objective to combat the menace of dowry deaths and harassment to a woman at the hands of her husband or his relatives. Nevertheless, the provision should not be used as a device to achieve tilted motives".

There are several reasons as to why this Section, although being a relevant one, is unfit for the Indian society, at least in the current form and procedure. First and foremost, this offence under Section 498A is a non-bailable one, and no investigation is required prior to arresting the accused. This is probably the biggest reason why this Section is misused so frequently. Furthermore, an offence under this Section is a non-compoundable offence, thus leaving no room for reconciliation between the two parties.

[975] Ram Gopal Vs. State of MP, SCALE 711, (2010).
[976] G Sagar Suri Vs. State of UP, 2 SCC 636, (2002).
[977] Section 498A, Indian Penal Code, 1860.
[978] 2 SCC 561, (2008).

In the case of ***Preeti Gupta Vs. State of Jharkhand***,[979] the SC observed "a serious re-look of entire Section 498A is required. All of these recommendations are in against the rigidity of this provision. The simple principle has been revealed here that if procedural laws are made too hard then object of the substantive law will be frustrated. If chance of reconciliation is not given then the whole institution of family will come to an end. But cardinal rule of family law is to make the family not to break the family. The aim of this provision was mainly to make a society free from family disputes. In writ petition about the constitutional validity of Section 498A, the SC said, merely because the provision was constitutional and intra vires, did not give a license to unscrupulous persons to wreck personal vendetta or unleash harassment."

3) THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: BIASED AGAINST MALE

The Protection of Women from Domestic Violence Act, 2005 was passed with the idea of providing a civil law remedy for safeguarding the women from domestic violence. It covers all forms of physical, emotional, verbal, financial and sexual abuse and forms a subset of the anti-dowry laws.[980] Section 3 of this Act encompasses all forms of harassment, damage and harms imposed to force a woman to meet an unlawful demand for dowry.[981]

Some of the provisions of the Act are biased in favour of women and they are being misused by them greatly. Under this Act, the aggrieved party is always "a woman", man does not fall within the purview of such definition. The worst part of the Act is Section 32(2) which states that on the sole testimony of the aggrieved party, that is the woman, the court may conclude that the offence has been committed by the accused. Hence, it is biased in favour of women and against men.

HOW TO TACKLE THE MISUSE OF THESE LAWS?

The Indian government and jurisprudence keep on adding inputs to strengthen the women, but men are not abandoned by law. Justice is always chosen over injustice. So, what are the options available to men? Whether they should stand byzuch false accusations or raise their voice against it?The answer is no as they are protected under Section 498A IPC as well. Moreover they can:

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[979] SC 3363, (2010).
[980] Suman Nalwa and Hari Dev Kohli, *Law Relating to Dowry, Dowry Death, Cruelty to Women & Domestic Violence.* New Delhi: Universal Law Pub. Co., pp.362-364, (2011).
[981] ibid

ISSN: 2581-6349

· The husband can file a case of defamation under Section 500 of the Indian Panel Code.

· Under Section 9 of CrPC, the husband can file an application for damage recovery which he and his family have undergone due to the false accusations of cruelty and harassment.

· Section 182 of IPC, 1860 is one of the prevalently used measures against false 498A cases. When the authority finds that the averments made were false, the culprit is subjected to imprisonment of 6 months or fine or both under this Section. The person will be charged on the grounds of misleading the judiciary with false information.

LOOPHOLES THAT EXIST IN THE ANTI-DOWRY LAWS IN INDIA

It is an undeniable fact that dowry gives rise to several issues such as physical as well as mental trauma and hence, it needs to eradicated. The term dowry has been ***defined under Section 2 of the Dowry Prohibition Act, 1961.*** However, in a layman's term language, the term dowry refers to any kind of perk (in cash or in kind) that is given by the bride's family to the groom's family in exchange for marrying the girl is termed as dowry and is demanded by the groom's family. This social arrangement many a times leads to mental and physical harassment of the woman at the hands of the husband and his family. With the passage of time, a number of anti-dowry laws have been incorporated in India like the Dowry Prohibition Act, 1961, Indian Penal Code, 1860 and Indian Evidence Act, 1872. Although the laws were incorporated with a view to put an end to dowry deaths/suicides but the laws seem to be flawed when given a closer introspection. Following are a few provisions that need to be revisited-

One of the biggest loopholes in the Dowry Prohibition Act is the allowance of giving of gifts. Now the general concept of gifts goes with the understanding that they are given willingly without any ulterior motive. The main aim of the Dowry Act is to prevent the forcible giving of money or any other item as per the demand of the groom's family, so as to not incentivise marriage for the wrong reasons. Section 498A of IPC & Section 113A of the Evidence Act read together and Section 304B of the IPC & Section 113B of the Evidence Act read together lead to the following observations:

1. There is presumption of cruelty/harassment to be the sole reason for suicide/dowry death and the other factors that might be responsible for suicide/dowry death has been ignored. The definition of cruelty is nowhere given and varies from person to person. Hence such presumption is arbitrary and unreasonable. The subjectivity in the definition of cruelty means that for every person the degrees of cruelty vary. As a result, one thing may be classified as cruel for one and not for the other. Thus such presumption, in every case, of applicability of the provision of cruelty is unreasonable.

2. A limitation period of 7 years has been allotted to cases of suicide/dowry death which is unreasonable. Even though this period is not fixed and is open to extensions, the same are painstakingly difficult to seek and mentally damaging to the victim. What is even more peculiar is that if prima facie that death has been due to natural causes, a hurried investigation might not reveal the truth, and the problem aggravates.

3. There is no limitation as to the filing and disposal of cases related to dowry death/suicide which leads to pendency of cases to an unreasonable extent and it's a very well established principle of law that justice delayed is justice denied. Also, the offence under Section 498A of the IPC is non-compoundable in nature which washes away any possibility of genuine reconciliation by the litigating parties.

These are the loopholes that exist and need to be taken care of for an effective justice system with regards to dowry.

INTERNATIONAL LAWS RELATED TO DOWRY

In some countries like China[982] and Thailand, the groom gives their bride's family cash on the day before wedding as a sign of gratitude as their view about marriage is based on financial stability. Dowry is still practiced on a large number in certain regions of Europe, South Asia and the Middle East, northern part of Africa and among some communities in Britain.

In Asia, dowry system is most commonly practiced in India, Pakistan and Bangladesh. However, dowry system is illegal in almost all the countries but still legal in Britain.[983] Pakistan has five separate laws (first being passed in 1984 and the last being passed in 2008) making the dowry system illegal. In Pakistan, dowry is called 'Jahez' in Arabic. West Pakistan Dowry (Prohibition of Display) Act, 1967; Dowry and Bridal Gifts (Restriction) Act, 1976 and the Muslim Personal Family Laws Ordinance, 1961[984]are some laws passed by Pakistan.[985] Violation of the act invites imprisonment for one year or fine up to 5000 or both or imprisonment up to six months or fine up to Rs.10000 or both.

Greece also amended its Family Laws in 1983 through legal reforms to make dowry illegal[986].

A petition in parliament has been moved to make dowry illegal as part of country's Family

[982] https://www.herworld.com/weddings/ideas-advice/pin-jin-or-dowry-what-you-should-know-about-chinese-wedding-tradition/
[983] https://www.indy100.com/article/dowry-outlawed-in-all-these-countries-but-still-legal-in-britain--x1HtqfYSUx
[984] https://www.dawn.com/news/1318742 .
[985] https://en.wikipedia.org/wiki/Dowry_death .
[986] https://www.nytimes.com/1983/01/26/world/around-the-world-greece-approves-family-law-changes.html

ISSN: 2581-6349

Violence Protection Act in Australia also. Kenya's marriage bill which was implemented in 2012 also bans any dowry payments.

The Social Customs and Practices Act also banned dowry in Nepal in 2009. The violator of this will face punishments of up to three months in jail or a fine of 3000 Nepalese rupees, or about 1,875 rupees.[987] Still Nepali people of the Madhesi society freely welcome dowry as a right to the groom's side. Even highly educated people in Nepal accept dowry without any hesitation.

The original practice in Bangladesh was 'Pawn' which was gradually replaced by the dowry which is known as 'Joutuk'. There is a rise in the rate of the dowry deaths in Bangladesh. Bangladesh has taken inspiration from Indian anti-dowry laws. Dowry Prohibition Act, 1980; Dowry Prohibition (Amendment) Ordinance, 1982 and Dowry Prohibition (Amendment) Ordinance, 1986 are the laws which prohibit dowry in Bangladesh.[988]Violators of the law will face punishments with imprisonment which may extend to five years and shall not be less than one year, or fine or both depending on the court. The offence of giving, taking or demanding is a non-cognizable offence under section 8 of the said act. Section 11 of the Prevention of Repression of Women and Children Act, 2000 says that if the husband of the women or relatives or parents of the husband cause death or attempt to cause death to that woman for dowry or cause serious or simple hurt to her than that relative or in-laws or guardian 1) shall be sentences to death for causing death or imprisonment for life for attempting to cause death and will be liable for a fine in both cases, 2) shall be punishable with rigorous life imprisonment or minimum five years or maximum twelve years rigorous imprisonment and will be liable for fine for causing serious hurt or injury 3) shall be punishable with minimum one year and maximum three years of rigorous imprisonment and will be liable for a fine for causing simple hurt (fine can be imposed up to Tk.50,000). But the law does not have any punishment for the misuse of the said act. Hence, it is frequently used by women to harass in-laws and the husband. The system of dowry is still being carries out in many countries like Serbia, Egypt, Afghanistan, Sri Lanka, Iran, Turkey, Azerbaijan, Tajikistan, Morocco and Bosnia.

SCOPE OF IMPROVEMENT

As observed, there is an urgent need for the anti-dowry laws to be re-examined with special attention to the needs of our society. Key issues that need to be dealt with are the non-bailable

[987]http://therisingnepal.org.np/news/12207#:~:text=The%20Social%20Customs%20and%20Practices,deteriorated%20to%20a%20large%20extent
[988] Ibid.

and the non-compoundable nature of the offence. Considering that the key motive behind the misuse of these laws is the mental harassment of the husband and his family, changing the nature of the offence, will directly result in the reduction of false accusations

CONCLUSION

It is a very well-known fact that dowry is a social evil which is responsible for mentally and physically tortured wives in various countries around the globe. Even though there are laws in place that tend to this issue, but it can undoubtedly be said that these laws are not as efficient as they were intended to be. The scope of dowry laws, which include both substantive laws and procedural laws, has to be restricted. The wide ambit of the law is necessary to an extent where it cannot be misused. Proper guidelines have to be laid down, after a detailed study of each and every aspect of the law when it comes to dowry because it is a social evil which affects the basic pillar of any society, the family and completely destroys the same.

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LEGALITY OF NARCO ANALYSIS TEST IN INDIA

- **DIVYANSHU GUPTA**

ABSTRACT:

Legality of narco analysis has always been a debatable issue. Investigative authorities in India have used scientific methods such as narco- analysis, polygraph test, BEAP test for conducting an investigation. The legality of these scientific tests was challenged in Selvi case and the court held that compulsory administration of narco analysis amounts to testimonial compulsion under article 20(3) and hence it is unconstitutional. Therefore, Selvi Case finally determined the legality of the narco analysis test in India. However, the case has not examined the legality of narco analysis test in case issue of public interest is involved and where it has become difficult for investigative agency to solve complex cases. The judiciary has left on the legislation to decide for using these scientific methods in these cases. This paper analyzes the theoretical aspect of the narco analysis test in India through the Constitution, Code of Criminal Procedure and Indian Evidence Act. The article further analyzes the most importantly, the concept of public interest with narco analysis and finally ends with conclusion and suggestions which can be incorporated by the legislation for conducting the narco analysis test in case arising out of public interest.

INTRODUCTION:

The term Narco Analysis is derived from Greek word "narke" (meaning anesthesia) and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated effects come to the surface where they can be exploited by the therapist.[989] This term was first coined by Horselley.[990] It is said that if a person is administered a drug where his reasoning and thinking power is suppressed and without affecting his memory, he can reveal the truth.

A good criminal justice system is considered where the investigative authorities without using any third-degree method reveals the true nature of the crime. Sometimes, the investigative authorities with the traditional investigation cannot reveal the true nature of the crime and Therefore, they have resorted to scientific methods to conduct the investigation. Narco Analysis test is used by the investigative officers to elicit the information from the criminal

[989] ISHITA CHATTERJEE, LAW OF FORENSIC SCIENCE, (1st ed, 2015).
[990] *Id*.

suspects. In India, there is no specific law on Narco Analysis. The use of narco analysis tests on suspects has always been a debatable issue. It raises serious scientific, legal and ethical questions. The legality of narco analysis has been interpreted through various judgments and under article 20(3) of the Indian Constitution. Narco analysis test can aid the investigation if conducted lawfully and any information derived from the accused can be used to corroborate the evidence.

CHAPTER IN DETAILS

Medical perspectives of narco analysis:

The drug used for narco analysis is Sodium Pentothal, also known as Sodium Thiopental.[991] It belongs to the category of narcotic Barbiturates, listed in Schedule III of Controlled Substances under the Narcotic Drugs and Psychotropic Substances Act, 1985. The narco analysis test is conducted by mixing 3 grams of sodium pentothal dissolved in 3000 ml of distilled water.[992] This substance inhibits the neural activity in the brain. In such a condition, a person cannot lie. Depending on the person's sex, age, health and physical condition, this mixture is administered intravenously along with 10% of dextrose over 3 hours with the help of an anesthetist.[993] Therefore, doctors give the dose of the drug considering all the above-mentioned criteria. Wrong dose can lead to the person in the stage of coma or even death. The test is conducted under medical observation and prior permission of the court and consent of the accused is required for conducting a narcoanalysis test.

Veracity of the Narco Analysis Test:

Experts think that the test of narco analysis does not yield true results. However, there exits contradictory opinion about the veracity of the narco analysis test. Narco analysis has not so far been held out as scientifically infallible.[994] The person induced by the drug will answer in a childlike simplicity, honesty without guile, deceit or fraud, an answer to a query that is stored in his mind as a memory.[995] Different legal and medical jurists have different opinion about the

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[991] GOODMAN & GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS, (Mc Hill Medical Publishers, XI Edn. Ch. 16 (2006)).

[992] Dharmendra Kumar Singh, *Constitutionality and evidentiary value of narcoanalysis, polygraph & BEAP tests*, Volume 3; Issue 4; July (2017).

[993] N. Murky P, et al. Narcoanalysis, International Journal of Medical Toxicology & Legal Medicine. 2007; 10(1):1-7.

[994] George H. Dession (et.al.), *Drug Induced Revelation and Criminal Investigation*, 62, YALE LAW JOURNAL (1953), pp. 315, 321.

[995] House, Robert E., "*The Use of Scopolamine in Criminology*", (1931) 2 American Journal of Political Science 328-38; Moenssens, Andre A., "*Narco Analysis in Law Enforcement*", (1961)52 The Journal of Criminal Law, Criminology and Police Science 453458.

reliability of narco analysis. Hence, the Indian judiciary has never admitted the statement as evidence under the influence of narco analysis. The statement has been merely used to aid the investigation and derive the derivative evidence.

ANALYSIS- LEGALITY OF NARCO ANALYSIS IN INDIA

Narco Analysis & Article 20(3) of the Indian Constitution:

Before drawing a link between narco analysis and article 20(3), we need to understand right against self-incrimination. Article 20(3) states *that no person accused of an offence shall be compelled to be a witness against herself.*[996] The cardinal rule of criminal law is that an accused is presumed to be innocent until the contrary is proved. The prosecution must prove the case beyond a reasonable doubt. Therefore, the accused cannot make any statement or testimony which incriminates him. In *MP Sharma v Satish Chandra*[997]*,* the Supreme Court laid three principles under right against self-incrimination: (1) it is a right of a person who is accused of an offence (2) it is a protection against compulsion to be a witness (3) it is a protection against such compulsion relating to his giving evidence against himself.

Therefore, a person who is accused of an offence is entitled to legal protection under Article 20(3). The court in this case interpreted the expression '*to be a witness'* to be very wide to include oral, documentary and testimonial evidence. However, this broad interpretation would have hampered the criminal justice system and therefore the correct interpretation under article 20(3) was laid down in the *State of Bombay v Kathi Kalu Oghad.*[998] The Apex Court said that the phrase 'to be a witness' is not equivalent to furnishing evidence and therefore, it only protects making or oral or written statements and not the production of documentary evidence.

"Self-incrimination can only mean conveying information based upon personal knowledge of the person giving information and cannot include merely the mechanical process of producing documents in court which may throw light on any point in controversy, but which does not contain any statement of the accused based on his personal knowledge."[999]

Therefore, fingerprints, handwriting expressions and other bodily evidences have been excluded under Article 20(3) because it furnishes evidence but is not included within the expression "to be a witness". They are merely used for corroboration for the information that already exists with the investigation officers.

[996] INDIA CONST. art. 20, cl. 3.
[997] MP Sharma v Satish Chandra, A.I.R. 1954 S.C. 300, Narain Lal v MP Mistry, A.I.R. 1961 S.C. 29.
[998] State of Bombay v Kathi Kalu Oghad, A.I.R. 1961 S.C. 1808.
[999] *Id.*

In *Nandini Sathpathy v PL Dani*, the court widened the scope of Article 20(3) and held that the prohibitive scope of Article 20(3) goes back to the stage of police interrogation and not commencing in the court only.[1000] The phrase compelled testimony not only includes physical threats or violence but also includes mental torture, atmospheric pressure, intimidatory methods etc.[1001] Therefore, these three landmark cases have established the principle of right against self-incrimination under Article 20(3) of the Indian Constitution.

The courts before *Selvi v State of Karnataka* believed that the narco analysis test is not violative of Article 20(3) of the constitution. The division bench of Bombay High Court in *Ram Reddy v State of Maharashtra*[1002] held that certain physical tests involving bodily harm such as narco analysis, lie detector tests do not violate right against self-incrimination under article 20(3). The Bombay High Court observed that:

"Statement which is recorded during the narco analysis test will attract the bar of Article ***20(3)*** *only if it is inculpating or incriminating the person making it. Whether it is so or not can be ascertained only after the test is administered and not before. In our opinion, therefore there is no reason to prevent administration of this test also because there are enough protections available under the Indian Evidence Act,* ***1872,*** *Code of Criminal Procedure,* ***1973*** *and the Constitution of India to prevent inclusion of any incriminating statement if one comes out after administration of the test."*[1003]

Madras High Court in *Dinesh Dalmia v State*[1004] held that subjecting an accused to narco-analysis does not amount to testimonial compulsion and he may be taken to the laboratory for the test against his will. All the statements that are given by him under the test of narco analysis is voluntary. Hence, earlier courts before the Selvi case believed that in narco analysis, the accused aids in the investigation of a crime and therefore he provides relevant information to the court, hence it does not amount to testimonial compulsion under Article 20(3).

Finally, the Supreme Court in *Selvi v State of Karnataka*[1005] discussed the legality of the narco analysis and other scientific tests and it was held that all these scientific tests amount to testimonial compulsion under Article 20(3) and therefore a person cannot be subjected to narco analysis tests. The court laid down the principle of testimonial compulsion for narco analysis and held that person is compelled to testify as he is in a drug-induced state and therefore, he

[1000] Nandini Sathpathy V PL Dani, A.I.R. 1977 S.C. 1025.
[1001] *Id.*
[1002] Ram Reddy v State of Maharashtra, MANU/MH.0067/2004.
[1003] *Id.*
[1004] Dinesh Dalmia v State, (2006) 7 S.C.C. 296.
[1005] Selvi v State of Karnataka, A.I.R. 2010 S.C. 1974.

testifies against his own will. This further violates the principle laid down in Nandini Sathpathy case where mental duress also amounts to testimonial compulsion. A forcible invasion into a person's mental process violates human dignity and liberty[1006] and narco analysis is nothing but the psychological intervention of the human mind in a drug-state and therefore amounting to mental torture.[1007]

Hence, the Selvi case established the principle that scientific tests such as narco-analysis violates rights against self-incrimination under Article 20(3) of the Indian Constitution. The underlying rationale is that it ensures that the person does not make any statement that is voluntarily administered. These tests are used as a medium to testify a statement by an accused and therefore this right even extends to the narco analysis test.

RELEVANT GUIDELINES GIVEN UNDER SELVI V STATE OF KARNATAKA[1008] FOR CONDUCTING SCIENTIFIC TESTS:

The case laid down the following guidelines for conducting these scientific tests:

a. No lie detector tests should be administered except based on the consent of the accused. An option should be given to the accused whether he wishes to avail such a test.
b. If the accused volunteers for a lie-detector test, he should be given access to a lawyer and physical, emotional and legal implications of such a test should be explained to him by the police and lawyer.
c. The consent should be recorded by Judicial Magistrate.
d. During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by the lawyer.
e. At the hearing the person in question should also be told in clear terms that the statement if made shall not be a confidential statement to the magistrate but will have the statement made to the police.
f. The magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
g. The actual recording of the Lie detector shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
h. A full medical and factual narration of the manner of the information received must be taken on record.

[1006] *Id.*
[1007] B. Umadethan, *Medico-Legal Aspects of Narco Analysis*, 2 NUALS L.J. 21 (2008).
[1008] A.I.R. 2010 SC 1974.

ISSN: 2581-6349

NARCO ANALYSIS TEST AND CONFESSION UNDER THE INDIAN EVIDENCE ACT, 1872:

The law of confession is governed under section 24, 25, 26 and 27 of the Indian Evidence Act. According to section 25 of the evidence act, *no confession made to a police officer shall be proved as against a person accused of any offence.*[1009] The underlying object of this section is that the police do not use any threat or force to make a confessional statement from the accused and prosecution have a duty to collect all the relevant evidence. Even any confession made to the police in its custody is inadmissible under sec 26 of the evidence act.[1010]

Under section 27 of the evidence act, *any fact discovered in consequence of information received from the accused while he is in police custody, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.*[1011] The admissibility of any derivative evidence under section 27 of the evidence act read with article 20(3) of the Indian Constitution was laid down in Kathi Kalu case where the court said that any subsequent discovery of fact even if it is incriminatory will be admissible if no threat or compulsion was used.[1012] Therefore, if a person voluntarily administers the test, the relevant information obtained which lead to the discovery of fact will be admissible.[1013] In my opinion, the question of admissibility of any derivative information will arise only if the accused consents for narco analysis. Usually, the accused or witnesses will refrain from going through these tests as it might pose a risk of their exposure to criminal activity.

NARCO ANALYSIS TEST AND CODE OF CRIMINAL PROCEDURE, 1973:

Under **section 53** of the criminal procedure code, it gives powers to the investigation agency to conduct the examination of the accused at the request of the police officers for ascertaining the facts of the case which may reveal the evidence.[1014] Therefore the interpretation of the term 'examination' was laid down in *Selvi v State of Karnataka.* According to this section and section 53-A & section 54, "*examination shall include the examination of blood, blood-stains, semens, sweat, hair samples and fingernail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical*

[1009] Section 25, Indian Evidence Act, 1872.
[1010] Section 26, Indian Evidence Act, 1872.
[1011] Section 27, Indian Evidence Act, 1872.
[1012] State of Bombay v Kathi Kalu Oghad, A.I.R. 1961 S.C. 1808.
[1013] Selvi v State of Karnataka, A.I.R. 2010 SC 1974.
[1014] Sec 53, Code of Criminal Procedure, 1973.

practitioner thinks necessary in a particular case." The fundamental argument that was raised was that once the court permitted to go for examination under sec 53, investigative agencies can exercise reasonable force against the accused. The court should liberally construe the principle and such other tests shall also include a beap test, narco analysis test, etc. Parliament has used the phrase 'such other tests' in light of development in new scientific technologies. Therefore, the use of narco analysis is permissible.

The court used the dynamic interpretation of the statute and applied the doctrine of ejusdem generis where it is proper for the court to interpret the word in the current scenario.[1015] It is difficult for the legislative body to consider the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made.[1016] Since, the language of the section includes only the examination of bodily substances, therefore, the impugned tests fall outside the definition and excludes testimonial substances.

Under **sec 161** of the criminal procedure code, *the police officer cannot interrogate the person with such questions who tend for to expose themselves for a criminal charge or to a penalty or forfeiture.*[1017] Therefore sufficient protection is provided under section 161 vis-à-vis article 20(3) right against self-incrimination.

Article 21 of the Indian Constitution & Narco Analysis test:

Article 21 of the constitution states that "*no person shall be deprived of his life or personal liberty except according to the procedure established by law."* Therefore, two aspects of article 21 will be discussed, violation of the right to privacy and safeguarding the right against cruel, inhuman treatment.

Right to privacy

The right to privacy is protected as an intrinsic part of the right to life and personal liberty under article 21 of the constitution.[1018] Forcible interference with a person's mental process is not provided under any statute therefore the use of these tests violates the right to privacy under article 21.[1019] These tests reveal the content of an individual's mind which may be personal to him. The right to privacy under article 21 should be construed under article 20(3) of the

[1015] JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, pp. 239-247 (New Delhi: Wadhwa & Co. Nagpur, 10th edn. 2006)
[1016] Senior Electric Inspector v. Laxminarayan Chopra, A.I.R. 1962 S.C. 159.
[1017] Sec 161, Code of Criminal Procedure, 1973.
[1018] K.S. Puttaswamy & Ors. v Union of India, (2017) S.C.C. 1.
[1019] Selvi v State of Karnataka, A.I.R. 2010 S.C. 1974.

constitution. Hence, forcefully use of narco analysis for extracting statements is a testimonial act and intruding into the mental capacity of an individual is a violation of the right to privacy.

SAFEGUARDING THE RIGHT AGAINST CRUEL, INHUMAN TREATMENT

It has been argued that narco analysis provides for a cruel and inhuman treatment on human beings. Several International Conventions provides for safeguards against human torture. They are:

a. **Article 7 of the ICCPR**[1020] states that *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*
b. **Article 5 of the UDHR**[1021] states that "No *one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*
c. **Articles 1 and 16 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**[1022] states that

Article 1*"For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*

Article 16 *"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Article 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment."*

[1020] Article 7, International Covenant on Civil & Political Rights, 1966.
[1021] Article 5, Universal Declaration of Human Rights, 1948.
[1022] Article 1, Article 16, Convention against torture and other cruel, inhuman or degrading treatment or punishment, 1984.

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These international conventions guide us that no law or statute can provide for inhuman treatment to human beings. The mental pain or suffering inflicted upon an individual during narco analysis could expose an individual to physical abuse. The investigative officer may also exercise force or threaten an individual for a narco analysis test. While infliction of a certain degree of pain and suffering is constituted under the law for constituting punishment for several offences, the same cannot be allowed during the interrogation. This will lead to the disproportionate exercise of powers of the police officers. Therefore, the protection under article 21 extends to protect the individuals against the bodily integrity and dignity of a person who are in custodial environments. This further extends to a person is arrested or detained during investigation.[1023]

NARCO ANALYSIS TEST AND INVOLVEMENT OF PUBLIC INTEREST

Some jurists are of opinion that narco analysis test is used in aiding the investigation and therefore, it does not amount to testimonial compulsion. The test can become effective when public interest is involved. Our Indian criminal justice system follows the adversarial system and therefore, the burden of proof lies on the prosecution. Further, emphasis has been given to one's liberty and freedom and therefore narco analysis test violates constitutional and human rights. Those who support narco analysis are of the view that it is useful when there is a requirement to elicit required information for preventing any offences by terrorists.[1024] Further, it has been argued that the modern criminal justice system is obsessed with individual liberty and freedom that reliable and relevant evidence is neglected when investigative officers are not able to find the truth. If the right against self-incrimination is upheld against the public interest, then it would undermine the criminal justice system and thereby denial of justice to the public.[1025] Supreme Court had a contradictory opinion on public interest and held that applicability of public interest must be decided by legislation. *In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law- making function which is clearly outside the judicial domain.*[1026] Therefore, constitutional right prevails over public interest and it is the legislation to decide what constitutes public interest to conduct a narco analysis test.

[1023] Sunil Batra v. Delhi Administration, (1978) 4 S.C.C. 494.
[1024] CHATTERJEE, *supra* note 1.
[1025] *Ibid*
[1026] Selvi v State of Karnataka, A.I.R. 2010 S.C. 1974.

CONCLUSION AND SUGGESTIONS

Indian Judiciary has interpreted the law on narco analysis through various precedents. The interpretation was finally settled in Selvi v State of Karnataka where the Supreme Court unanimously declared narco analysis test as unconstitutional. In my opinion, the legality of narco analysis decided in this case is valid as no one can be compelled to self-incriminate against himself/herself. However, the arguments based on public interest is left for the legislation to decide. Various cases like Abu Salem, Nithari case, Arun Bhatt Kidnapping case, etc. the Narco Analysis was very much useful in solving the cases.

Legislation should find a feasible solution where narco analysis should be made permissible without the consent of the accused if the public interest is involved. The legislation should define as to what should constitute public interest for conducting narco analysis. The reasoning is that investigative authorities without complying with the traditional investigation will take the permission of the court under the law of public interest to conduct narco analysis. It should be treated as a last resort technique when all the means have been used by the police in conducting the investigation. There is a little possibility of miscarriage of justice where public interest is involved and the investigative authorities cannot reveal the truth of the crime. Hence, observing due safety precautions and complying with the law, the apprehension on the part of the accused and the critics is unwarranted. Ironically, in all these issues we apply the cardinal principle of criminal law only to protect the individual freedom of the accused when the interest of the public is at stake. Though fundamental rights of an accused are considered to be supreme, however, where the public interest is involved, the narco analysis should be made permissible. It can help the investigation agency in conducting the investigation swiftly and without any obstruction.

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REVISITING POLYGAMY: THE NEED FOR ACKNOWLEDGING THE RIGHTS OF MUSLIM WOMEN

- **SHUBHANGI KOMAL**

INTRODUCTION

"Justice has become elusive for Muslim women in India not because of the religion they profess, but on account of lack of legal formalism resulting in immunity from law."[1027]

This statement of Kerala High Court highlights the fact that despite several constitutional guarantees on gender equality, Indian Muslim women continue to face discrimination in various forms in the name of religion.[1028] The most prominent form of such disparity is Polygamy, which refers to the practice of having more than one wife at the same time. Permitted by both Shia and Sunni marital jurisprudence, polygamy has been considered a manifestation of male chauvinistic notions which are deeply engraved, not only in the Muslim community but also in the "Muslim Personal Law". This practice of Polygamy has been condemned by various international organisations such as the Committee on the Elimination of Discrimination against Women, which observed that, "polygamous marriages contravenes a women's right to equality with men."[1029] In fact, the Committee on Civil and Political Rights has recommended for abolition of polygamy from wherever it exists.[1030] But instead of protecting the rights of the Muslim women, the Indian courts have shirked their responsibility by providing immunity to personal laws from constitutional scrutiny.[1031] Thus, when the matter involves violation of fundamental rights, how far is the judiciary justified in remaining mute spectator and revert Indian Muslim women to legislature to seek help when judicial remedy is in itself, a fundamental right?[1032]

Thus, the present paper advocates for criminalisation of Polygamy for Muslim men in order to achieve gender equality, which forms part of the 2030 Sustainable Development Goals which

[1027] 2017 (1) KLT 300.
[1028] Prakash v. Phulavati, (2016) 2 SCC 36.
[1029] UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CEDAW GENERAL RECOMMENDATION NO. 21: EQUALITY IN MARRIAGE AND FAMILY RELATIONS (1994)
[1030] COMMITTEE ON CIVIL AND POLITICAL RIGHTS, GENERAL COMMENT NO. 28: THE EQUALITY OF RIGHTS BETWEEN MEN AND WOMEN (2000)
[1031] Narasu Appa Mali v. State of Bombay, AIR 1952 Bom 84.
[1032] State of Madras v. V.G. Row, AIR 1952 SC 196.

India is also bound to achieve.[1033] The present paper ventures to discuss how Polygamy has been justified in the name of religion and culture by the cultural relativists. It highlights that the practice is unconstitutional by contending that personal laws are not immune from constitutional scrutiny. Moreover, the paper also advocates for observance of principles of "transformative constitutionalism" by the judiciary in order to realise the aim of gender equality.

THE SEED OF CONFLICT: UNIVERSALISM V. CULTURAL RELATIVISM

All human rights are universal, indivisible, interdependent and interrelated.[1034] This universality of human rights is inherent in every individual irrespective of culture, race, ethnicity, gender, age and so on because each one of us is equal in rights and dignity. However, this universal character of human rights has often been criticised by cultural relativists, who assert that all religious, ethical, aesthetic and political beliefs of an individual are supposed to be understood in relation to his/her cultural context[1035] and urges "the need for tolerance and respect for all cultures."[1036] They contend that since all standards and values are specific to a particular culture, the postulates and values of one culture can never be applied to the whole of mankind.[1037]

The human rights of woman have always been violated in the name of culture or religion as is evident from the case of Polygamy as well. The practice of Polygamy has been justified on a combination of cultural and religious factors including patriarchy, religion, social cohesion and economic concerns. In contrast, the Universalists advocate that the practice of Polygamy should be abolished because it is a "harmful cultural practice" and violates various human rights of a woman including the right to dignity of a female.

In fact, article 6 of the UNESCO Universal Declaration on Cultural Diversity states that "Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent and all persons should be able to participate in the cultural life and practices of their choice, *subject to respect for human rights and fundamental freedoms*." Right to live with dignity is a right that is inherent in us by the virtue of being human beings and practices like

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[1033] *Goal 5: Gender Equality*, United Nations Development Programme, https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-5-gender-equality.html.

[1034] The Vienna Declaration, art. 5 (1993).

[1035] *What is Cultural Relativism?,* World Atlas, https://www.worldatlas.com/articles/what-is-cultural-relativism.html.

[1036] SUSAN DELLER ROSS, WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASE-BOOK 461 (2008).

[1037] American Anthropological Association, *Statement on Human Rights by the Executive Board,* 49 AMERICAN ANTH. 539 (1947).

Polygamy takes away a woman's right to dignity in the name of religion and culture. Thus, it has been aptly remarked by Arati Rao, "no social group has suffered greater violation of its human rights in the name of culture than women."[1038]

THE CONSTITUTIONAL VALIDITY OF POLYGAMY

Article 25 of the Indian Constitution declares the right of the individual to freedom of religion while Article 26 protects the exercise thereof. For the practice of Polygamy to be protected under the shield of articles of faith, it needs to get protection as "essential religious practice" under Article 25 else the practice will be subject to public order, morality, health and other provisions of Part III of the Constitution.

(i) The Essential Religious Practice Test

In order to differentiate between what constitutes matters of religion and what not, the "essential religious practice" doctrine was evolved by the Apex Court in the Shirur Mutt[1039] case. According to the Court, "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."[1040] The phrase "essential religious practice" was defined as "those practices that are fundamental to follow a religious belief such that the nature of the religion will change without that practice."[1041]

For a practice to be religious under Islam, it needs to have basis in the Quran, the sacred text of Islam. It has been considered the greatest authority on any question pertaining to Muslim Personal Law.[1042] The verse 3 & 4 of fourth chapter of the Quran provides for Polygamy in the following manner: *"Give orphans their property, do not replace their good things with the bad, and do not consume their property with your own. That is a serious crime. If you fear you will not deal justly by the orphans, marry the women, who seem good to you, two or three or four; and if you fear that you cannot do justice (to so many) then one (only) or the captives that your right hands possess. Thus it is more likely that you will do injustice."* Though the above verses makes it evident that Quran provides for polygamy but one should also take note of the fact that it provides for Polygamy, not as a right but as a responsibility to ensure social justice to the orphans. The Quran makes it clear that polygamy is permitted only if they are unable to

[1038] Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse* in J.S. PETERS & ANDREA WOLPER, WOMEN RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 169 (1st ed. 1995).
[1039] The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt, (1954) SCR 1005.
[1040] *Id.*
[1041] Commissioner of Police v. Acharya Jagdishwaranda Avadhuta, 2004 (12) SCC 770.
[1042] Mohammad Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

deal with orphans in a just manner. But unfortunately, the practice, which was originally endorsed to provide for widows, orphans and other vulnerable women, has now become a means to satiate male sexual appetite and lust. Today, in modern Indian society, the Muslim men do not practice polygamy to marry widows and even if they did marry a widow, these marriages were not inspired by the "welfare of orphans"- a litmus test laid down by Quran for practising Polygamy.[1043]

Further, the second part of the verse emphasizes on just conduct towards their women and this just treatment is not limited to the financial capacity of a man to maintain more than one wife but also extends to emotional support, time and companionship provided by a man to his wife and children. Such a just treatment is almost impossible as has observed by the verse 4:129: *"You are never able to be fair and just between women even if that were your ardent desire."* Since just treatment between wives is impossible, Allah has advocated for monogamy in order to prevent injustice to women. Hence, how come the first half of the verse becomes the right of a Muslim man (which was originally a responsibility and not a right) and the second half is totally forgotten? Thus, one can conclude that though Quran provides for polygamy but it advocates for monogamy.[1044] Hence, polygamy is not an essential religious practice of the Muslim community, as has been observed in a series of cases,[1045] the most recent being Khursheed Ahmed v. State of U.P.[1046], wherein the Apex Court observed that, "Polygamy was neither an integral nor the fundamental part of the Muslim religion, and monogamy is a reform within the power of the State under Article 25 of the Indian Constitution."[1047]

Moreover, Mohammad Ghouse, a renowned Muslim scholar, has observed that despite regulation by Muslim law, marriage, divorce, inheritance and other aspects of personal status are secular (or social) in nature and the state can validly enact measures of social welfare and reforms in this respect.[1048] Since marriages do not form part of religion,[1049] the possibility of Polygamy being an "essentially religious practice" is thereby, ruled out.

(ii) Subject to public order, morality or health.

[1043] Moin Qazi, *Myths about Islamic Polygamy*, Qrius (Jan. 7, 2018), https://qrius.com/myths-islamic-polygamy/.
[1044] Shahulameedu v. Subaida Beevi, 1970 KLT 4
[1045] Badruddin v. Aisha Begum, (1957) ALL LJ 300; Pathen, RA v. Director of Technical Education, (1981) Labour & IC 185; Javed v. State of Haryana, 2003 (8) SCC 369
[1046] (2015) 8 SCC 439.
[1047] *Id*.
[1048] Mohammad Ghouse, *Personal Laws and the Constitution of India* in TAHIR MAHMOOD, ISLAMIC LAW IN MODERN INDIA 51 (1972).
[1049] Prakash v. Phulavati, (2016) 2 SCC 36.

Polygamy, a practice that inhabits in the shield of patriarchy and sexism, is an abhorrent form of masochism in Indian society. The practice has short and long term detrimental effects on the health and psychological and sexual well-being of the females. Since Polygamy exposes the Muslim wives to the risk of HIV/AIDS and other sexually transmitted diseases, it has been regarded as a public health danger.[1050] Moreover, studies reveal that women in polygamous marriages experience elevated somatisation, depression, hostility and psychoticism.[1051] Further, "first wife syndrome" was found to be prevalent in polygamous families, due to which the first wife experience more anxiety, paranoid ideation and psychoticism in comparision to other wives[1052] because usually, she is sexually deprived, lonely, jealous, given to intrigue, and degraded.[1053] Surprisingly, Polygamy also has detrimental effects on the health of the husband as it makes them vulnerable to coronary heart diseases.[1054] Thus, Polygamy affects the health of the Muslim women and men in a drastic manner.

Further, this unjust practice of Polygamy is also subject to constitutional morality by virtue of the fact that the term "morality" in Article 25 and 26 refers to "constitutional morality". Constitutional morality means adherence to the norms of the Constitution and is not limited to the literal text of the Constitution. Rather, it imbibes within itself virtues of wide magnitude in order to ensure that the rights and dignity of an individual is not prejudiced and the cause of its citizens is championed.[1055] Constitutional morality is a beacon of light which ensures the growth of traditions and conventions in conformity with the values of such a morality[1056] and helps to preserve the faith and trust of people in the constitutional courts.

Constitutional morality rejects all notions of popular morality as popular notions about what is moral and what not may be deeply offensive to individual dignity and human rights. The Apex Court, in a slew of judgments,[1057] has considered the practice of polygamy to be injurious to even public morals. Moreover, Polygamy disregards the individual dignity of a woman which cannot be allowed to be subordinate to the morality of the mob.[1058] Since constitutional

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[1050] Helen Epstein, *God and the Fight Against AIDS*, 52(7) N.Y. REV. OF BOOKS (2005), http://www.nybooks.com/articles/17963

[1051] Alean Al-Krenawi, *Mental Health and Polygamy: The Syrian Case*, 3(1) WOR. J. PSYCH. (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3782180/

[1052] *Id*.

[1053] RICHARD A. POSNER, SEX AND REASON 255 (1992).

[1054] Laura Donnelly, *Polygamy is 'bad for heart'*, The Telegraph (Apr. 29, 2015, 11:30 AM), https://www.telegraph.co.uk/news/health/news/11570638/Polygamy-increases-the-risk-of-heart-disease-study-finds.html

[1055] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

[1056] Manoj Narula v. Union of India, 2014 (9) SCC 1.

[1057] Javed v. State of Haryana, (2003) 8 SCC 369; Sarla Mudgal v. Union of India, (1995) 3 SCC 635.

[1058] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

morality ought to be preferred over customary values, traditions and beliefs, thus, the practice of Polygamy should be declared unconstitutional as it is against the ethos of the Constitution.

(iii) Subject to provisions of Part III of Constitution

Polygamy violates Article 14, 15 and 21 of the Indian Constitution. Article 14 and 15 of our Constitution, embodies the right to equality and non-discrimination and thereby, bars discrimination and discriminatory laws.[1059] Since section 494 of IPC, which deals with polygamy, is rendered inapplicable only in case of Muslim men and since only Muslim women are subjected to the practice of polygamy by virtue of Muslim Personal Law, thus, one can conclude that these classifications are solely based on religion and sex which renders the classification arbitrary and unreasonable. Hence, Polygamy violates Article 14 and 15 of the Indian Constitution.[1060]

Article 21, being the most fundamental of all rights, assures to every person the right to life and personal liberty. The expression "life" encapsulated in Article 21 means "something more than mere animal existence" and includes the **right to live with human dignity**.[1061] Though the word dignity has not been defined, it refers to the freedom of choice of human beings, the autonomy of their will and their human identity.[1062] "Every human being has dignity by virtue of his existence."[1063] Since Polygamy blemishes the adorable possession of a woman, i.e. dignity, thus, it is violative of Article 21 of the Indian Constitution.

Right to personal autonomy, an important aspect of independent and dignified life, includes non-interference with one's own concept of existence and one's own self. It nourishes dignity by permitting individuals to make critical choices with respect to one's own self in every facet in exercise of their liberty.[1064] However, autonomy can be coloured because sometimes people are forced to believe things as a result of indoctrination or manipulation.[1065] In the present case, the Muslims (both males and females) are indoctrinated to believe that Quran permits polygamy without any restrictions, which has resulted in undermining of the autonomy of the Muslim females. Prima facie, the decision of a Muslim woman to enter into a polygamous marriage may appear autonomous but essentially, this practice is forced upon them and they are left with no choice to make. Thus, Polygamy is discriminatory in the sense that the religious

[1059] Indian Young Lawyers Association & Ors. v. The State of Kerala, 2018 SCC OnLine SC 1690.
[1060] Charu Khurana v. Union of India, (2015) 13 SCC 44
[1061] Francis Coralie v. Delhi AIR 1981 SC 746**.**
[1062] Aharon Barak*, Human Dignity: A Constitutional Value and the Constitutional Right*, 192 PROC. BR. ACAD. 361, 363 (2013).
[1063] M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[1064] Indian Young Lawyers Association & Ors. v. The State of Kerala, 2018 SCC OnLine SC 1690.
[1065] FARAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM 55 (2015)

identity of the woman is left completely bereft when they try to exercise their autonomy to enter a monogamous arrangement. Thus, the autonomy of Muslim woman, guaranteed by Article 21 of the Indian Constitution, has been overpowered by the community norms in the disguise of Muslim Personal Law.

Moreover, since **right to health** is inherent to a life with dignity[1066], thus, it forms part of the right to life jurisprudence and therefore, is a fundamental right under the Indian Constitution.[1067] In the international scenario, Article 12 of ICESCR and Article 25 of UDHR guarantees right to highest attainable standard of health. Health, according to WHO, is a "state of complete physical, mental and social well being and not merely absence of disease."[1068] Since Polygamy has detrimental effects on physical as well as mental health of the female, thus, the practice is incompatible with the right to health of a Muslim woman and hence, is violative of Art. 21 of the Constitution.

(iv) Can Personal Laws be subjected to constitutional scrutiny by the Courts?

Though the practice of Polygamy is violative of Fundamental Rights, however, in order to declare the practice void by virtue of Article 13(1), one needs to prove that the practice falls within the ambit of the phrase "laws in force." If one adopts the approach of Nariman, J. in Shayara Bano v. Union of India,[1069] then the practice of Polygamy will be recognised and enforced under section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 as it makes Polygamy "the rule of decision in cases where the parties are Muslims". However, the researcher respectfully expresses her disagreement on this construction of the 1937 Act because of two reasons. Firstly, section 2 of 1937 Act explicitly provides that "..rule of decision shall be Muslim Personal Law" which unquestionably forecasts the authority of Muslim Personal Law in respect of matters enumerated in section 2. Secondly, if the legislature would have intended to enforce Muslim Personal Law through the Act of 1937, it would have laid down every minute details relating to Muslim Personal Law as has been done in Dissolution of Muslim Marriage Act, 1939. Thus, in order to prove the practice unconstitutional, the researcher has proved that the judgment in Narasu Appa Mali was based on flawed grounds. This would mean that Personal Laws falls within the ambit of "laws in force" and hence, such practices can be scrutinised on the touchstone of Part III of the Constitution.

[1066] Sunil Batra v. Delhi Administration, AIR 1980 SC 1579.
[1067] Francis Coralie v. Delhi AIR 1981 SC 746.
[1068] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York (1948).
[1069] (2016) 2 SCC 445.

The decision in Narasu Appa Mali was based on five grounds. *Firstly,* the court, referring to art. 372(2) held that the provision was not intended to apply to Personal Laws and as remarked by Justice Gajendragadkar, was "clearly intended to apply to the Statutory Law." However, the term "statutory laws" also includes the Indian Christian Marriage Act, 1872, Divorce Act, 1869, Parsi Marriage and Divorce Act, 1936 and all codified personal laws. Since Personal Laws do not cease to be so even after codification, therefore, the above proposition is too broad to hold that all Personal Laws do not fall within the ambit of Art. 372(1) or 372(2). Even if it is assumed that the learned Judges sought to refer to only non-statutory personal laws by the expression "Personal Laws", however, it is difficult to infer that *laws in force* do not include non-statutory personal laws within its ambit. This is because, the Supreme Court, in a series of judgments, has held that, "the expression *laws in force* includes not only enactments of the Indian legislatures *but the entire gamut of common law of the land* which was being administered by the Courts."[1070] In fact, it was explicitly observed by the Federal Court in United Provinces v. Atiqua Begum[1071] that the expression "laws in force" in s. 292 of the Government of India Act, 1935 "applies not only to statutory enactments then in force, but to all laws, including even *personal laws,* customary laws and case laws." This clearly highlights the flawed observation of the learned judges in the Narasu Appa Mali and how they failed to take into account this binding decision of the Federal Court.

Secondly, the bench held that the constitution-makers, through the inclusion of Article 44 in the Indian Constitution, recognized the existence of personal laws and also "permitted" and provided for the perpetuation of such laws *as they were*. Here, the question which pops-up in one's mind is: when the Indian Constitution has a specific article (i.e. Art. 372) to deal with the issue of continuance of all the earlier laws in force, then, why should one refer to some other article, like art. 44 to indirectly imply the "permission" for the continuance of Personal Laws. Significantly, when art 372 provides for perpetuation of all the "laws in force", but since that expression does not include Personal Laws, then, for obvious reasons, Personal Laws themselves would stand excluded from being continued.[1072]

Thirdly, the court reasoned that if the phrase "laws in force" in Art. 13(1) included Personal Laws, then Art. 15 would certainly have rendered void all such provisions of the Personal Laws which discriminated between individuals on the ground of religion, race or caste and in such a

[1070] Sant Ram v. Labh Singh, AIR 1965 SC 314; Builders Supply Corporation v. Union of India, AIR 1965 SC 1061 (1068); Superintendent & Remembrancer of Legal Affairs v. Corporation of Calcutta, AIR 1967 SC 997 (1007).
[1071] AIR 1941 FC 16 (31).
[1072] RUMA PAL, A.M. BHATTACHARJEE'S MATRIMONIAL LAWS AND THE CONSTITUTION 57 (2nd ed. 2017).

case, the provisions of Art. 17 or Art. 25(2)(b) would become redundant. However, the above is reasoning is not sound because "some amount of repetitiveness or overlapping is inevitable in a Constitution like ours, which unlike the American Constitution is drawn elaborately and runs into minute details."[1073] For instance, even the very presence of Art. 13 in the Indian Constitution has been considered redundant by the Supreme Court in A.K. Gopalan,[1074] Dr. Justice D. Basu in his Tagore Law Lectures[1075] and even by Seervai in his Constitutional Law of India[1076], owing to the observation made in Marbury v. Madison[1077] and also in later decisions[1078] that with the initiation of a new Political Charter and Constitution, all pre-existing laws which are inconsistent thereto stands void even in the absence of any declaration to that effect. Thus, the mere fact that a subject-matter has been dealt by one or more articles would not mean that the same would not have been covered or dealt with again in any other article or articles of the Constitution.

Fourthly, the decision of Chief Justice Chagla was very much guided by the expression "personal law or custom having the force of law," which was present in s.112 of the former Government of India Act, 1915. Keeping in mind the contrasting effect of the terms "personal laws" and "custom having the force of law", the learned judge concluded that since constituent assembly had only used the phrase "custom and usage" while defining the word "law" and has omitted the phrase 'personal law' as such from Art. 13, then "this is a very clear intention of the constitution-making body to exclude personal laws from the purview of Art. 13." However, the learned judge, with respect, failed to take note of the fact that if Constituent Assembly would have considered s. 112 of the repealed Government of India Act 1915, then certainly it would have taken Government of India Act, 1935 in cognizance while drafting art. 372(1) of the Indian Constitution, which corresponds to s. 292 of the 1935 Act. Section 292 also used the expression "laws in force" which had been interpreted by the Federal Court in the United Provinces v. Atiqua Begum[1079] to include personal laws also within its ambit. Thus, following the same line of reasoning adopted by the learned Chief Justice, it can be argued that since the Constituent Assembly was well-versed with the fact that the expression "laws in force"

[1073] Special Courts Bill Reference, AIR 1979 SC 478 (500).
[1074] AIR 1950 SC 27 (34).
[1075] D.D. BASU, LIMITED GOVERNMENT AND JUDICIAL REVIEW (TAGORE LAW LECTURES) 292 (1972)
[1076] 1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 402 (3rd ed., 1994)
[1077] [1803] 1 Cranch 137
[1078] Chicago Rock Island v. William Meglinn (1884) 29 Law Ed 270 (272); Vilas v. City of Manila (1910) 55 Law Ed 491.
[1079] AIR 1941 FC 16.

included Personal Laws within its ambit by virtue of the above Federal Court judgment, thus, there was no need to explicitly use the phrase "personal laws" in article 13 and art.372.

Fifthly, the decision of the court was based on the fact that though customs and usages can be rendered void to the extent of inconsistency, however the personal laws would not be void on that account because it is "impossible to hold that either the Hindu or the Muslim Law is based on customs or usages having the force of law." However, this reasoning of the court is difficult to agree with. This is because provisions of the earlier enactments such as s. 5(b) of the Punjab Laws Act, etc has clearly directed application of Hindu law and Muslim law as such law has been modified by the custom and if the personal laws stand modified by customs, then they are certainly based on customs also. Even writings of certain jurists prove the fact that the Muslim Personal Law was sourced out of pre-Islamic customary laws of the Arabian communities.[1080] Thus, one can conclude that customs and usages forms part of the personal law and when they are subject to constitutional scrutiny, then certainly, personal laws should also be subjected to constitutional scrutiny.

Thus, after an all-embracing analysis of the reasons of the Narasu Appa Mali decision, one can conclude that the decision was based on flawed approach, which has also been observed by Chandrachud, J. in Indian Young Lawyers Assn. v. State of Kerala ('Sabarimala'),[1081] though he has left for the future courts to overrule it. Hence, one can conclude that personal laws should be assessed on the touchstone of constitutional values. The support for this same conclusion can be derived from C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil,[1082] wherein the Apex Court held that "though scriptures and not Constitution is the source of personal laws, however, if such personal laws violated Fundamental Rights, then they would be rendered void under art. 13." In fact, Dr. B.R. Ambedkar, the Chairperson of the Drafting Committee, was opposed to the idea of saving personal law within the ambit of religious freedom and hence, remarked that, "I personally do not understand why religion should be given this vast expensive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon the field."[1083] Thus, by scrutinizing practices under Personal Law on the anvil of constitution, the courts can ensure that a barbaric practice such as Polygamy is declared unconstitutional and hence, the goal of gender equality is achieved.

[1080] DAVID PEARL, A TEXTBOOK ON MUSLIM LAW 2,4 (1970).
[1081] 2018 SCCOnline SC 1690.
[1082] (1996) 8 SCC 525.
[1083] CONSTITUENT ASSEMBLY DEBATES, Vol. VII, at 781.

TRANSFORMATIVE CONSTITUTIONALISM: AN INSTRUMENT TO PROMOTE RIGHTS OF MUSLIM WOMEN

The Constitution of India has often been regarded as a transformative document as it confers positive obligation on the State to protect and promote the essential liberties of those classes of individuals who had systematically and historically disadvantaged and discriminated against. This highlights the fact that the Constitution was conscious of the status quo at the time of its enactment and it sought to achieve equality rather than reinforcing status quo. Thus, one of the essential features of the Indian Constitution is considered to have reformatory effect on the society for better and this objective forms the essential feature of transformative constitutionalism, which assigns the State, especially the judiciary with a crucial role to pursue this change/ transformation. It refers to the aim of the Constitution to transform the Indian society into a society wherein ideals of justice, equality, liberty and fraternity as imbibed in the Preamble, are actually observed and embraced.[1084]

Though the recent slew of judgments in Puttuswamy[1085], Shafin Jahan[1086] and triple talaq[1087] have progressive impact with respect to gender equality, however, the larger picture still remains bleak, especially for Muslim women. This is because the courts have continuously shirked their responsibility from realising substantive equality for women by holding that personal laws were beyond the reach of constitutional law and guarantee of equality which is a manifest ignorance of the aspect of gender equality.[1088] This ghost of Narasu Appa, haunts the court till date with respect to the rights of woman.

Significantly, a welcoming step was taken by the Supreme Court in the direction of gender equality in the case of Joseph Shine v. Union of India[1089] wherein the offence of adultery, which was based on the underlying notion of paternalism and parochial mores, was declared unconstitutional. Section 497 was based on the anachronistic presumptions such as "women, like chattels, are the property of men" or "infidelity of men is normal but that of women is impermissible." However, the Supreme Court rejected the notion of marital subordination and observed that, "Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees." Recognizing

[1084] OSCAR VILHENA, et al., TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (2013).
[1085] Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161.
[1086] Shafin Jahan v. Asokan K.M. & Ors., 2018 SCC Online SC 343.
[1087] Shayara Bano v. Union of India, (2016) 2 SCC 445.
[1088] Narasu Appa Mali v. State of Bombay, AIR 1952 Bom 84.
[1089] AIR 2018 SC 4898.

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the aspect of transformative constitutionalism, the Court observed that the protective discrimination imbued in Article 15(3) of the Indian Constitution cannot be applied in a manner that establishes paternalistic notions of 'protection' which serves to restrict a woman in a cage. Rather the dignity of an individual should be upheld so that women can observe substantive equality, which is an important facet of achieving gender equality.

Thus, the courts can use the facets of "substantive equality" and "permeation into private sphere" to ensure that the rights of the Muslim women are given precedence over religion and hence, practices under personal are scrutinised on the anvil of the constitution. This would, in turn, aid in realising the goal of gender equality.

CONCLUSION AND SUGGESTIONS

Though Polygamy has always been justified in the name of religion within the Muslim community, but it has failed to be in accord with the constitutional norms as it is violative of Art. 14. 15, 21 and 25 of the Indian Constitution. However, this practice has never been subjected to constitutional scrutiny by virtue of the Narasu Appa judgment which has done more wrong to the women subjected to personal laws and no good to society. Thus, the author contended respectfully that the reasoning of Narasu was flawed and hence, such practices shielded within personal laws should be tested on the constitutional anvil. Hence, the researcher has suggested that the courts should adopt the principles of transformative constitutionalism and declare such practices to be unconstitutional. Moreover, the researcher suggests that the State should enact a law under Article 25(2)(b), which would be titled, "Prevention, Suppression and Control of Polygamy and Bigamy Act". The Act should criminalise Polygamy and should be uniformly applicable to all religions. This law should in fact cover "live-in relationships" where the individual already married indulges in so that the women are not left bereft of their dignity from any angle of the problem.

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JUDICIAL SEPARATION: HINDU AND MUSLIM PERSONAL LAW AND DIVORCE

- **CHHAVI SOMPURA**

INTRODUCTION

Marriage under is a sacred relationship between two persons established by performing the rituals according to the customs. In earlier days there was no such thing as separation or divorce and one has to remain or continue with marriage no matter what.

Now times have changed and enforcement of personal laws like Hindu Marriage Act, 1955 and Dissolution of Muslim Marriage Act, 1939 has given marriage a legal color and has provided with remedies such as judicial separation, consensual or mutual dissolution and divorce.

Judicial Separation- Separation from the spouse by way of a decree of court is judicial separation. In effect it means separation from bed and breakfast. In this system parties are not bound to cohabit with each other after getting the decree. During the separation period all the basic marital rights and obligations of the parties are suspended except those reserved expressly or impliedly such as maintenance.

In a case before Calcutta High Court, it was held that judicial separation can be allowed only if the marriage is valid[1090]. Judicial separation doesn't nullify or end the marriage, it just temporarily suspend the marriage. The parties undergoing separation are said to be married and legal spouse of each other till the marriage is dissolved[1091].

However, the parties may resume cohabiting whenever they want after getting an order of court rescinding the judicial separation decree[1092]. As per J. Subba Rao, I.-(1) When a spouse seeks judicial separation on the ground of desertion a heavy burden lies on him or her to prove four essential conditions, namely (1) the factum of separation, (2) animus deserendi, (3) absence of his or her consent, and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home[1093]. The only object of judicial separation is to allow the parties sufficient time before getting divorced to reconcile the marriage.

[1090] Bishwanath v Anjali 1955, cal. 45
[1091] Narsimha Reddy v M. Boosamma 1976, AP 77
[1092] Section 10 (2), Hindu Marriage Act, 1955.
[1093] 1964 SCR (4) 331

Judicial Separation under Hindu Marriage Act, 1955- Section 10 (2) of Hindu Marriage Act, 1955 provides for the provisions of judicial separation.

Section 10 reads as follows:

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so[1094].

Grounds for Judicial Separation- It has been provided under Section 10 of the Act that the parties to a marriage can file a decree for judicial separation on the following grounds:

a**) Adultery [Section 13(1)(i)]:** It means that when any of the party to a marriage voluntarily had a sexual intercourse with any person other than his/her spouse, the aggrieved party can seek for the relief. Provided such intercourse took place after solemnization of marriage.

b**) Cruelty [Section 13(1) (i-a)]:** When a party to a marriage treats the other party with cruelty after the marriage has been solemnized, the aggrieved can file a petition on the ground of cruelty. A Delhi High Court case dated 9th April, 2018 **R v J.**

c**) Desertion [Section 13(1) (i-b)]:** As per this section, a person is said to be deserted when he/she has been left by the spouse for a period not less than two years immediately before presenting such petition. Desertion gives a right to seek relief of judicial separation.

In the case of **Laxman Utamchand Kriplani v Meena alias Mota[1095]** It was held by J. Subha Rao that the respondent(wife) left the matrimonial home without reasonable cause and didn't returned till 2yrs amounts to desertion against the petitioner and his petition under section 10 (1) (a) of HMA, 1955 is maintainable.

[1094] Dr. Paras Diwan, *Modern Hindu Law* 539-540 (Allahabad law agency, Faridabad, Twenty second ed Reprint, 2014)
[1095] 1964 SCR (4) 331

d) **Conversion [Section 13(1) (ii-i)]:** If any of the spouses gets converted into a religion other than Hindu, the other spouse can file for Judicial Separation.

e) **Unsound Mind [Section 13(1) (iii)]:** If a spouse in a marriage is suffering from a mental disorder of sort which makes it impossible for the other spouse to live with the sufferer, the other spouse can file for a decree of judicial separation.

f) **Leprosy [Section 13(1) (iv)]:** If a party to a marriage is suffering from leprosy which cannot be cured, the other party can seek judicial separation as a remedy to get out of such marriage.

g) **Venereal Disease [Section 13(1) (v)]:** A venereal disease in a communicable form is also a sufficient ground for filing a petition for judicial separation.

h) **Renounced the world [Section 13(1) (vi)]:** If one spouse has renounced the world, the other one has a sufficient ground for seeking relief of judicial separation.

i) **Civil Death [Section 13(1) (vii)]:** If the other party has not been heard alive for a period of 7 or more years by the people who would have heard of him/her if he/she were alive[1096].

In case of **wife**, she is entitled to the aforesaid relief of judicial separation on following two additional grounds also:

(a) that the husband has, since the solemnization of marriage, been guilty of rape, sodomy or bestiality;

(b) that a decree or order has been passed against the husband awarding maintenance to the wife under section 18 of Hindu Adoptions and Maintenance Act, 1956 or in proceeding under section 125 Cr.P.C and since the passing of the decree or order, cohabitation between the parties has not been resumed for one year or upwards;

(c) that her marriage was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years[1097].

[1096]https://www-lawnn-com.cdn.ampproject.org/v/s/www.lawnn.com/judicial-separation/amp/?amp_js_v=a3&amp_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15918725706418&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2F%2Fwww.lawnn.com%2Fjudicial-separation%2F

[1097] http://www.legalservicesindia.com/divorce/judicial-separation.htm

Judicial Separation under Muslim Law - Unlike Hindu personal law there's no such concept as judicial separation in Muslim personal law. There is no mention of judicial separation either in Dissolution of Muslim Marriage Act, 1939 or the Muslim Women (Protection of Rights on Marriage) Act, 1986, etc. However, the concept is in practice as elucidated by the court from time to time.

Grounds for Judicial Separation - We don't have a concrete provision for judicial separation under Muslim law and hence we don't have defined grounds for separation. Although Hindu law has a provision for judicial separation, the grounds are the same as of divorce i.e. the grounds of divorce are also the grounds for judicial separation. Similarly, the apex court in Ms. Jordan Diengdeh v. S.S. Chopra[1098] observed that the grounds for divorce given under Section 2 of Dissolution of Muslim Marriage Act, 1939 shall also be the grounds for judicial separation for Muslims in the country.

Following are the grounds -

- If the husband is missing and his whereabouts are not known for more than 4 years. For instance, if the husband is serving in the armed forces and went missing on a mission or if confident information is received that he has died in a battle but he returns after 5 years. In these cases, judicial separation can be obtained.
- If the husband does not maintain his wife and neglects her needs and requirements for a period of two years or more, the wife can apply for judicial separation.
- If the husband is convicted for any offence punishable with the minimum punishment of 7 years of imprisonment or for any other offence where he has been sentenced for 7 years of imprisonment, the wife can claim judicial separation.
- If the husband has abstained from fulfilling his marital obligations such as taking care of his wife and children, meeting the emotional and physical needs of the wife, for a period of three years or more, judicial separation can be obtained
- If the wife founds out that her husband is impotent and the information was not disclosed to her during the marriage, she can file for judicial separation.
- If the husband suffers from leprosy or any other form of venereal disease which is likely to be communicable.

[1098] AIR 1985 SC 935.

- If the husband married to a girl below the age of 15 years and the girl has repudiated or withdrawn herself from the marriage before attaining the age of 18 years, she can claim judicial separation.
- If the husband commits cruelty upon the wife, habitually beats her and tortures her, the wife can plead for judicial separation[1099].

Maintenance under Judicial Separation- In a case before SC in 2017 a division bench of Justice Madan Lokur and Deepak Gupta set aside the ruling of Patna High Court and remanded the matter for fresh consideration.

A judicially separated wife is also entitled to maintenance as a divorced wife and there is no reason to deny it to her.

"We are noting this argument only to reject it since we find no substance in this argument. If a divorced wife is entitled for maintenance, there is no reason why a wife who is judicially separated is not entitled for maintenance," the bench said in its order[1100].

Sohan Lal v. Kamlesh: It has been held in this case that when the court has passed a decree of judicial separation, a husband can be ordered to give maintenance to the wife if she cannot maintain herself[1101].

Judicial Separation and Divorce- Though both may seem similar there is a difference between both. A decree of divorce puts the marriage to an end. All the mutual rights and obligations of the spouses towards each other come to an end except in relation to maintenance (Section25) and custody of children (Section26). The parties no longer remain husband and wife and they become free from the relationship. Parties are then free to remarry someone else. However, in judicial separation the marriage is merely suspended and all the mutual rights and obligations are also temporarily suspend except those expressly or impliedly reserved. Even during the period of judicial separation parties continue to be husband and wife. Here also wife is entitled to maintenance.

[1099] https://www.legalbites.in/judicial-separation-under-muslim-law/

[1100] https://m-economictimes-com.cdn.ampproject.org/v/s/m.economictimes.com/news/politics-and-nation/judicially-separated-wife-also-entitled-for-maintenance-supreme-court/amp_articleshow/61965384.cms?amp_js_v=a3&amp_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15918728276377&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2F%2Fm.economictimes.com%2Fnews%2Fpolitics-and-nation%2Fjudicially-separated-wife-also-entitled-for-maintenance-supreme-court%2Farticleshow%2F61965384.cms

[1101] AIR 1984 P H 332

If in case of judicial separation the cohabitation is not resumed for a period of one year or more from the date of passing of decree then either party can sue for divorce under Section 13 (1A) (ii) of Hindu Marriage Act, 1955.

Gomathi v. Kumaragurrupaan[1102]: In this case, it was held that where a decree for judicial separation has been passed and the parties did not cohabit even after the period of one year of passing of such decree for judicial separation, a petition for divorce can be filed. The period of one year shall be calculated from the date or original order of the trial court even if such order has been appealed against in the higher court[1103].

Alternate Relief- The Marriage Law (Amendment) Act, 1976, has a noval Section 13-A to give statutory recognition to this rule. The new section reads: "In any proceedings except where the petition is set on the grounds mentioned in [clause (ii) change of religion, clause (vi) renunciation of world or clause (vii) presumption of civil death] of sub-section (1) of Section 13, the court may, if it considers it just to do so having regard to the circumstances of the case, pass instead a decree for judicial separation[1104]".

CONCLUSION

In India marriage is something which is considered holy and a religious sacrament. It is always advised to keep it intact and continue with it because getting out of the marriage is considered a failure and more of a taboo for the female. Earlier for Hindus there was no such thing as separation, people had to live with the marriage and take it to the end. There was no way out of it but after the Hindu Marriage Act, 1955 came into force it is easy for people to get out of a bad marriage and live a better life. Whereas in case of Muslims there's always been a remedy of divorce(talaq) to get out of the marriage but that too was men's prerogative and women didn't really had any say in those matters as women were subservient to men. With the advent of judiciary's active participation and codification of laws it has become easier for women to access these remedies available for their betterment. In my opinion every person is entitled to

[1102] AIR 1987 Mad 259

[1103] https://www-lawnn-com.cdn.ampproject.org/v/s/www.lawnn.com/judicial-separation/amp/?amp_js_v=a3&amp_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15918725706418&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2F%2Fwww.lawnn.com%2Fjudicial-separation%2F See also, Dr. Paras Diwan, *Modern Hindu Law* 539-540 (Allahabad law agency, Faridabad, Twenty second ed Reprint, 2014) See also, Chandra v Sudesh 1971 Delhi 208 See also, Reddy v Kistamma 1969 Mad 235.

[1104] The Marriage Laws (Amendment) Act, 1976

live a free and happy life and for that he/she should be allowed to do whatever it takes unless it is illegal or harms other person or society. Judicial separation is in a way better as it does not end the marriage and parties can still live peacefully.

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LIVE – IN – RELATIONSHIP: A BANE IN LONG RUN

- SRISTI NIMODIA

INTRODUCTION

With the changing time, the world has witnessed enormous change and a reasonable amount of change has been witnessed in India too. Marriage has been since time immemorial considered to be sacramental. It is seen as a means of spiritual fulfilment. But in the recent times, there has been a shift from the institution of marriage towards a living arrangement without marriage. Such arrangements are gaining more and more popularity in today's time, thereby hampering the institution of marriage. The more people are being influenced by western culture, the more has the concept of live-in-relationship come into picture.

This shift from marriage towards live-in-relationship may seem to be a good option in short run but may prove to be the worst in the long run. Live-in-Relationship though has acquired a legal status in the country but is still considered to be immoral. In the recent times there has been a huge deviation from the concept of marriage towards live-in-relationships owing to various factors. But such relationships provide no commitment and security and has harmful effect not only on the children but is also disadvantageous to the dependent family members. Not only this if live-in relationships will continue to grow, there may come a time when the institution of marriage will start disappearing.

Marriage is not only considered to be sacramental but is also the foundation of the society. Live-in-relationship in long term will demolish the very concept of family and can prove to be a major setback.

RESEARCH OBJECTIVE

1. To understand the socio legal status of live in relationship in India.
2. To understand why there is a deviation from the concept of marriage to live-in-relationship.
3. To understand the effect of such relationship on children.

RESEARCH METHODOLOGY

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The research has used secondary research methodology. The research has been done with the data collected from case laws, National Surveys, Newspapers, Articles etc.

LITERATURE REVIEW

- **JUDICIAL APPROACH TO LIVE- IN-RELATIONSHIP IN INDIA- ITS IMPACT ON OTHER RELATED STATUTES - SONALI ABHANG, RESEARCH SCHOLAR, SYMBIOSIS INTERNATIONAL UNIVERSITY (SIU), PUNE, MAHARASHTRA (INDIA)**

The researcher has used secondary form of research, judicial decisions, and the laws in other countries regarding live-in-relationships. In India, marriage is considered to be sacred and is undoubtedly the basis of social foundation. But with the changing time, there has a rising tendency to enter into Live-in- Relationship instead of marriage. Live-in-relationship can be defined as a living arrangement in which an unmarried couple live together in a long-term marriage that resembles a marriage.

The paper talks about the judicial approach towards Live-in-Relationships. Until 2000, the judiciary had not recognised the concept of Live-in-relationship. In the year 2001, the Judiciary for the first time recognised Live-in- relationship. Live in relationship can be said to be immoral but is not illegal. In 2010, the judiciary laid down various guidelines through numerous judgements on validity of Live-in-relationships. The paper focus on the legal status of live-in-relationship in the country.

- **LIVE IN RELATIONSHIP AS A NEW FORM OF FAMILY [VOLUME 2; ISSUE 11], AUTHOR- CHAKSHU THAKRAL, LL. B, BHARATI VIDYAPEETH UNIVERSITY, PUNE, CO-AUTHOR- AMIT CHOUHAN, LLB, BHARATI VIDYAPEETH UNIVERSITY, PUNE.**

The following research paper talks about how live-in-relationships has emerged as the new form of family. It talks about various judicial decisions which made it clear that such relationships are not illegal, though the society regard them as immoral. The paper talks about the rights given to women and children out of such relationships and the changes made in Protection of Women from Domestic Violence Act, 2005, in order to include women in live-

in-relationships under the purview of this act. The research paper also talks about the property rights of the children borne out of such relationships. In the later part of the paper the researcher has talked about the laws relating to live in relationships in different parts of the world.

The researcher has used the secondary method of research. The research is on the basis of Judicial decisions from recognising live-in-relationships for the first time with reference to the Section 114 of Evidence act to later including it under Right to Life. The researcher has thrown a light on the laws of different countries in context to Live-in-relationships.

- **CHANGING DIMENSIONS OF THE CONCEPT OF MARRIAGE - A CONTEMPORARY CHALLENGETO PERSONAL LAWS IN INDIA. - BALWINDER SINGH, ASSISTANT PROFESSOR, SCHOOL OF LAW, THE NORTHCAP UNIVERSITY, GURUGRAM.**

The research paper talks about the changing dimensions of marriage in the present world. It talks about how marriage is treated as the most important institution in India. India is still looked upon by the world as a country where marriage occupies the most sacramental position. The paper talks how marriage is looked upon under Hindu, Muslim, and Christian Laws. The later part of the paper shifts to the concept of Live-in-Relationships.

"With the change in the modern-day setup, the traditional concept of marriage has changed and now-a- days a change is visible in our society from arranged marriages to love marriages and now to live-in-relationships as well as gay marriages. Despite all these developments and even granting a level of legal legitimacy to the live -n relationship or gay relationships, it is still largely perceived to be an immoral relationship in our society. In the absence of legislation to deal particularly on live-in relationship as well as gay relationships in India, the partners in these types of relationships often face hardships."

The paper also looks upon the judiciary's role from recognising live-in-relationships from not being illegal to providing maintenance to the women and the children in the live-ins. The paper also tries to look into recent developments in the attitude of the courts in granting various rights to live-in couples as well as gay relationships in India.

The researcher has made this research on the basis of secondary sources available. It has used the concept of marriage under Hindu, Muslim, and Christian Laws. It has also used the judicial decisions and the various steps taken by it to recognise live-in-relationships. The Judicial

decisions identifying the legality of live-in-relationships, maintenance rights of the live-in-partners, inheritance rights of the live-in-partners has been used in the research.

RESEARCH AND RESULTS

TO UNDERSTAND THE SOCIO LEGAL STATUS OF LIVE IN RELATIONSHIP IN INDIA

Live-in-relationship can be defined an arrangement in which an unmarried man and woman or, a married man and an unmarried woman or, an unmarried man and a married woman live together. Though there are no laws in India recognising such a relationship, but it is not considered to be illegal though regarded as highly immoral. The Hindu Marriage Act, 1955, The Hindu Adoption and Maintenance Act, 2956, The Criminal Procedure Code, 1973, The Special Marriage Act, 1954. The Indian Succession Act, 1925, all have laid high importance to marriage and has no mention of live-in-relationships. However, the Judiciary has from time to time recognised such relationships and later on, the Protection of Women from Domestic Violence Act, 2005 has included "Relationships in nature of marriage" in the definition of domestic relationships.

Prior to the independence, the privy council in case of A. Dinohamy v. W.L. Blahamy,[1105] laid out that, " Where a man and a women are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage". Later on, in the case of , Mohabhat Ali v. Mohammad Ibrahim Khan, [1106] it was laid down that, "where a child has been born to a father from a woman who has not been in a mere occasional concubinage, but a more permanent connection, and where there is no invincible obstacle to such a marriage, then law makes a presumption in favour of such marriage i.e. law presumes that marriage has taken place".

After Independence, in the case of, Badri Prasad v. Dy. Director of Consolidation,[1107] the judiciary has for the very first time, recognised live in relationship as a valid marriage, and has held the judgement, "by putting a stop to questions raised by authorities on the fifty years of life in relationship of a couple". Later on, in the case of, Payal Katara v. Superintendent Nariniketan and others,[1108] it was held that, "live-in-relationship is not illegal though it may be

[1105] A. Dinohamy v. W.L. Blahamy (1928) 1 MLJ 388 (PC)

[1106] Mohabhat Ali v. Mohammad Ibrahim Khan (1929) 31 BOMLR 846

[1107] Badri Prasad v. Dy. Director of Consolidation AIR 1978 SC 1557

[1108] Payal Katara v. Superintendent Nariniketan and others AIR 2001 All. 254

regarded as immoral by the society". Then, in the case of, Patel and Others,[1109] the court held that, "two individuals living together without a formal marriage cannot be called criminal offenders and further stated that there is no legislation in India which considers live-in-relationship as an offence". Again, in the case of, Tulsa v. Durghatiya,[1110] the concept of live-in-relationship was again recognized by the judiciary. Later on, in the case of Khushboo v. Kanniammal & Anr.,[1111] the Supreme Court gave a Landmark Judgement and made its stand clear on the concept of Live-in-relationships and pre-martial sex. In this particular case, 22 criminal appeals were filed against the South Indian Actress Khushboo, saying that, "she is endorsing pre-marital sex which affects the moral fabrics of the society". However, the court quashed the appeals saying that "living together cannot be illegal. If two adult people want to live together what is the offence? If two people, man, and woman, want to live together, who can oppose them? What is the offence they commit here? This happens because of the cultural exchange between people."

With judiciary recognising Live-in-relationships and pre-marital sex, further, decisions were taken to recognise the rights of women in such relationships and of children borne out of such relationships. In the case of, D. Veluswami v. D. Patachiammal,[1112] the supreme court held that, "Merely spending weekends and one-night stands do not amount to a domestic relationship. In order to be entitled to maintenance the relationship should be in the nature of marriage. And only those relationship which are in the nature of marriage fall under the purview of the Protection of Women under the Domestic Violence Act, 2005". Also in the same time , in the case of, Varsha Kapoor v. UOI & Ors,[1113] it was held that female living in a relationship in the nature of marriage has right to file complaint not only against husband or male partner, but also against his relatives . Further, in the case of, Indra Sarma v. V.K.V. Sarma,[1114] the court illustrated the categories under which the live-in-relationship can be considered and proved in the court of Law. Recently, in 2018, the Supreme Court in the case of, Nanda Kumar v. State of Kerala,[1115] has passed a judgment expanding the concept of Live-in-relationship.

[1109] Patel and Others, 2006 (8) SCC 726

[1110] Tulsa v. Durghatiya AIR 2008 SC 1193

[1111] Khushboo v. Kanniammal & Anr 2010 5 SCC 600

[1112] D. Veluswami v. D. Patachiammal (2010) 10 SCC 469

[1113] Varsha Kapoor v. UOI & Ors (190) 2010 DLT 166

[1114] Indra Sarma v. V.K.V. Sarma AIR 2014 SC 309

[1115] Nanda Kumar v. State of Kerala 2018 (6) Supreme 69

The Court in this case observed that "Even if they were not competent to enter into wedlock, they have right to live together even outside wedlock."

The Judiciary throughout the last 40 years has left no stone unturned in giving a legal status to live-in-relationships and has recognized pre-marital sex. Live-in-Relationships in the nature of marriage, now fall under the purview of the PWDVA, 2005, and the women in such kind of relationship have also been given the right to maintenance. However, despite of gaining a legal status in the country, live-in-relationship is regarded as immoral by the society and the more it has been accepted by the younger generation, higher it has been criticized by the rest.

TO UNDERSTAND WHY THERE IS A DEVIATION FROM THE CONCEPT OF MARRIAGE TO LIVE-IN-RELATIONSHIP

Marriage is a highly responsible relationship that not only demands personal commitment of both the spouses, but, is bound by social and legal provisions that tend to enforce responsibility and accountability.[1116] It demands high levels of sincerity, cooperation and compromise.[1117] There has been a deviation from the concept of marriage towards live-in-relationship.

Though, there are many reasons which have led to such deviation. One of main reason is the fear of commitment, followed by the fear of Divorce. Some want to check their compatibility with their partners before marriage, hence go for live-in before the marriage. Some are being highly influenced by the western culture, some have been in a failed marriage before, some want to attain financial stability and some just don't want to marry. Some in live-in-relationships might be same-sex couples, whose marriage has still not been legalised in the country. Many are those who could not marry because they have been facing opposition due to their caste.

The National Survey of Family Growth (NSFG, 2002) in a study of Teens' Attitudes toward Marriage, Cohabitation, and Divorce reported that teens who grew up living with both parents tend to have more traditional attitudes toward marriage, cohabitation, and divorce. [1118] Teens who grew up with two biological/ adoptive parents were more likely than teens from other

[1116] Neelam Rathee & Natashinder Shergill (2008). Attitudes toward Marriage and Cohabitation among Adolescents as a function of Parental Relationship. Praachi Journal of Psycho-Cultural Structure, Volume 24.

[1117] Ibid.

[1118] The National Survey of Family Growth (NSFG) (2002). Teens' Attitudes toward Marriage, Cohabitation, and Divorce. Science Says, November 2005. National Centre for Health Statistics, Centres for Disease Control and Prevention, U.S. Department of Health and Human Services (HHS)

types of households to agree that marriage is better than remaining single, but the differences were not statistically significant.[1119] Also, it has been found that women from intact families reported the most positive attitudes toward marriage, while those in the reconstituted-family group reported the most accepting attitudes toward divorce.[1120] Teen boys (37.0%) and girls (40.0%) who grew up in two biological/adoptive parent households were more likely to disapprove of cohabitation than were teen boys (25.4%) and girls (31.3%) who grew up in other types of households.[1121] Studies show that the nature of parents' marital relationship significantly affects children's attitudes toward the marriage. [1122]

TO UNDERSTAND THE EFFECT OF SUCH RELATIONSHIP ON CHILDREN

Live-in-relationships though are helping elderly people find companionship but are also acting as a curse for the children borne out of such relationship. In the case of, Tulsa & Ors v. Durghatiya & Ors. ,[1123] the Supreme Court gave a landmark judgement by providing 'legal' status to children borne out of live-in-relationships. It was held that "One of the crucial pre-conditions for a child born from live-in relationship to not be treated as illegitimate are that the parents must have lived under one roof and co-habited for a considerably long time for society to recognize them as husband and wife and it must not be a walk-in and walk-out relationship. Therefore, the court also granted the right to property to a child born out of a live-in-relationship." Despite of this, there is no specific law in the country with regards to the status of children borne out of such relationships. Not only this, live-in-relationships detoriate the quality of the parent-child relationship. In case the parents of the child decide to move of the live-in, and there arises a situation where none of the parents want to take the responsibility, there is no place left for the child to go to. And the situation gets worst if there is no guardian

[1119] Ibid.

[1120] Kinnaird, K.L., & Gerrard, M. (1986). Premarital Sexual Behaviour and Attitudes toward Marriage and Divorce among Young Women as a Function of Their Mothers' Marital Status. Journal of Marriage and the Family, 48(4), 757-765.

[1121]The National Survey of Family Growth (NSFG) (2002). Teens' Attitudes toward Marriage, Cohabitation, and Divorce. Science Says, November 2005. National Centre for Health Statistics, Centres for Disease Control and Prevention, U.S. Department of Health and Human Services (HHS)

[1122] Boyer-Pennington, M., Pennington, J., & Spink, C. (2000). Students' Expectations and Optimism Toward Marriage as a Function of Parental Divorce. Journal of Divorce & Remarriage, 34(3/4), 71-88. ; Kinnaird, K.L., & Gerrard, M. (1986). Premarital Sexual Behaviour and Attitudes toward Marriage and Divorce among Young Women as a Function of Their Mothers' Marital Status. Journal of Marriage and the Family, 48(4), 757-765.

[1123] Tulsa & Ors vs. Durghatiya & Ors AIR 2008 SC 1193

who could take care of the child. Thereby, punishing the child for something which was not even their fault. And, as this child grows up, he would have no idea what a marriage or a family is, thereby leading him to prefer casual walk-in walk-out and not even believing in the institution of marriage.

CONCLUSION

Live-in relationship is a walk-in and walk-out relationship where neither any strings are attached, nor does it create any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without the consent of the other party and one party can walk out at will at any time.[1124] Whereas marriage is considered to be a sacramental relationship with stings attached, creating a legal bond between the parties and cannot be terminated by either of the party without the consent of the other party. Marriage ensures satisfaction not only to the couples but also the family.

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children.[1125] The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage.[1126] Live-in-relationships do not provide any security and do not give rise to any moral and legal obligation. And, if the concept of live-in-relationship overrides marriage, the foundation of the society will be weakened. Not only it acts as a threat to the term family but can especially be dangerous to young girls. If such concept prevails, there might be changes that young girls might fall into the trap of trusting wicked men and become their prey under false beliefs.

India is known for its culture and tradition. Commitment and responsibilities form the foundation of a society and if this foundation is weakened, it will harm the very concept of human society.

RECOMMENDATION

[1124] Alok Kumar v. State and Another

[1125] Dr. Rabbiraj. C Assistant Professor, Saveetha School of Law, Saveetha University, India (2014). Socio-Legal Dimensions of Live-In-Relationships in India. IOSR-JHSS, Volume 19, Issue 7, Ver. VI, PP 25-29.

[1126] ibid

Though Live-in-relationship has its own benefits and is seen reliable in short term. But if see a lager scale, it not only harms the upbringing of children but also leaves the partners with insecurity and harms the very foundation of the society.

The judiciary has taken a lot of steps to provide security to those in such relationships by providing a legal status. This step is beneficial for those who are in same-sex relationship or are from different caste. The judiciary instead of taking steps towards Live-in-relationships should take some steps towards the reason which are leading to such relationships, such as legalising same-sex marriage, supporting inter-caste marriage by slight increase in the benefits of marriage etc.

One of the reasons that people don't want to go for marriages is the fear of divorce. According to various studies it has been revealed that the main source of divorce is not cohabitation but not being able to choose the right one due to family pressure. Steps can be taken to provide counselling to parents who pressurise their children into marriages. Also counselling centres can be set up in every district which can be approached by those who are being forced into marriages.

Children from their very young age can be educated about the importance and benefits of marriage and about the disadvantages and harmful effects of live-in-relationships. The benefits seen from live-in-relationships are good for short term but not in long term.

There can certain laws for such relationship, such as restricting the easy out especially when children have been borne out of such relationships or when one of the partner is financially dependent on the other.

The more the society is moving towards westernisation, the more encouragement are provided to live-in-relationship. If more emphasis is laid on the brighter side of Indian culture and if emphasis id put on what to take in from the western culture and what not, in order to maintain a balance, it may provide a way of not dealing with the needs of the younger generation but also the children and the older generation, there maintain a balance and retaining the basic foundation of the society in long run.

Formal, committed, intimate unions are much more stable than inform, walk in and out live-in-relationships and are more beneficial for the partners, the children, and the dependent family members.

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SOCIAL IMPACTS OF DECRIMINALISING ADULTERY: AN ALTERNATIVE APPROACH

- SAYAN DEY & ANUSHKA MANDAL

ABSTRACT

Adultery in plain English diction means intercourse between a married person and a person who is not their husband or wife; similarly it is understood that the act of adultery can be carried out by both men and women. The Indian laws failed to recognize that basic tenet, leading to gender bias, inequality and imbalance. The object of this paper is to scrutinize the basic ingredients of the section and outlay the pre and post scenario in the matrimonial realm. The legislation was subject to Article 13 not the crime. The role of a legal structure is welfare and protection and adultery diminishes the grounds of social well being of a family also leading to denial of justice, psychological derailment of individuals, in certain cases subjects the family to domestic violence, abuse and other related impacts. The balance of convenience and higher social welfare has to be studied before acknowledging the grey area that is now left to be misutilised. The paper suggests that a different approach could have been adopted rather than abolishing them criminality of the act. If the judiciary has taken a step forward by striking down an undignified provision, the legislative backing of a well structured law for protection will only engrave a progressive path forward.

INTRODUCTION

A judgment that has the potential to impact innumerable families, the Apex Court of India declared the 158 year old law as unconstitutional. The provision was uprooted on grounds of causing unreasonable classification between genders; portraying the patriarchal norms of the country. This judgment, adopted by the five judges bench, striking off section 497 of Indian Penal Code, 1860 along with section 198 of Civil Procedure Code as unconstitutional, thereby decriminalizing the act of adultery.

Decriminalizing Adultery

The provision of Adultery was defined under the criminal scope in India[1127]

[1127] Indian Penal Code Section 497, 1860.

The section was flawed on face and lays numerous misleading facets. Section 497 emphasized on the element of consent of the husband as an approval for infidelity of the wife reducing the institution of marriage to ownership, moreover, treating women as the property in the hands of their husband. The discriminatory Section neglected the aspect of the consent of a woman and victimised her which not only showed the other party as an adulter but an abuser and made him guilty as under the crime of abduction. The said section also clouded the fact of recourse when a husband commits adultery as Section 198(1) only considered a married man as the aggrieved person. The provision was abolished for two broad reasons:

I. **Intruding Gender Neutrality**

Consent and Connivance: Consent can very well be defined as permission or an agreement for something. The plain study of the aforesaid section exhibit the importance of consent and connivance of the husband rather than the wife herself who is actually committing the act. This abridges women's autonomy over her own body, and her right to bodily integrity. The forefathers of the Constitution have expressly guaranteed such right to each individual which undeniably includes married women as well. Connivance is the voluntary consent to a spousal offence or a culpable acquiescence in a modus of conduct likely to lead to the offence being committed.[1128] Connivance being an action of the mind implies acquiescence and knowledge. Connivance has it's source and it's limits in the principle *volenti non fit injuria*, a willing mind, this is all that is necessary.[1129]

In the 21st Century, a statute which aims to protect the rights of the husband over his wife by granting him the authority to superintend the women, unquestionably shows the patriarchal thinking of the society. The language of the statute reflects that the bedrock of the crime is diminished once consent or connivance of the husband is established. The provision dents the individuality of women.

Women Treated as Property: Adultery rather than being considered as an offence against the matrimonial home is led against the husband. To further dig the object of such legislation and evaluate the relevancy of the piece in the contemporary times, it is vital to analyze the intention of the drafter *Thomas Babington Macaulay*. The intellect behind such drafting is based upon an erroneous presumption of women being the property of men; and consequently husband having the solitary right over the bodily affairs of his wife. The way a person is not expected to trespass upon the property of others without the consent of the owner; the same way other

[1128] Stroud's Judicial Dictionary, Vol I, p. 580.
[1129] Boulting v. Boulting, (1864) 33 LJ (P M & A) 33.

men are not permitted to have sexual affairs with someone's wife except his connivance. The morale was to restrict any infidelity by the husband without the husband's permission, rather than actually criminalize physical relations beyond marriage. Undoubtedly women are treated as belongings or rather as chattels.

Women cannot be punished: The provision was for long under criticism due to another patent felony for portraying strong gender inequality. The section only imposes punishment upon the male offender turning a blind eye upon the female party to the crime. The expressions "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" and "In such case the wife shall not be punishable as an abettor" undoubtedly relieves the wife of any criminal liability for committing the exact same crime as the man himself. The plain fact that the appellant is of female genetics gives her absolute immunity against adultery and she cannot be proceeded against for the same.[1130]

Actually, women had not been credited any weightage; their consent seemed to be unimportant; they had no right to file a complaint of adultery against their husbands, even disburdened of adverse punishments. Indirectly females were perceived as the delicate half of the society and accordingly deprived of any prominent authority.

II. Unconstitutionality

The mother of all laws recognizes gender equality and explicitly protects equality before the law as a fundamental right of each individual. Any legislation arbitrary to the fundamental rights should be struck out; similarly Section 497 of the Code based on gender stereotypes is unconstitutional on being violative of Articles 14 [Right to euality and equality before the law], 15(1) [Prohibition of discrimination] along with Article 21. In this respect, the Court refers to the judgment of *K.S. Puttaswamy and another v/s Union of India and others (2017*) in which Court declares that right of privacy is a fundamental right as prescribed in the Constitution.[1131]

The hon'ble court declared the bodily integrity and dignity of women cannot be curtailed.

As per the aforesaid section the offence is restricted to be committed by a male spouse, but contrary to which the concluding sentence of the Section prohibits woman from being punished as an abettor. It is said that this offends equality before law and fosters discrimination.[1132] The argument falls down that the definition should be revised by extending the ambit of the offence which casts a shadow of liability on both the genders. Section 497 disregards instances where

[1130] Kalyani v. State, AIR 2012 SC 497 : (2012) 1 SCC 358
[1131] The Constitution of India, Art. 21, 14 and 15
[1132] Joseph Shine v. Union Of India, 2018 SC 1672

the male spouse has sexual relations with bachelor woman giving him a license under the law to have extramarital relationships with unmarried women. It confers upon the man the authority to prosecute the offender but rights of the wife are neglected as no provision allows her to proceed against the woman with whom her husband has committed adultery; similarly it does not provide any option to the wife to adopt legal actions against the husband who is an infidel with outside women.[1133]

Current Scenario

The legislation was declared invalid by the Apex Court in the pertinent case of *Joseph Shine* on previously mentioned grounds, but it is difficult to ignore the catastrophic effects of adultery in the union of marriage. Though the then C.J. Deepak Misra stated "Adultery in certain cases, may not be the cause of an unhappy marriage. It can be carried the result", nonetheless infidelity does create a series of complexities in marriage. According to the judiciary treating the act as an offence would tantamount to chastise spouses who are unhappy in a marriage. It is inferred that the Hon'ble court shunned the social reality revolving around the country itself. India facing challenges with the rising divorce rates and cases of infidelity; the invalidation of the crime would not only endanger the sanctity of marriage but also isolate the product of such marriage.[1134]

There has been a long drawn debate of the social impact of the ruling. In this note, the authors try to reflect that although the judgement is pathbreaking in the history of gender neutrality and protection of women rights in the Country, it shall be interpret to eclipse the legislation and the unconstitutional vice it enforced not to decriminalise the entire nuisance of adultery. The basic notion being, that when a concept is flawed, it shall be remedied, not erased. The legislation needs to be remodelled to protect innocent victims from the brutality that the related parties have to face when made to undergo the effects of social disgrace, domestic abuse, cruelty and most importantly derailed justice. A crime shall be studied by its impacts and not by the outdated definition of a radically different social structure.

Effects of Adultery:

[1133] Smt. Sowmithri Vishnu v. Union Of India & Anr 1985, AIR 1618

[1134] Abha Singh, Decriminalisation of Adultery a Setback to the institution of marriage in India, https://www.outlookindia.com/website/story/decriminalisation-of-adultery-a-setback-to-the-institution-of-marriage-in-india/317282

Adultery is not a victimless act - A person committing adultery often tends to blame the partner for an unhappy marriage but the truth is otherwise as only the person committing infidelity should be blamed. Members of the immediate family, including the extended family, not to mention friends, are all undeservedly hurt. Infidelity hurts each member of the family.[1135]

Effect on the children: When the house burns down the innocent children are not exempted from it. The psychological and sociological effects in the offsprings have long term effects on their life, witnessing their parents break down have horrific implications.

Cruelty: Individuals devolving themselves into infidelity tend to resort to cruel acts on their partners; especially this can be recognised where husbands having extramarital affairs tend to take up physical violence against the spouse leading to cruelty. Adultery castes a bitter relation in the virtue of marriage.

Maintenance: It has been sincerely established by the Indian Courts that striking down the provision of adultery from The Penal Code will not effect its standing as a ground for divorce. The reality of the situation is far drifted from the model expectations and as unfortunate as it is, pure theory of legal positivism does not help protection against abuse. The divorce laws in India has a high standard of proof for resorting to adultery as a ground which is stated as "living in adultery". This is not only difficult to prove but also excludes the different aspects of infidelity. In some recent Cases, circumstantial evidence was accepted by Courts but even then proving adultery is extremely difficult which directly influences the maintenance claims and proceedings. Thus in case of the wife being the victim of the husband's adultery, she is lost in judicial burden of proof and social stigma without resources to support herself or even her children. On the other hand, the wife who commits adultery looses rights of custody and maintenance for her child, which is not just unfair to the child but against his/her legal rights of maintenance.

Having no lack of esteem for the landmark judgment, the Hon'ble Court could have adopted a different approach to the issue. The protectors of the Constitution should have regarded the societal norms omnipresent in relation to ill effects of Adultery in the sanctity of the marriage union, and rather than abolishing the law completely could have amended the gender bias tenets. The provision could have been altered not just to protect the individuality of women but also towards a better tomorrow by mending it constitutionally and socially. The Code of Civil

[1135] Vidhi Sharma,The 5 Negative Effects of Adultery on a Family, Apr 18,2019, https://www.gosmartlife.com/surviving-infidelity/the-5-negative-effects-of-adultery-on-a-family

Procedure Section 198(2)[1136] should have been solely uprooted, as it only confers upon the husband jurisdiction to file a case under section 498 against the offender. There shall be a restructured Law that protects a partner in the marriage against the crime of the other irrespective of gender and which also includes under its umbrella the LGBTQA+ community. All laws of protecting human dignity and connected to one another and cannot be treated without harmonious construction. The reinstatement of the concept of infidelity in marriage not only impacts gender neutrality or divorce and related rights but is directly linked to vices of marital rape, dowry deaths, domestic abuse, child rights, privacy and basic human dignity. We acknowledge that morality cannot be interlinked with criminality but the same does not apply when the criminal attributes of something immoral has such condescending and cynical impacts on social structure.

CONCLUSION

The Court has acknowledged a 150 years old law on adultery as unconstitutional, which treats husband as the master of his wife. The section is flawed on face and lays numerous misleading facets. Section 497 emphasizes on the element of consent of the husband rather than the wife herself i.e. treating women as the property in the hands of their husband. Though decriminalization of adultery is one of the few steps towards social progress, turning a blind eye towards the ill effects of infidelity is undoubtedly incorrect. The only remedy against an adulterous wife or husband is divorce, the Court should have discerned that the verdict would dissect the institution of marriage. It is best suggested for the parliament to resolve the issues by adopting immediate measures.

[1136] Indian Penal Code, Section 198, 1860.

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CRITICAL ANALYSIS OF THE DNA PROFILING BILL 2019 AND WHY IT IS FLAWED

- SOWMYA M & S. YESESWINI

INTRODUCTION

DNA Technology (Use and Application) Bill, 2019, also known as 'DNA profiling bill' is no stranger to the halls of the Parliament. The history of such a bill dates back to 2003, but due to various issues of privacy concerns and ethics surrounding the use of DNA profiles, several criticisms of the bill surfaced and it never saw the light of the day. In 2018, the Law Commission of India in its 271st report prepared the draft bill named the DNA Based Technology (Use and Regulation) Bill 2017. The commission examined the stance on DNA profiling and highlighted its several advantages to the criminal justice system and the society at large, however, it also flagged the privacy concerns, and the ethics involved in this scientific collection of data were very high.

The bill was passed in Lok Sabha on January 2018, but it could not be cleared in the Rajya Sabha. With the dissolution of the Lok Sabha, the bill had then lapsed. Subsequently in 2019, the bill was passed by the Lok Sabha in July. The DNA Technology (Use and Application) Regulation Bill has been referred to the Parliamentary Standing Committee on Science and Technology, Environment and Forests by Rajya Sabha Chairman M Venkaiah Naidu, in consultation with the Speaker, Lok Sabha.

This article aims to highlight the main provisions of the bill and the several issues it poses to Indian citizens. The flaws of the bill need to be abridged before it can be enacted as a law, mainly to protect the privacy of all individuals.

HIGHLIGHTS OF THE DNA TECHNOLOGY (USE AND APPLICATION) BILL, 2019

- The Bill is aimed at regulating DNA technology used for establishing the identity of persons in respect of matters which are laid down in the IPC, and also, offences under other laws such as the Immoral Traffic (Prevention) Act 1956, the Medical Termination of Pregnancy Act, 1971, the Protection of Civil Rights Act, 1955 and the Motor Vehicles Act, 1988 and for various civil matters such as migration, parentage disputes, transplantation of human organs, etc.

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- DNA Profiling Board will be set up. The Board, with 12 members, will constitute regulatory authority that grants accreditation to DNA laboratories and lays down guidelines for their functioning. It will advise central and state governments on "all issues relating to DNA laboratories". It will also be involved in recommendations on ethical and human rights, questions of privacy, and issues related to DNA testing.
- The members of the Regulatory Board shall consist of experts in the field of biological sciences; member of the National Human Rights Commission; the director-general of the National Investigation Agency(or nominee); the Director of CBI(or nominee); the Director-General Police of a state; the Director of the Centre for DNA Fingerprinting and Diagnostics; Director of the National Accreditation Board for Testing and Calibration of Laboratories; Director of the Central Forensic Science Laboratory; Officers not below the rank of Joint Secretary from the Ministry of Law and Justice and Ministry of Science and Technology; and an officer not below the rank of Joint Secretary with knowledge and experience in biological science.[1137]
- National DNA Data Bank and various Regional DNA Data Banks will be established for maintaining essential indices such as crime scene index, suspects or undertrials index, offenders index, missing person index, and unknown deceased persons index. The DNA laboratories are required to share DNA data so collected during analysis, with the Data Banks.
- No laboratory shall undertake DNA testing without obtaining accreditation from the Board. The Board may, within ninety days from the receipt of application grant accreditation to such laboratory or renew it, subject to such conditions as it may deem fit. On the revocation or suspension of accreditation of the DNA laboratory, the laboratory shall hand over all DNA samples and records relating to DNA testing from its laboratory to such DNA laboratory as may be directed by the Board.
- Whoever willfully discloses such data in any manner to any person or agency not entitled to receive it under this Act shall be punishable with imprisonment for a term which may extend to three years and also with fine which may extend to one lakh rupees; willfully obtains individually identifiable DNA information from the DNA laboratory which may extend to three years and also with fine which may extend to one lakh rupees; accesses information otherwise than by following the provisions of this Act; knowingly and intentionally, destroys, alters, contaminates or tampers with biological evidence which is

[1137] DNA Profiing in India, Towards the new age of DNA Technology, 2019, Mondaq.

ISSN: 2581-6349

required to be preserved under any law for the time being shall be punishable with imprisonment for a term which may extend to five years and also with fine for a maximum of two lakh rupees.

PART I - DNA TESTING AND DATABASES

This section aims to deal with the biological aspect of DNA testing, processing, and finally analysing if it matches with the suspect. It also deals with the DNA Databases and its uses in investigations.

1. DNA as evidence

Deoxyribonucleic acid or DNA is the building block of every human cell and almost all other organisms. The DNA contains the genetic information for the development and proper functioning of living beings. Their primary role is to store information for the long term. Apart from this, they carry out four leading roles that necessitate our daily lives. These are replication, encoding information, mutation and recombination, and gene expression. It differs from person to person, even in the case of identical twins, they share a maximum of only 99.9% similarity[1138]. No two DNAs on the planet can be 100% identical which paves the way for its users to solve crime cases.

During a sexual assault, biological shreds of evidence such as hair, semen, or blood can be collected from the victim's body or the crime scenes. If the DNA samples are appropriately collected, then it can be matched with known samples to see if it matches. If no suspects match, then the DNA profile retrieved from the crime scene can be entered into the database to identify a suspect from anywhere else or link different serial suspects to each other.

DNA helps to solve the most mysterious cases by aiding in finding the real convict AND also serves to exonerate those who have been wrongly convicted. It is a scientific justice providing technique and presumed to be reliable.

Techniques in DNA collection

Investigators can collect DNA from the materials that have been touched by the persons involved in the crime. The materials can be comb, clips, hats, masks, eyeglasses, toothbrushes, condoms, bedding, clothing, cups, bottles, etc.

For example, in cases of breaking and entering such as theft or murder that has occurred in a residential area, if a knit cap is found at the point of forced entry and the house owners confirm

[1138] Evidential value of DNA, Dr. Himanshu Pandey,2019

ISSN: 2581-6349

it is not theirs, then there is a good possibility of finding hair cells in the hat which could help find the suspect.[1139]

With advancing technology, forensic scientists are now equipped even to analyse smaller samples and obtain DNA Profiles. For example, if a person touched a weapon, skin cells would be available on it. This low-level DNA is referred to as touch DNA. It can even be collected from the victim's bruises if handled coarsely. This DNA is extremely helpful when retrieving fingerprints becomes difficult. However, not all labs are capable of doing this process. This requires experts who have immense experience in these techniques.

To compare the suspect's DNA with the retrieved DNA from the crime scene, the laboratories are required to have their samples for comparison. These known samples are reference samples. In some countries, they have rules such that DNA can be routinely taken from the person arrested, however since it is an evolving area of law, states vary in their laws. Sometimes, if a person is unwilling to give his fingerprints, then court order needs to obtained to collect DNA from the person of interest[1140].

In addition to reference DNA samples, elimination samples need to collected from the persons investigating the crime, analysts, sex partners, responders so that they can be excluded from the investigation. Evidence must be collected with proper care and precautions as it is a delicate substance, and if it is mishandled, it can be destroyed. Storing of pieces of evidence in cold places or refrigerating it is most suitable.

2. The process of testing

DNA Testing comprises four primary steps of Extraction, Quantitation, Amplification, Capillary Electrophoresis.

Extraction

DNA is located within the nucleus of the cell throughout the body. The extraction process is responsible for separating the DNA from the nucleus and release it into the solution. This process also helps in separating it from other debris present in the cellular molecule. There might be specific potential inhibitors that might cause disruptions in the later stages. Hence, it is essential to isolate only the DNA molecule. Few common inhibitors are haemoglobin and indigo dyes. This process can be done by two methods which are; organic extraction (manual) or through the robotic system.[1141]

[1139] Understanding DNA Evidence- A Guide, 2000
[1140] Handbook of Forensic Services: Evidence Examinations. Washington, DC: U.S. Department of Justice, FBI, 1999
[1141] Forensic DNA Analysis, By The Royal Society, 2017

Quantitation

This step aims in determining whether the obtained DNA is from a human cell or a bacterium cell. The quality and quantity of the DNA extracted is measured and assessed. The amount determined needs to weighed as the next step requires only a narrow range of input DNA. This step is necessary to generate enough DNA for the amplification process. It can be done through a Sequence detection system which will take around 2-3 hours, including the setup time.

Amplification

The amplification process is carried out by a technique known as Polymerase Chain reaction (PCR). Evidence collected from the crime scenes will be limited. Extracting DNA from minimal resources can lead to lower quality or incomplete DNA. To avoid this, the DNA collected can be processed into millions of copies by PCR. The molecular "Xeroxing" is accomplished by precise heating and cooling of the samples in a cyclic pattern for 28 cycles.

Capillary electrophoresis

After the PCR process, a large number of amplified DNAs are obtained, and it needs to be separated to identify the different molecules which are done through capillary electrophoresis. When an electric current is passed, the molecules enter a thin capillary filled with gel-like polymer. DNA is negatively charged and thus, moves toward the positive anode. The PCR molecules can be easily identified and separated as they are of small size and can easily migrate through the polymer. The data from this is converted to a DNA profile with the help of a software.

3. Results obtained

At the end of all these procedures, a chart called an electropherogram would be obtained. This chart will contain details of the genetic material tested at each locus. There will be a maximum of two peaks at each locus. The grey area at the end will denote the gender of the individual. The peaks from each locus will be analysed and compared with the suspect sample. This process will continue for all the thirteen loci, and the result will be interpreted after that.[1142] However, in practice, the evidence collected will have a mixture of DNA and pose challenges in interpreting. In any case, if an allele is missing at the locus, then a complete profile cannot be obtained. These are known as Partial profile. They happen due to a lack of care in the preservation or collecting of samples. Hence, additional care needs to be taken to obtain a complete DNA profile.

[1142] National Research Council. 1996. The Evaluation of Forensic DNA Evidence. Washington, DC: National Academy Press.

4. DNA databases

A DNA database is used to store DNA profiles of various crime offenders and facilitates a comparison of DNA profiles obtained from a crime scene against the stored profiles. The primary function of the DNA Database is to provide matches for the suspected individual and support criminal investigations. The majority of the National DNA Database is used for forensic purposes.

In the early days, analysing a crime scene without a suspect yielded very little or no information. However, if the government establishes DNA databases, even unknown samples could trace a suspect. Many violent crimes such as murders, rape, child abduction cases have a high degree of repeat offenders.[1143] Even if an unknown sample from a crime scene does not match with a suspect's DNA from the database, it might match with other unsolved cases which leads to the finding of a new suspect. Hence, maintaining a database proves to be essential.

Interpol DNA Database is an automated system that collects and maintains DNA profiles submitted by member countries collected from crime scenes, unidentified bodies, and missing persons. This system is called as DNA Gateway. It was established in 2002 and has received DNA profiles from 69 countries. To uphold the privacy of the individual, it does not link the DNA profile to the physical or psychological conditions of the individual.

The first national DNA database was set up by the United Kingdom and contained around 5 million DNA profiles. United States national database is called CODIS (Combined DNA Index System) and is maintained at three levels; national, state, and local.

PART II - FLAWS IN THE DNA TECHNOLOGY (USE AND APPLICATION) BILL, 2019

1. Effective consent not defined

Section 21 of the bill provides that consent in writing is required for procuring bodily substances of a person who is arrested for an offence, other than 'specified offences' which are more serious: any offence punishable with death or imprisonment for a term exceeding seven years. If consent is refused, the Magistrate having jurisdiction on the application of the investigating officer can override the refusal and direct the procurement of bodily substances if he is satisfied that exists 'reasonable cause' that the person is involved in committing the offence. The accused is severely deprived of the basic fundamental right to privacy when the Magistrate overrules on the refusal to consent-based upon unreasonable grounds.

[1143] Thirty Years of DNA Forensics, By Celia Henry Arnaud,2017

ISSN: 2581-6349

Rules and guidelines for the Magistrate to override the refusal of consent have not been specified in the bill, which contravenes the recent judgment on privacy of *KS Puttaswamy v Union of India.*[1144]

2. Boon to the criminal justice system, a menace to privacy

Data banks are required to store the information under one of the five indices — a crime scene index, a suspect or undertrial index, an offenders' index, a missing persons' index, and an unknown deceased persons' index. Although information from DNA can yield much information about the person, the data banks are supposed to store only that information that is necessary to establish the identity of the person. Section 33 of the bill explicitly states that all DNA data, including DNA profiles, DNA samples, and records in any DNA laboratory and DNA Data Bank shall be used only to facilitate identification of the person and not for any other purpose, but, it is a blunder to ignore the potential dangers that misusing of DNA profiling entails.[1145]

In addition to criminal matters, DNA profiling according to the schedule of the bill has been extended to civil disputes including pedigree, emigration, immigration, among other things. Legislations almost always reflect the good intentions of the legislature; however, commercialisation of DNA profiles for profiting, surveillance are some of the aspects which undermine the good intentions which need to be abridged suitably.

3. Collection of DNA from crime scenes

Section 37 deals with restrictions on access to information in the crime scene index about the DNA profile of a victim of an offence or a person who has been eliminated as a suspect. It is no shock that a crime scene contains a plethora of DNA from various persons and sources who might have incidentally crossed it, having no bearing to the crime whatsoever. The information contained in the crime scene index will be retained, unless, the persons who are neither an offender nor a suspect or an undertrial requests in writing to the National DNA Data bank to remove his/ her profile from the data bank.

It is crucial at this juncture to ponder on this particular situation: How can any person who is entirely unaware that their DNA profile exists in DNA databases request for the removal of the same from the National DNA database?

4. Retainment of DNA profiles

[1144] (2017) 10 SCC 1
[1145] DNA TECHNOLOGY REGULATION BILL – CHHAYA LALWANI - ILSJCCL. https://journal.indianlegalsolution.com/2019/07/14/dna-technology-regulation-bill-chhaya-lalwani/

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Continuing closely with the previous issue is the issue of the retainment of DNA profiles indefinitely. Consider the case of a missing person who has not been found for seven years or more. According to Section 108 of the Indian Evidence Act, if a person is not heard of for seven years or more, he is presumed to be dead. In that case, their DNA profile is retained indefinitely. Alternatively, the previous issue where DNA profiles of several persons from the crime scene are retained indefinitely since they are unaware that their DNA is profiled and stored in DNA databases is a threat to privacy.

An obligation to inform an individual about the details of the collection and usage of DNA rests on the regulatory board. Moreover, there exists a supreme obligation on the board and the DNA databases to remove DNA profiles of all biological data and bodily substances of persons who are neither offenders nor suspects recovered from the crime scene once the purpose of the collection is served.

5. DNA profiles can be misused

Maintaining DNA profiles for offenders makes sense, and a crime scene index offers to work towards the goal. Nevertheless, depending on the perspective in which one looks at DNA profiling in India, it could either pave the way for faster conviction of criminals or lower the standards of right to privacy for reasons noted earlier.

DNA profiling is the process where a specific DNA pattern, called a profile, is obtained from a person or sample of bodily tissue.[1146] Section 26 of the bill mandates every DNA data bank to maintain five indices in addition to the identity of the person in case of a profile in the suspects' index or undertrials' index or offenders' index. In indices other than that, the profiles must be accompanied with the case reference number. However, the bill fails to elaborate on the specifications on which the DNA profile is based. DNA profiling can be used or misused to find out a lot more about the person more than just identification, putting the privacy of the concerned individual at considerable risk. Personal information included in genetic material, such as markers that identify various genetic diseases, physical and behavioural traits, could be used for discriminatory profiling and its collection may constitute an invasion of privacy.[1147]

6. Security measure critique

The DNA regulatory board is ultimately responsible for the protection of information relating to DNA profiles, samples which are in the custody of National DNA data bank, Regional DNA data bank, and DNA laboratory and ensure that it is secure and maintained confidential. Section

[1146] DNA profiling — Science Learning Hub. https://www.sciencelearn.org.nz/resources/1980-dna-profiling
[1147] DNA database - Wikipedia. https://en.wikipedia.org/wiki/DNA_database

30 (3) specifies the board to implement organisational security measures and to ensure any agency is appointed for the same. DNA profiling calls for a superior level of security systems in place and the efficacy of the stated security system can be analysed only after its implementation.

7. Silent on the proper chain of custody

These security measures, in light of the sensitive information being stored in the form of genetic material, might prove to be insufficient when a proper chain of custody is not established conclusively.

The DNA laboratories are required to return the biological sample to the investigating officer if it is a criminal case. In all other cases, they are obliged to destroy the biological sample, nevertheless, after depositing it with the DNA data bank. This change in custody of DNA samples and profiles need to be carried out in the backdrop of strict rules and regulations since DNA evidence holds high value lest chances of misusing and tampering it increase manifold.

8. Mix up of DNA profiles

It is not uncommon for DNA samples and profiles to get mixed up – but generally, courts tend to view DNA evidence with utmost faith to convict an offender. Contamination and mixing up DNA samples can lead to innocent people getting convicted for an offence. Section 24 of the bill contains the provision for taking bodily substances for re-examination if the trial court is satisfied with the plea of the accused that the bodily substances taken from such person or collected from the place of occurrence of crime had been contaminated.

It sounds reasonable and attractive, but the practice, in reality, might not be necessarily the same. It is not simple to prove that DNA was contaminated by the accused. In this situation, the accused must be presented with the right to consult experts in this field. In addition to this, the trial court, when dealing with evidence relating to DNA must take the assistance of an expert panel to analyse the DNA evidence to arrive at an unbiased order.

9. Rules and regulations not detailed in the bill

Section 59 of the bill explains the powers of the regulatory board to frame regulations consistent with the provisions of the bill and also rules to carry out the provisions. A mere perusal of the bill contains several instances where rules and regulations are required to be framed by the board. Several vital regulations such as the form, the fee and how a DNA laboratory shall make an application for accreditation; requirements of such DNA laboratory; sources of collection of DNA; the format in which the National DNA Data Bank shall receive DNA data from Regional DNA Data Banks and store the DNA profiles under sub-section; have been extended to the responsibilities of the board.

This showcases the incompleteness of the bill in the sense that it fails to acknowledge the critical instances where the bill has to specify the rules. This aspect of the bill needs to be abridged to ensure consistency and clarity on its implementation.

10. The short-sightedness of the legislature

This particular bill ultimately targets the privacy of an individual. Without set in the backdrop of robust data protection laws, this bill fails to comply with several standards required for privacy. Genetic material falls under the category of 'sensitive personal data' in the Data protection bill of 2019.[1148]

An obligation lies with the legislature to ensure all standards of protecting and safeguarding an individual's privacy is ensured before enacting a law which affects one's privacy. Several concepts and procedures are left open-ended in this bill, making it an incomplete legislature. The issues and considerations need to be consolidated and incorporated for this bill to take the shape of an entire legislature, which is the need of the hour in the current scenario of the criminal justice system.

PART III - A NECESSARY INTROSPECTIVE

The DNA testing though proves to be a powerful investigatory tool, and has its downsides. It raises privacy concerns as it can reveal an individual's sensitive information. The DNA bill remains unclear on various aspects mentioned above. It barely provides any security to the DNA collected as there have been no proper limitations on consent and purpose. Collecting and using the DNA, without prior consent can lead to foul plays. This is not based on false assumptions but with clear evidence from the happenings of other countries.

The government has insisted that the bill is to merely expand the practical application of DNA technology to strengthen the justice delivery system. However, several activists stakeholders have criticised it by highlighting the security concerns which the centre has failed to notice.[1149]

The Privacy related developments that have taken place were not taken into consideration by the law commission while examining the bill. The law commission finalised its deliberation by July 2017, just a month before the landmark *K.S.Puttaswamy* Judgement was passed. The commission has made multiple references to the pending privacy judgment. In conclusion, the commission has acknowledged that the DNA bill intends to protect the Privacy of and

[1148] Section 3 (36) of the Personal Data Protection Bill, 2019.
[1149] India's Controversial DNA Bill, By The Wire Analysis, 2018

individual but sternly states that "In India, it is still a matter of academic debate as to whether Privacy is an integral part of Art 21 of the Constitution."

Even after the passing of the Judgement, the 2017 bill is yet to state how exactly DNA profiling can be used and is missing several safeguards that might pose a threat to an individual's rights. A parliamentary standing committee has been appointed to examine how well the DNA Bill conforms with the Privacy Judgement.

As experts have stated, the law commission claims that the bill has included 13 CODIS Profiling Standards while drafting the bill to protect the privacy and uphold security but has left the definition of privacy and safety standards to the legislation. Alternatively, in other words, it means that the entire CODIS standard will be left to the government regulations.

The second context in which the bill must be examined is according to the Justice S.N. Sri Krishna report regarding data protection and privacy and on how the private entities should treat the sensitive information of an individual. Steps need to be taken to ensure the safety of the evidence collected in a way that no harm is caused to an innocent who has no link to the crime that has taken place.

To provide a solution to these mishaps that are prone to happen, the Personal Data Protection Bill 2019 needs to be passed before the DNA Regulatory Bill. The Personal Data Protection Bill will serve as the foundation and give strength to withhold the pressure in the passing of such a sensitive bill (DNA).

CONCLUSION

DNA testing has presumed to be a successful accused detector weapon. Every new technology evolving in this world has its pros and cons. In the same way, DNA testing is like a coin with two faces, a face where the correct convict has been identified and another face where an innocent is left to undergo the trial without proper investigation. We all believe that Science never lies and indeed it does not. The entire world exists because there is a science behind the happening of even a small event. Science is very vast like the universe; what we have discovered today will equal only the size of an atom. With the level of technology and knowledge we have, we cannot rely 100 per cent on the results we obtain from the scientific process. DNA Testing is a great example of it; not all matches with a suspect from the database will be accurate.

There exists evidence to prove the same from several countries who are not only well ahead in this technology but are equipped with precise instruments; still, errors have happened. In the US, a man with Parkinson's disease unable to walk was convicted of burglary based on a partial

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DNA match. Further in 2012, a famous US comedian named Adam Scott was convicted for a rape that happened in a city 200 miles away from where he lives and has never visited. This happened due to careless mistakes in the procedure and reusing of the same plates in the lab. This results in false leads and miscarriages of Justice. DNA technology is extremely sensitive and needs to have regulations to avoid such errors from happening.

India could have been behind the race when compared with several other countries like the US, the UK who have passed regulatory acts to govern this evolving technology. However, despite being late, we can still clearly analyse, study and pass an appropriate DNA regulatory bill by keeping in mind the privacy of several individuals that will be at stake due to careless drafting of the bill. They should also consider the false leads that this technology has given rise to and realise that the forensic crimes should not depend entirely on the results of the DNA testing, and make sure that the result synchronises with further investigations and evidence.

The DNA Regulatory Bill should be read comprehensively with the Data Protection Bill to establish a more secure mechanism of DNA testing procedures and not violate the Privacy Judgement. DNA Evidence though convincing should never be oversold in court, and be considered only in light of other evidence.

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IMPACT OF CRYPTOCURRENCY ON CURRENCY COMPETITION

- **ANJALI GANDHI**

The article studies the impact of cryptocurrency in the financial market and thus, on the currency competition. The special emphasis is laid on how cryptocurrency has gained value in the financial market. It is established that the nature of currencies plays an important role in determining the type of competition which prevails in a given market. The conflicting propositions of Hayek and Rothbard are also analysed. Role of cryptocurrency in currency competition is given the central place in this article. The status of cryptocurrency globally has been mentioned with special reference to India. Lastly, one case study is presented in short of the recent Indian case where the Hon'ble Supreme Court has held that the order of Reserve Bank of India banning all banking services for the transactions involving cryptocurrencies to be unconstitutional, thereby laying a new road for cryptocurrency market in India.

INTRODUCTION

There are three eras of currency: Commodity based, politically based, and now, math based. – Chris Dixon

Cryptocurrency, since its inception has been an issue of discussion in the financial market. From the issue of centralization/decentralization of cryptocurrency to its potential to increase/decrease competition, all aspects related to it are considered to be debatable due to its highly uncertain nature. The first cryptocurrency was introduced by David Chaum in 1983. But it gained popularity in 2009 only when a decentralized cryptocurrency named Bitcoin was introduced by a pseudonymous person called Sakoshi Nakamoto. It became popular as it was the first alternative to the *fiat* currency.

In India, cryptocurrency gained a sudden popularity with the emergence of Bitcoin as a potential investment source but nevertheless, the dealings in relation to Bitcoin were happening in a vacuum as there was no legitimate sanction or any statement by the Government or any regulatory authority ascribing the usage of Bitcoin or cryptocurrency in general. But in April, 2018, Reserve Bank of India, in one of its official circulars, declared that no banking services could be used to deal in cryptocurrencies. But cryptocurrencies, *per se* were not banned in India and therefore, a person could still deal in cryptocurrencies using non-Indian banking services.

Recently, the Hon'ble Supreme Court of India in *Internet and Mobile Association of India v. RBI*[1150] held that the aforesaid circular which was issued by RBI in April 2018 is unconstitutional. This brings in a new line of debate into picture that whether India will start recognizing cryptocurrency as a legal tender, whether India will pass a legislation to regulate the investments and/or dealings in cryptocurrency, whether the dynamics of competition in the financial market will change due to the introduction of cryptocurrency *et al*.

HOW COMPETITION DEPENDS UPON THE NATURE OF CURRENCY IN THE MARKET

Since centuries the currency has remained a subject of interest in both academics and politics. Many philosophers like Aristotle, Plato and Xenophon had taken every chance to answer the questions in relation to the properties of currency, its shape, value, function and the way it circulates in the market.[1151] The economists have tried to analyse currency on similar lines. But the concept of currency remains far from being answered or finally understood. Nevertheless, it is clear that cryptocurrency and the *fiat* currency are different from each other in many aspects.

Friedrich August von Hayek proposed that many problems such as inflation, socio-economic issues exist in the society because the government has a monopoly over the currency and its regulation. He had stated- *"the further pursuit of the suggestion that government should be deprived of its monopoly of the issue of money opened the most fascinating theoretical vistas and showed the possibility of arrangements which have never been considered."*[1152] Hayek supported that the problems which exist in the market economy are due to monopoly of the government over money and to solve these problems, it is necessary to decentralize money.

There have been many criticisms to the aforesaid proposition of Hayek and one of the most rational one was given by Murray Rothbard. He had said- *"the best-known proposal to separate money from the state is that of F.A. Hayek and his followers. Hayek's denationalization of money would eliminate legal tender laws, and allow every individual and organization to issue its own currency, as paper tickets with its own names and marks attached."*[1153]

[1150] Writ Petition (Civil) No.528 of 2018.
[1151] Paicu M. Dobrescu, M., New approaches to business cycle theory in current economic science, Theoretical and Applied Economics, vol. XIX, no. 7(572) (2012).
[1152] F.A. Hayek, Denaționalizarea banilor. Argumentul îmbunătățit. O analiză a teoriei și practicii monedelor concurente, Libertas Publishing, București (2006).
[1153] M. Rothbard, Pledoarie pentru un autentic dolar de aur, Institutul Ludwig von Mises România (2003).

Rothbard further said that Hayek's proposition would have been a success only if we'd considered money to be similar to other goods and services. But Hayek does not talk in those terms. Other goods and services are desired for their own sake, i.e., for their own utilities and properties, whereas money is not wanted for its own sake. But only due to the reason that it serves as money and we can barter or exchange it for other commodities. Money can be taken as a ticket in a metaphorical sense. We desire to have that ticket because we know that we can sell those tickets for any goods and services that we desire. Hayek's view is founded to be correct by Rothbard only to an extent that he is advocating for a free economy. But at the same time Rothbard says that there has to be a distinction found in issuance and acceptance. In a free economy, anyone could come up with a currency which is not regulated by the government but the main question here lies whether that would be accepted by everyone as a valid legal tender. This property of universal acceptance is an important characteristic of money and therefore, Hayek's view is limited in its scope.[1154]

Cryptocurrency is the kind of currency that Hayek talked about except it circulates in the cyber world, i.e., virtually. Bitcoin, the most commonly used cryptocurrency and the Blockchain technology have emerged vastly as being a viable option for investments but high risks are involved as the value of any cryptocurrency remains highly volatile, given that it does not have a physical entity and is formed by a process of algorithmic mining. That is what makes it different from other kinds of currencies. The cryptocurrency can be viewed as creating a system which is decentralized network where payments can be made anonymously globally without the interference by third parties. The basic differences between cryptocurrency and other currencies thus include: anonymity of transactions in cryptocurrency, absence of any regulating central authority keeping a track of transactions and regulating the issuance of cryptocurrency, there is no fixed rates of exchange and everything depends on how much cryptocurrency the mining yields at a particular time. It is important to realize that the supply of Bitcoins is limited, that is, only 21 million Bitcoins can be generated. And therefore, it is expected that the competition in the financial market will change drastically due to the circulation of Bitcoin in the market.

CURRENCY COMPETITION: ROLE OF CRYPTOCURRENCY

The emergence of cryptocurrency has touched upon the debate of currency competition in the market. It is a well-known fact that competition is the best possible way to satisfy the needs of

[1154] *Supra* 1.

consumers or in this case, the citizens. But it is a bit impractical to see innumerable competitors coming into picture to compete against the government. Many economists support the concept of perfect competition which is best for any social settings only if 3 assumptions are met: there shall not be an alternate market power on either side, the consumers or the parties to a transaction must be informed regarding the economic environment and they must not default in their promises even if the situations around them change. The absence of external factors, thus is important as well.[1155] If either of the assumptions is not met, the perfect competition will not yield an efficient outcome. It is also known that if in a market there are several buyers and only one seller, there are high chances that the buyer may have excessive concentration of wealth and might exploit the buyers. Therefore, it is desirable that there are various suppliers in the market. If that is the case, one must also consider that if the government has a monopoly over the currency, then there are high chances that it starts exploiting its citizens and becomes an authoritarian government. But it is to be remembered that we have a social contract structure in our society and the citizens do need to forego some rights and the government must be seen as a welfare government trying to protect the legal rights of its citizens.

One must also look how cryptocurrencies affect this currency competition. While they are virtual, cryptocurrencies are costly just as coins. The mining of bitcoins, for instance, requires a costly procedure and an exorbitant energy requirement. It is also important to consider that the miners of these bitcoins also put real inputs, like programming effort, electricity and computational resources to authenticate the transactions of Bitcoins. Moreover, there is a profound competition amongst the miners because only the miner who first generates a valid solution gets the Bitcoin. The energy cost sustained by all the other miners turns to zero and this cost pedestals rapidly as more miners enter the mining business. Mining is an expensive activity that is commenced by persons who pursue to maximize profits. Therefore, it is very improbable that any single miner will ever be able to control the total transaction/supply of the Bitcoin system and other virtual currencies as they are intended to operate in a decentralized, costly, and competitive environment. This absence of control over the total supply of money in circulation may also has critical consequences for the stability of prices in an economic market.

To comprehend the ramifications of this outcome, it is maybe useful to contrast it and a standard investigation of financial arrangement in the theoretical model is made, in which it is

[1155] Daniel Sanches, Bitcoin vs. the Buck: Is Currency Competition a Good Thing?, (June 16, 2020, 7:34 PM), https://www.philadelphiafed.org/-/media/research-and-data/publications/economic-insights/2018/q2/eiq218-bitcoin.pdf?la=en.

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normally expected that there is a single currency given by the Central Bank. In this manner, the central bank controls the size of the cash supply in the economy. In this standard model, the estimation of cash can likewise change impressively if the central bank doesn't keep up a credible arrangement to control the estimation of cash. All things considered; officially sanctioned money is additionally an inherently pointless token that is similarly dependent upon inevitable outcomes. In any case, a functioning national bank whose expressed objective is to stabilize the estimation of its own cash will probably prevail with regards to building up an equilibrium in which the estimation of cash remains generally steady after some time.

Some cryptocurrencies, like Bitcoin, have been structured so that a fixed upper limit is there on its total quantity. This quality of cryptocurrencies can bring financial stability till the time the government is able to limit the no. of miners or cryptocurrency generators in a given market. It could also serve as an effective alternative to the *fiat* money and thus end the monopoly of the government. But this is not true for all cryptocurrencies. Not every cryptocurrency is designed to have an upper limit of supply.

STATUS OF CRYPTOCURRENCY AS A LEGAL TENDER IN DIFFERENT COUNTRIES

Cryptocurrency can be used anonymously to do transactions between any parties, anywhere and anytime globally. This feature of anonymity also attracts criminal activities. While a person may use cryptocurrency in order to maintain privacy in the transactions, another may use it to do any offence or to buy any illegal objects. Most countries have not clearly determined the legality of cryptocurrency, choosing instead to take a wait-and-see approach. Some countries have indirectly agreed to the legal use of cryptocurrency by enacting some regulatory oversight. Whereas Bitcoin is received well in many parts of the world, a few countries are cautious because of its volatility, decentralized nature, apparent threat to current monetary systems, and links to illicit activities like drug trafficking and money laundering. Some nations have outright banned the digital currency, while others have tried to cut off any support from the banking and financial system essential for its trading and use.

STATUS IN INDIA

In India, transactions in cryptocurrencies were happening in vacuum as no law was there to govern it until April 2018 when Reserve Bank of India issued a circular banning to use of any Indian banking services for the transactions involving cryptocurrency.

An inter-ministerial committee was formed by the Government in November 2017 to analyse the issues related to cryptocurrencies and propose specific action, which had suggested banning of private cryptocurrencies and criminalising any activity related to virtual currencies. The government was never in favour of any private digital/crypto/virtual currencies, including bitcoin. Former Finance Minister, Late Sh. Arun Jaitley in his 2018 Budget speech stated that cryptocurrencies were not legal tender and the government would take all efforts to eliminate their use in "financing illegitimate payment systems or as part of the payment system."[1156]

The Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019 was introduced by the government in the Parliament which sought to prohibit mining, holding, selling, trade, issuance, disposal or use of cryptocurrency in the country and proposed 10-year prison sentence for persons who "mine, generate, hold, sell, transfer, dispose, issue or deal in cryptocurrencies."

CASE STUDY: *Internet and Mobile Association of India v. RBI*[1157]

The journey of this case started with the Reserve Bank of India's "Statement on Developmental and Regulatory Policies" on April 5, 2018 which banned all banking services to enter into or exit from any transactions in relation to cryptocurrencies. Two group of petitions were filed in the courts. One was by the Internet and Mobile Association of India, a non-profit group that aims to represent the interests of the online and digital services industry, and second by a group of corporations that were in the business of running of crypto exchange platforms. The Kali Digital, a crypto firm from Ahmedabad had filed a writ petition against this RBI circular on May 16, 2018. Similar petitions were filed and then the Hon'ble Supreme Court clubbed them all in a single Petition in August 2018.

The petition claimed that this circular of RBI was against Articles 19(1)(g) and 14 of the Indian Constitution and that Reserve Bank of India had no authority to pass such an order. The Petitioners had claimed that it was outside the Reserve Bank's capacity to pass such an order of banning cryptocurrency and that it had never passed such an order banning any economic activity just because of the nature of the activity. That it was outside RBI's realm to pass such an order and the same should have come from the Act of the legislature. Moreover,

[1156] India mulling an official cryptocurrency looks like government veering towards the idea, Economic Times, (June 10, 2020, 5:30 PM), https://economictimes.indiatimes.com/https://economictimes.indiatimes.com/markets/stocks/news/india-mulling-an-official-crypto-currency-looks-like-govt-veering-towards-the-idea/articleshow/70343343.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
[1157] *Supra* 1.

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Cryptocurrencies are not legal tender and thus, outside the scope of the Reserve Bank of India Act, 1934; Banking Regulation Act, 1949 and the Payment and Settlement Systems Act, 2007. According to the Hon'ble Supreme Court, in the absence of any legislative prohibition, the business of dealing in cryptocurrencies ought to be treated as a legitimate trade that is protected by the fundamental right to carry on any occupation, trade or business under Article 19(1)(g) of the Indian Constitution. The Court also rejected that the order of RBI was proportionate in view of the doctrine of proportionality w.r.t. Article 19(6) restrictions.

The Supreme Court also criticized the steps taken by Central Bank of India for freezing the account of Koenix company. It noted that due to the unlawful order of the Reserve Bank, many companies have suffered without any fault on their part. The Court has left the ball in the Legislature's court to decide the legality of cryptocurrencies in India through this judgement. This judgement has laid a new road for cryptocurrency in India but the same will prevail till the time the legislature comes up with a new policy regarding the same.

CONCLUSION

The role of Cryptocurrencies in modern day world cannot be dropped. Hayek's view that de-nationalization of currency is a mark towards ending the socio-economic problems is quite convincing. The most favourable reason to introduce cryptocurrency in a market is decentralization of currency and thereby opening to a road for private entities to enter the competition. But the present-day notion that if cryptocurrency has to be made legal, it shall be regulated by the government fails the core reason itself. But nevertheless, that regulation is inevitable and necessary as otherwise, it won't be accepted as a legal tender. The introduction of cryptocurrency in the financial market would also upsurge the competition for other currencies. The exchange rate is already high for cryptocurrencies like Bitcoin, etc. As it has been pointed out in this article that for cryptocurrencies like Bitcoin which have a limited circulation are easy to be regulated by the government and these will not have a major harmful effect on the competition but this can't be presumed to be true for all other cryptocurrencies. With respect to India, a proper legislation or policy stating anything about cryptocurrency was never passed. Reserve Bank of India took the first step by announcing the ban on any banking services to deal in cryptocurrencies. But the same step has been held to be unconstitutional by the Supreme Court as being outside the legitimate scope of the RBI and as being violative of Article 19 (1)(g). This judgement though has made transactions in cryptocurrency legal for the time being but has left the ball in the hands of the legislature to decide further as it is a policy matter. It is also important to note that legislature had already taken a step to declare

cryptocurrency as illegal by introducing a bill. The Bill seeks to prohibit mining, holding, selling, trade, issuance, disposal or use of cryptocurrency in the country and proposed 10-year prison sentence is proposed for persons who "mine, generate, hold, sell, transfer, dispose, issue or deal in cryptocurrencies." If this Bill is converted into and Act, the status of cryptocurrency would turn to illegal in India like many other countries. Many Indian miners will also face huge losses. But the food for thought here lies in the stance of the government. Is it so that the government is too apprehensive about the competition that cryptocurrency could bring in the Indian market? Or is it actually trying to limit the no. of crimes that the introduction of cryptocurrency could increase? The answer is outside the scope of this article but nevertheless, the fact that cryptocurrency has a huge impact on the currency competition in any financial market is true.

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INTERNET MEME LAW: THE NEED OF THE HOUR

- **ARPINDERDEEP SINGH.**

"What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another"- **Supreme Court of India *in re* Shreya Singhal v. Union of India.**

ABSTRACT:

The Constitution of India provides several fundamental rights to the citizens of India. When we talk about the rights, then one of them is the right to freedom of speech and expression as enshrined under Article 19(1)(a). The Indian Judiciary while scrupulously upholding the right to speech and expression has delivered several rhetorically exemplary and notable judgements to safeguard the sanctity of a democracy. But, the Indian Judiciary while dealing with internet speech and memes is often found to have propounded erroneous and lackadaisical judgements.

Ever since the Supreme Court's landmark judgement *in re* Shreya Singhal v. The Union of India, the Court while solemnly promulgating the right to internet speech and expression and deliberately describing the unconstitutionality of section 66a, has observed that the citizens have been profoundly seen to have celebrated their concomitantly declared right to internet speech. But, while analysing the right to internet speech and expression, the paper has more precisely and specifically discovered that the ultimate right has often been subject to frivolous and malicious prosecutions in the context of internet memes.

The paper aims to enunciate the nebulous right to internet memes, and how the ultimate right has even led to compunctuous offences with an aim to appeal for the discovery of a meme-law. The researcher has tried to delve and discover that memes are actually an inherent right of a citizen and how this inherent right has been subject to frivolous charges of section 66a of the Information Technology Act (2000). While elaborating about the citizen's right to memes, the researcher has also discovered how memes could lead to severe health issues and that time has arrived when internet memes and its abetted offences need adequate attention and an absolute panacea.

INTRODUCTION:

'Internet meme' has been defined as "*an idea, image, video, etc., that is spread very quickly on the internet*[1158]*". "An image, video, piece of text, etc., typically humorous in nature, that is copied and spread rapidly by internet users, often with slight variations*[1159]". The term *'Meme'* was first identified by British evolutionary biologist Richard Dawkins in 1976 in his work "*The Selfish Gene*[1160]" whose literal definition describes it to be something that '*imitates*'. But, who knew that imitation would someday lead to serious offences.

The Constitution of India does not recognise the freedom of speech and expression guaranteed under Article 19(1)(a)[1161] as an absolute right when compared to the US Constitution. The Indian Judiciary over the past few years has scrupulously upheld the various fundamental rights of its citizens but, is often nebulous in the context of internet speech and expression. A retrospective perusal of the internet speech has examined that there has been a lacuna *vis-a-vis* internet memes.

Speech and Expression are condonable to a certain extent, beyond which, the same constitutes an offence under Article 19(2)[1162]. There have been a plethora of issues to be addressed by the Indian judiciary apropos internet memes because the ultimate right is concomitant for some, while, on the other hand being malicious and vexatious for others.

There have been several cases where people like Ravi Shastri[1163], Nusrat Jahan and Mimi Chakraborty[1164] and Ananya Panday[1165] have been criticised and memetised but remain neutral

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[1158] Cambridge Dictionary.
[1159] Oxford English dictionary.
[1160] Richard Dawkins, Memes: the new replicators, The Selfish Gene 169-179 (2nd ed. Oxford University Press, October 25, 1990).
[1161] (1) All citizens shall have the right—
(a) to freedom of speech and expression;
[1162] [(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]
[1163] Akash Khanna, *Ravi Shastri's "Titanic" Pose In ICC Tweet Inspires Meme Fest On Twitter*, NDTV (October 13, 2019, 11:44 A.M.).
https://sports.ndtv.com/india-vs-south-africa-2019/ravi-shastri-titanic-pose-in-icc-tweet-inspires-meme-fest-on-twitter-2116032
[1164] Premankur Biswas, *Bengali actors Mimi Chakraborty and Nusrat Jahan deal with memes, sing for Didi's victory*, TheIndianExpress (April 28, 2020, 03:19 P.M.). https://indianexpress.com/article/express-sunday-eye/memes-music-and-the-masses-5694543/
[1165] Trisha Sengupta, *Siddhant Chaturvedi's reply to Ananya Panday on nepotism is Twitter's favourite new meme*, HindustanTimes (January 04, 2020, 12:57 P.M.). https://www.hindustantimes.com/it-s-viral/siddhant-

and let the public have a good laugh. While such instances were not exaggerated by them, several others like Ashoke Dinda[1166] were found to have raised their voice for themselves and others like Heidi Yeh[1167] ending up ruining their career.

Not only this, internet memes have often been found to misguide a large part of the society towards misinformation and fake facts and beliefs. According to 'Public Policy Polling', it was found that memes actually misguided people to believe in adulterated facts. Around 40% of people in Florida, in 2016, were actually influenced by memes that depicted Ted Cruz as a zodiac killer and ended up voting accordingly[1168]. Similarly, it was found that internet memes do play a major role as a medium to disseminate information[1169] and sometimes even act as a catalyst. The recent being seen in the TikTok v. YouTube[1170] controversy where memes buttressed the public towards hurling up an internet war and ended up promoting hatred and derogatory beliefs among the two communities.

'*Internet Meme*'- an art?

"*The meme, as artistic form, is the intersection of modern art, digital art, and internet cultures*[1171]". The Merriam-Webster dictionary defines "*Art*" as "*something that is created with imagination and that is beautiful or that expresses important ideas or feelings*[1172]".

Memes have been observed to comprise innovation, skill and creativity to express humour and satire. They have been evolving and transforming the orthodoxical definition of art and, people

chaturvedi-s-reply-to-ananya-panday-on-nepotism-is-twitter-s-favourite-new-meme/story-i2oKwMqg9ce8JTOSpMAM1J.html

[1166] Santosh Rao, *India Cricketer Reveals Reason For Outburst Against Trolls, Slams RCB's "Irresponsible" Tweet*, NDTV (April 29, 2019, 09:47 A.M.). https://sports.ndtv.com/ipl-2019/ashoke-dinda-reveals-reason-for-outburst-slams-rcbs-irresponsible-tweet-2030042

[1167] BBC News, *'Internet meme ruined my career'*, BBC (Nov 08, 2015). https://www.youtube.com/watch?v=7WMebV5qt3s

[1168] Dr. Anushka Kulkarni, *Internet Meme and Political Discourse: A Study on the Impact of Internet Meme as a Tool in Communicating Political Satire*, SSRN (Dec 31, 2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501366

[1169] *ibid*.

[1170] The Free Press Journal, *Carry Minati's latest roast ends Youtube Vs TikTok feud, triggers epic meme fest*, Freepressjournal (May 09, 2020, 11:17 A.M.). https://www.google.com/amp/s/m.freepressjournal.in/article/viral/carry-minatis-latest-roast-ends-youtube-vs-tiktok-feud-triggers-epic-meme-fest/19b96336-5af7-4553-bc45-9b92cd6d0612

[1171] Aysha White, *The Artists of the Future Are Here and They're Making Memes*, TheLink (Nov 06, 2018). https://thelinknewspaper.ca/article/the-artists-of-the-future-are-here-and-theyre-making-memes

[1172] Merriam-Webster dictionary. https://www.merriam-webster.com/dictionary/art

have started to believe and expand it into a new form[1173]. Not only this, memes even involve creativity and innovation and the creators/innovators[1174] of these memes nevertheless consider it to be an art *per se* .

Article 19(1) of the International Covenant on Civil and Political Rights states that "*everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*".

The said clause explicitly allows people to attempt or desire to obtain information, receive as well as transmit one's opinions in several ways including in the form of *art*.

Things evolve with time and similarly art evolves itself; and thus, memes portraying uniqueness can be believed as an *art.*

'*Internet Meme*'- a fundamental right?

Article 19[1175] of the Universal Declaration of Human Rights provides freedom of speech and expression to the citizens through any media and concomitantly allows the people to seek, receive and impart information and ideas. But, the words "*through any media*" and "*ideas*" attract utmost relevance. Here '*media*[1176]' covers internet under its ambit and the word '*ideas*[1177]', as already stated, is therefore believed to involve memes as an integral part and therefore be contended as a fundamental right.

[1173] Sudipto Roy, *Are memes a form of art?*, Media India Group (June 17, 2017). https://mediaindia.eu/culture/are-memes-a-form-of-art/
[1174] NBC News, *Living off Memes: The Life of a Professional Meme-Maker*, NBC (July 25, 2017). https://www.youtube.com/watch?v=f9PmA5j3EXg
[1175] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
https://www.un.org/en/universal-declaration-human-rights/
[1176] The internet, newspapers, magazines, television, etc., considered as a group, Cambridge Dictionary. https://dictionary.cambridge.org/dictionary/english/media
[1177] *Supra* note 1.

Nevertheless, according to a report by the United Nations Special Rapporteur, it was contended that internet speech and expression are a fundamental right of a citizen and also described certain types of information which should/could be reasonably restricted[1178].

The Supreme Court of India in Sakal Papers (P) Ltd., And Others v. The Union of India[1179] observed that "*the right to speech and expression has been understood as quite synonymous to the right to opine and the right to provide as well as receive information*[1180]". Thus, analysing the aforementioned statement, it is obvious to believe that making, transmitting and receiving internet memes is a concomitant right.

"*Freedom of speech lay at the foundation of democracy*[1181]" and "*public criticism is the very base of democracy*[1182]". A self-analysis of internet memes *per se* enunciates that internet memes are an integral part of freedom of internet speech and expression because it isn't declared to be an immoral or illegitimate act and; memes depicting political satire should be considered a concomitant right.

Acceptability v. Restrictiveness:

Making and transmitting image, audio, video and textual content in the form of memes, defaming and abusing an individual, group or community is a serious matter of concern. Internet memes have been profoundly seen to be promulgating immoral and indecent content, often defaming and abusing beyond community guidelines and public policy. Therefore, internet memes should be acceptable and permissible until and unless it does not oppose the morality, decency and dignity of the people, culture, traditions, etc.

Freedom of speech and expression are an integral and important part of a democracy. A democracy continues to prevail if and only if the citizens have the right to express their views. Internet memes, simply depicting humour and satire are creating pernicious effects. While it is obviously elaborated that people should have there right to (internet) freedom of speech and

[1178] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*.* https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
[1179] (1962) 3 SCR 842.
[1180] Dr. Debarth Halder, *A retrospective analysis of section 66a: Could section 66a of the Information Technology Act be reconsidered for regulating "Bad talk" in the internet?*, SSRN (Oct 03,2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650239
[1181] Romesh Thappar v. State of Madras, (1950) AIR 124; (1950) SCR 594.
[1182] Bennett Coleman and Co. & Ors. v. Union of India & Ors., (1973) 2 SCR 759 at 829.

expression, article 19(2) also lays down certain *reasonable* restrictions beyond which the state has the right to prevent the free flow of speech and expression. While we believe memes to be an integral part of our free speech, it can also be restricted in an intelligibly careful and diligent manner.

Internet memes should not oppose decency and morality and should not be defamatory. While decency could be defined as "*the quality of following accepted moral standards*[1183]", morality could be defined as "*a set of personal or social standards for good or bad behaviour and character*[1184]". Similarly, everybody has there right to live with dignity[1185] as guaranteed under article 21[11186] of the Constitution of India. Every citizen has the right to have a dignified life and must be allowed to practise it feasibly without prejudice. If internet memes defaming an individual continue to prevail, the right to have a dignified life cannot be adequately exercised.

Present provisions:

While there are several provisions present in the Indian Penal Code and several other Acts to protect the citizens from offences harming a person's dignity and esteem, the Information Technology Act (2000) is one such statute which deals with offences related to electronic devices and discourse. Section 66a[1187] of the IT Act is one such provision which criminalises acts inciting or, intended to incite information of grossly offensive and menacing character[1188], defaming a person and promoting indecent and immoral acts and content.

***'Ambikesh Mahapatra Case'*- a boon?**

Almost three years before the landmark judgement by the Supreme Court of India *in re* Shreya Singhal v. the Union of India, Ambikesh Mahapatra, a professor at the prestigious Jadavpur

[1183] Collins Dictionary.
[1184] Cambridge Dictionary.
[1185] Riya Jain, *Article 21 of the Constitution of India – Right to Life and Personal Liberty*, Academike (Nov 13, 2015).
https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/
[1186] No person shall be deprived of his life or personal liberty except according to procedure established by law.
[1187] any person who sends, by means of a computer resource or a communication device-
(a) any information that is grossly offensive or has a menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, criminal intimidation, enmity, hatred or ill-will, persistently by making use of such computer resource or a communication device;
(c) any electronic mail or electronic message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.
[1188]Rohas Nagpal, *Commentary on Information Technology Act* 255-258 (Asian School of Cyber Laws).

University, West Bengal, was arrested in April, 2012 for sharing a meme of CM Mamata Banerjee with some of his friends[1189]. He was even assaulted for having transmitted the spoof (meme) to around 65 others. While he and one of his neighbours were charged under several offences including section 66a of the IT Act, they were approved bail by the competent Court after spending a night in custody. The instance incited several questions on internet speech and expression. But, the court, while upholding the individual's freedom to internet speech, exonerated the professor.

The professor while celebrating the feasibly upheld verdict stated that "*I am happy with the verdict of the Calcutta High Court. This verdict is a step forward towards the victory of human rights, freedom of speech and democratic rights of the people*[1190]". But were his words and beliefs really worth it?

Shreya Singhal v. the Union of India[1191]:

In 2015, Shreya Singhal including several other petitioners contended that section 66a and several other provisions of the IT Act were too broad and that they violated several fundamental rights of the citizens because of its unidentified meanings and immeasurable scope.

Justice R.F. Nariman and other Hon'ble judges after scrupulously listening to the arguments of both the sides, observed that the provision was a *vague* and unfathomable provision and lacked essential definitions and meanings to understand its applicability. The provision, while violating the freedom of internet speech and expression was declared to be an *unconstitutional* provision.

While Justice Nariman hoped that the unconstitutionality of the provision would help the judiciary in better promulgation of dispute settlement, the same remained to be still used. A total of 45 cases were found to be still listed between January to September, 2018 in IndianKanoon and a total of 21 cases in SCC Online from march 2015 to September 2018[1192].

[1189]Monideepa Banerjie, *Professor Jailed For Circulating Mamata Cartoons to be Compensated, Says Court*, NDTV (March 10, 2015, 10:51 P.M.). https://www.ndtv.com/india-news/double-the-compensation-of-jadavpur-professor-arrested-for-circulating-mamata-cartoons-court-tells-g-745593
[1190]*ibid.*
[1191](2013) 12 SCC 73.
[1192]Charu Bahri, *Police Continue To Make Arrests Using 'Unconstitutional' Section 66A of IT Act, Struck Down By Supreme Court 3 Years Ago*, IndiaSpend (Dec 03, 2018). https://www.indiaspend.com/police-continue-to-make-arrests-using-unconstitutional-section-66a-of-it-act-struck-down-by-supreme-court-3-years-ago/

Priyanka Sharma case:

Long after Ambikesh and Shreya's case, Priyanka Sharma[1193], a resident of West Bengal and a youth Bharatiya Janata Party leader, in 2019, was alleged for having transmitted a morphed picture of Chief Minister of West Bengal, Mamata Banerjee. She was imprisoned for fourteen days judicial custody by the apex Court for having circulated a meme of Mamata Banerjee attached to that of Priyanka Chopra's *'Met Gala'* photograph. The case received widespread attention and criticism as it arose the question of freedom on the internet speech and expression. The accused (Priyanka) was simply sabotaged and received a frivolous judgement and, abdicated the freedom of speech and expression of political satire[1194]. The case is an unfathomable instance because the judiciary not only delivered a frivolous judgement but also ordered her to provide an apology note for her misconduct.

A citizen cannot be accepted to have exercised his/her right to free speech if he/she does not have freedom *after* speech[1195]. It is surely believed that citizens are able to exercise their right to internet speech and expression, but at the same time, if citizens are not protected for expressing their views after exercising their right to freedom of speech, the same cannot be believed to have been exercised in its true sense.

The Indian Constitution does not describe a clear-cut meaning of *what is a meme* which is permissible under article 19(1)(a) and which can lead us to be *punished* for.

While several cases remained listed under the *unconstitutional* and *vague* provision-section 66a, several people have suffered. The reason could be unawareness of such unconstitutionality or even fear of police and prosecution.

While the above-stated cases are some of the most popular cases in the context of internet memes, below are some of the cases which didn't get widespread attention but remained to be prosecuted for memetic content under the unconstitutional provision.

[1193] Madhuparna Das, *Priyanka Sharma case has no parallels before 2012: Police officials*, EconomicTimes (May 15, 2019, 07.47 AM). https://www.google.com/amp/s/m.economictimes.com/news/politics-and-nation/priyanka-sharma-case-has-no-parallels-before-2012-police-officials/amp_articleshow/69334514.cms

[1194] Gautam Bhatia, *The Supreme Court and Memes*, Indconlawphil (May 14, 2019). https://indconlawphil.wordpress.com/2019/05/14/the-supreme-court-and-memes/

[1195] Maqbool Fida Husain v. Raj Kumar Pandey, Crl. Revision Petition Nos. 114/2007 and 280/2007. https://indiankanoon.org/doc/1191397/

ISSN: 2581-6349

Case:1

A comedy group in the name of All India Bakchod (AIB) had shared a picture of a PM Narendra Modi lookalike peeping into his cell phone in a Snapchat (dog) filter alongside an actual image of him[1196]. The picture simply depicting satire, was charged for having described of a *lascivious*[1197] nature. AIB had been charged for defamation and under section 67[1198] of the IT Act for depicting *obscenic* content. While the post could have been offensive for several individuals and groups, it could never be accepted to be of an *obscene* nature.

Case:2

Rahat Khan[1199], a 23 y/o from Buddha Nagar District in Uttar Pradesh is another great example of internet meme offence. Rahat was arrested for sharing a (memetic) picture of a lookalike of Chief Minister Yogi Adityanath on his social media account. He confessed of having transmitted an impersonated picture of Yogi ji and was charged under section 66a of the IT Act and section 153A[1200] of the IPC[1201]. He was imprisoned for 42 days in jail.

Case:3

Krishna Sanna Thamma Naik[1202], 29 y/o, resident of Doddabalse, Karnataka was the *admin* of a WhatsApp group in the name of '*The Balse Boys*'. He was erroneously charged on behalf of an act done by two of the members in his group. The two members had shared a memetic picture of Prime Minister Narendra Modi among 75 other group members. Krishna being an uneducated person and not the sole perpetrator was not even aware of the sections he was prosecuted and charged for.

[1196]The Wire Staff, *After Snapchat-Modi Meme, AIB Faces Obscenity, Criminal Defamation Case*, TheWire (July 15, 2017).
https://thewire.in/politics/narendra-modi-all-india-bakchod-snapchat-dog-meme-aib
[1197]feeling or revealing an overt sexual interest or desire, Oxford English Dictionary.
[1198]Punishment for publishing or transmitting obscene material in electronic form.
Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.
[1199]Ashwaq Masoodi, *Prisoners of memes, social media victims*, Livemint (Dec 05, 2018). https://www.livemint.com/Politics/sWTiTg8jscRZpKwSPN25UN/Prisoners-of-memes-social-media-victims.html
[1200]Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.
[1201]Indian Penal Code 1860 (Act no. 45 of 1860).
[1202]*Ibid* note 42.

Looking over the continued usage of section 66a, the People's Union for Civil Liberties- one of the petitioners in the Shreya Singhal case- approached the apex Court in 2019 for implementing the needful steps to curb its malicious usage. The apex Court after listening the matter carefully, ordered to perform certain necessary steps[1203] in order to promote awareness among the legal fraternity and persons situated to law.

Effects:

Though curbing the continued usage of section 66a could somehow help the judiciary in resolving several issues, the problem of internet memes still would require an adequate solution.

Internet memes in its true sense resemble the state of a person in a given situation and some even resemble a more sarcastic and satirical scenario. Internet memes have been observed to imitate the happenings in one's life and have also been profoundly seen to have helped in improving mental health and depression[1204]. While these internet memes help in curing certain ailments of mental sickness, they are also found to have an increased effect in abetting mental sickness, anxiety and depression. A survey was conducted to find the effects of internet memes on 133 students (respondents) from different universities and colleges in Jakarta. The survey contended that 71% of the respondents (students) had been experiencing depression and anxiety symptoms due to internet memes. Around 46% had been claimed to have experienced such symptoms occasionally[1205].

In 2017, a 14 y/o girl had committed suicide after looking at depressing and suicidal memes (in graphical content)[1206]. Another 27 y/o woman from Coimbatore had killed herself after she was harassed and blackmailed for her morphed picture[1207].

[1203] Apar Gupta, *Supreme Court issues notice to check any 66A Cases #RightToMeme #Section66A*, IFF (July 01, 2019).
https://internetfreedom.in/iffs-supports-seeking-a-stop-to-66a-cases-righttomeme-section66a/
[1204] Abrar Al-Heeti, *Memes on Instagram, Reddit bring comfort to people struggling with depression*, CNET (Aug 23, 2019).
https://www.cnet.com/news/memes-on-instagram-reddit-bring-comfort-to-people-struggling-with-depression/
[1205] A.A.T Kariko and N. Anasih, *Laughing at one's self: A study of self-reflective internet memes*, 1175 JOURNAL OF PHYSICS: CONFERENCE SERIES, 5 (2018).
[1206] Alex Hern, *Instagram to extend its ban on images of self-harm to cover cartoons*, TheGuardian (Oct 28, 2019).
https://www.theguardian.com/technology/2019/oct/28/instagram-extend-ban-images-self-harm-cartoons
[1207] Times of India, *Two held for morphing photos of woman, driving her to kill herself*, TOI (Dec 26,2018).
https://m.timesofindia.com/city/coimbatore/two-held-for-morphing-photos-of-woman-driving-her-to-kill-herself/articleshow/67249040.cms

All these instances prove that time has come to either draft or tender adequate attention on internet memes. While we can obviously believe that we have our right to internet speech and expression, at the same time while retrospectively analysing in relation to memes, we find that it surely is lackadaisical by the Indian Constitution. While many of us enjoy memes for its humorous content, those who actually see and resemble themselves have deeply suffered.

Albeit, the Indian Judiciary is considered to be one of the greatest judiciary in the world, the above elaborated instances clearly explain *per se* the failure of the judiciary in terms of internet speech and expression and more precisely in the case of memes.

The lack of appropriate recognition of internet memes is the primary reason for compunctuous offences. The court *in re* Kartar Singh v. State of Punjab[1208] rhetorically enunciated citing Grayned v. City of Rockford[1209] that - "*laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly*".

If citizens of a democratic nation are unaware of what could be termed as an offensive or defaming meme, the problem of malicious prosecutions and arrests will remain.

CONCLUSION:

The law in the context of internet memes is a farrago. The right to freedom of speech and expression apropos internet memes is actually ostensible. The lack of appropriate meaning, definition and/or extent to which internet memes are an integral right remains marginalized. This unfilled gap has been the primary reason behind the arduous delivery of judgements and improper exercise of the right to freedom of internet speech and expression.

Due to the lack of appropriate statute or provisions that identify and penalise internet memes, the ones who become the prey of these internet memes are often under several hardships. Internet memes have been considered a mere peripheral issue. While many report such memetic offences, others, instead of reporting such issues, are facing extremely depressing and deploring conditions.

This ambiguous right is at a stage of utmost recognition to expeditiously exonerate the offenders as well as the innocents in internet meme cases and describing its acceptability. The

[1208] 1994 SCC (3) 569, JT 1994 (2) 423.
[1209] 408 U.S. 104, 92 S.Ct. 2294 (1972). https://www.google.com/amp/s/www.lexisnexis.com/community/amp-casebrief/casebrief-grayned-v-city-of-rockford

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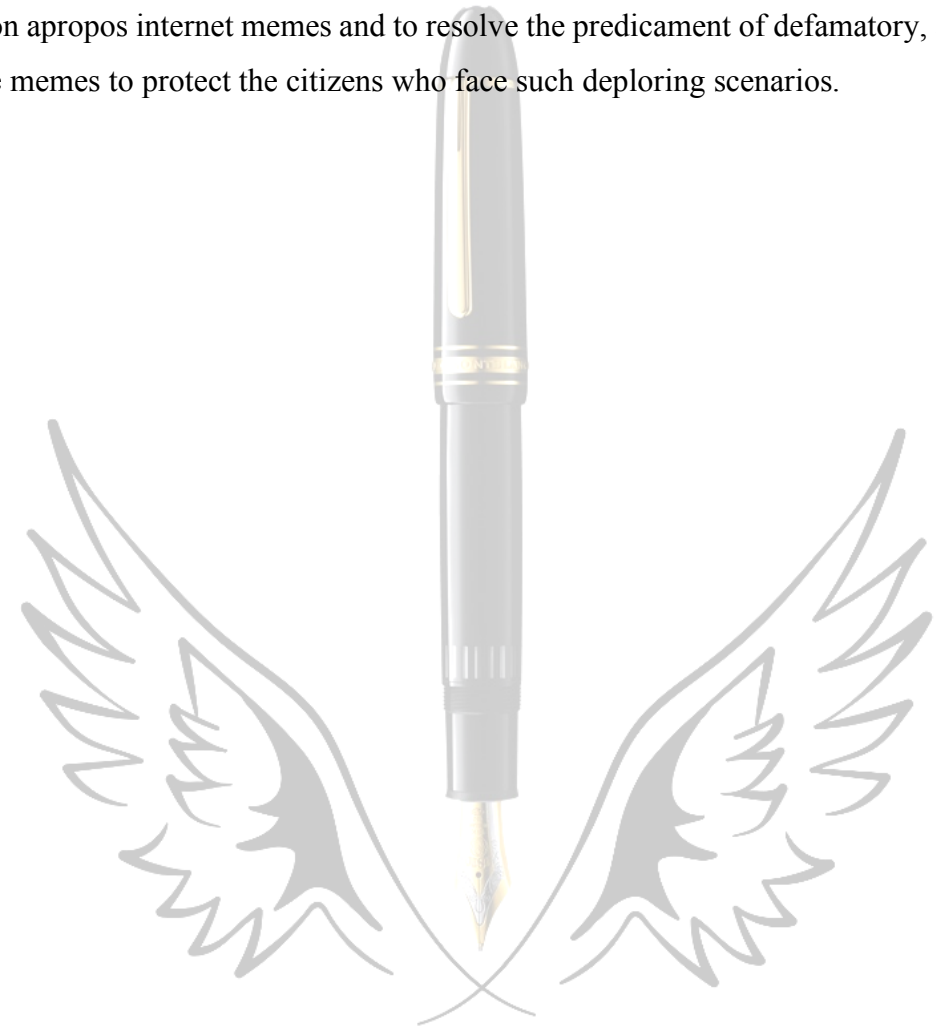
Indian Constitution is at a position where improper definition and extent of internet memes needs profitable panacea. An appropriate identification of statute or provisions is required to allow the citizens of the country to feasibly exercise their right to internet speech and expression apropos internet memes and to resolve the predicament of defamatory, abusive and offensive memes to protect the citizens who face such deploring scenarios.



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THE UNBREAKABLE BARRIER OF DOMESTIC VIOLENCE

- AYUSH RAJ & AISHWARYA SHANKAR

INTRODUCTION

The offence which will be taken into consideration in this research paper is Domestic Violence. All the dimensions of Domestic Violence will be covered and dealt extensively in this research paper including the way at which the victims of this offence look at domestic violence. Domestic Violence, whenever this word has been perceptible then the state of mind of most of the people is directed towards a series of act which includes a husband thrashing his wife in a normal or intoxicated state, damaging his wife physically. Domestic violence can be best defined as "the power misused by one adult in a relationship to control another." It is the establishment of control and fear in a relationship through violence and other forms of abuse. The abuses can be physical, sexual, psychological, social or financial. Abusers use physical and sexual violence, threats, emotional insults and economic deprivation to dominate their victims and get their way.[1210]

There have been various legislations existing in India dealing with domestic violence and those pre-existing legislations have given women the powers in respective fields but particularly so far as the torture, cruelty, and harassment are concerned, the provisions of section 498A, 304B of the Indian Penal Code and the Dowry Prohibition Act of 1961 are the basic ones. Despite these legislations in force, the offence of domestic violence has not declined and hence the need for the emergence of new provision was felt. To suffice the needs of the society and to protect the victims of domestic violence from the said offence the national and the international bounties compelled the Indian Government to enact the Protection of Women from Domestic Violence Act of 2005. The act says that any act, conduct, omission or commission that harms or injures or has the potential to harm or injure will be considered domestic violence by the law.

The Protection of Women from Domestic Violence Act,2005 is "An Act to provide for more effective protection of the rights of women guaranteed under the constitution who are the

[1210]Susan Scheter, Visionary leader in the movement to end family violence: Retrieved on 27th June2020; 18:10 Hours.

victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto".[1211]

Now, if one has to classify the forms or the kinds of domestic violence, the best suited way to classify it will be as followed:[1212]

- PHYSICAL ABUSE.
- EMOTIONAL ABUSE.
- SEXUAL ASSAULT
- ECONOMIC ABUSE

Also, serious health problems do occur. It is often the effect of physical, emotional and sexual forms of abuse. Health problems may include fractures and internal injuries, unwanted pregnancy, STDs including Miscarriage, Pelvic inflammatory disease, Headaches, depression and anxiety, hormonal Imbalances, low self-esteem, etc. Fatal and serious effects take into consideration suicide, homicide, maternal mortality or HIV/AIDS.[1213]

DOMESTIC VIOLENCE IN INDIA

From the time India, regained its independence there have been various legislations existing for the protection of rights of women in India. Not only the offence of domestic violence is committed against women but it can also be constituted against men and children.[1214] The various legislations which are in force comprises of the Indian Penal Code,1860; Universal Declaration of Human Rights; The Constitution of India; Convention on the Elimination of All forms of Discrimination Against Women; Protection of Women from Domestic Violence Act; and many more.It is rightly stated that there are forces within the society that confines a woman to a private sphere the trends have been changing recently but earlier the only source of information of a public sphere, a woman got was through her husband, who looked into the matter of the societal chores.[1215] No single factor explains why men assault women and cause the incidence of domestic violence. The offence is an effect of many inter-related factors.[1216]

[1211]P.K. Das, The Protection of Women from Domestic Violence. Retrieved on 27th June 2020; 18:10 Hours.
[1212]Vijendar Kumar Associate Professor, Nalsar Hyderabad, Law relating to domestic violence. Retrieved on27th June 2020; 18:30 Hours.

[1213] Domestic Violence Against Women and Girls, UNICEF, 2000 Report. Retrieved on 27th June2020; 18:30 Hours.
[1214]Slep AM, O'Leary SG. Parent and partner violence in families with young children: Rates, patterns, and connections. J Consult Clin Psychol. Retrieved on28th June2020; 15:00 Hours
[1215]Vijendar Kumar Associate Professor, Nalsar Hyderabad,Law relating to domestic violence. Retrieved on28th June 2020; 15:00 Hours
[1216]P.K Das, Protection of Women from Domestic Violence. Retrieved on28th June2020; 15:00 Hours.

The factors can be religious which might include the belief that men are superior to women and hence domestic violence can be an effect of a patriarchal society. By patriarchal society it is meant, that the society believes that men should be the working class and should dominate the females. This belief of controlling the women can lead to domestic violence wherein the male commits the said offence to establish their own say and work according to their will with neglecting the wishes and desires of the female members of the society. Not only this, but one of the reasons for the offence of domestic violence can also be the inequality in earning between the husband and the wife where one of them might think that the person earning more is being in a dominant position and hence this factor can also lead to domination of one being on the other

The societal forces can also lead to the offence of domestic violence like dowry death and cruelty. Section 498A recognizes physical abuse of only the kind that causes danger to life, limb or death. Lately cruelty has also been included within its scope. The evil of dowry death is also a kind of domestic violence that is inflicted on the victims of domestic violence. The offence of domestic violence is dealt in section 304B of the Indian Penal Code,1860and the legislations made with respect to the offence duly punishes the offender. The death caused by this reason deprives a person of their fundamental right to life and hence it can be rightly denoted that this causes the infringement of human rights. Another factor deals with the reason of alcohol and drugs. Alcohol and drugs may constitute a violent behavior.[1217] An intoxicated person is more likely to lose his temper and violence impulses towards his or her partner. This fluctuation of behavioral change may result into the offence of domestic violence.[1218] Risk factors for a person becoming the victim or the abusers of domestic violence include poverty, lack of high school education, witnessing family violence as a child, having a low sense of self-worth, and attitudes of male domination or substance abuse.[1219] The cultural and religious ideologies too have sanctioned the beating and chastising of wives. Such physical punishment of wives has been particularly sanctioned under the notion of entitlement and ownership of women.The common physical effect of domestic violence can be as followed: bruises, marks, shortness of breath, muscle tension, sexual dysfunction, fractures, hurt, etc. the mental effects may include depression, anxiety, alcohol and drug abuse, suicidal thoughts and post dramatic stress disorder. Not only domestic violence aggrieves a person physically and mentally but it

[1217]Article by Toby D Goldsmith. What causes Domestic Violence. Retrieved on28th June 2020; 15:20 Hours.
[1218]Toby D Goldsmith. What causes domestic violence. Retrieved on 28th June 2020 15:20 Hours.
[1219]Medical author Roxanne Dryden Edwards, MD. Domestic violence. Retrieved on28th June 2020; 15:30 Hours.

can also affect a person emotionally and spiritually. Some of the emotional and spiritual effects of domestic violence are: hopelessness, feeling unworthy, inability to trust, questioning and doubting spiritual faith, being unmotivated.[1220]Domestic violence is also highly oppressive for the children who witness it. The impacts of domestic violence on children can be burdensome. Consistent amount of violence at home can subject them to anxiety, depression, academic problems.[1221]The National Family Health Survey 4 showed that every third girl who's of 15 years in age or more has faced domestic violence at some or the other instance.[1222] This indicates that nearly 27% of the Indian women have faced domestic violence in one form or the other after the age of 15 years. It has also been found that the number of such incidents reported in rural areas is more than the urban regions. As far as the rural areas are concerned 29% women face domestic violence whereas in urban India the count is slightly lower to 23%. The World Bank collection of indicators in 2017 reported that nearly 48.17% is the count of the female population in India. This is a big reason to worry for not only the legislators and administrators but also to the entire Indian society. Sexual violence is one of the kinds of domestic violence which women across the world are vulnerable to. Discussing about the Indian scenario approximately 31 per cent of married women have experienced physical, sexual, or emotional violence by their spouses. This spousal violence is both physical and mental which amounts to 27% and 13% respectively. It is quite unfortunate that out of the total victims especially of the physical nature of DV only 14% of them sought help to stop it. It is quite unfortunate that even women support and justify the acts of domestic violence. The same survey of the ministry of health showed that women of the age group between 40-49 years were supportive of DV were 54.8%, the percentage however is slightly less in the age group of 15 to 19 years at 47.7%. Now, talking precisely about sexual violence it has been reported that 6% of the Indian women have faced sexual violence in their lifetime. It is the harsh reality that India is one of the 36 countries where "marital rape" is not included as an offence till date for adult female, that is the IPC 1860, only considers marital rape as an offence when the age of the female is 15 years or less. However, the Protection of Domestic Violence Act has banned marital rape and has offered civil remedy. It is relevant to mention that the Indian Penal Code 1860 in section 375 includes sexual assault of any form, which means the nonconsensual one

[1220]Samantha Gluck, Effects of Domestic Violence, Domestic Abuse on Women and Children. Retrieved on 28th June 2020; 15:30 Hours.

[1221]http://www.joyfulheartfoundation.org/learn/domestic-violence/effects-domestic-violence. Retrieved on 28th June, 2020; 15:35 Hours.

[1222]https://www.news18.com/news/india/the-elephant-in-the-room-every-third-woman-in-india-faces-domestic-violence-1654193.html Retrieved on 28th June, 2020; 15:35 Hours.

as well, but ironically gives immunity to a husband and wife provided the wife is above the age of 15 years. This type of sexual activity where there is an absence of consent is marital rape. Now, marital rape is just one form of domestic or more specifically saying sexual violence. Here, not only the husbands do such inhumane acts but it has been found that in approximately 27% of the cases of sexual violence relatives are involved. Even the unmarried women and girls have faced such torture and that too in significant numbers either by their present and ex-boyfriends or even friends and acquaintances in some cases. There are many reports which show that in cases of sexual violence like marital rape the FIR itself is not reported. The reasons for this might be many, in some cases the societal embarrassment could be a reason while in other cases fear of breakdown of family.

The women in India who are unmarried too face domestic violence by their family members including their mothers. The survey's report suggested that there are many perpetrators at home for any unmarried girl or women. They include mothers and step-mothers, who were found to be a perpetrator for approximately 56% of such unmarried women, fathers or step-fathers their count was 33%, sisters or brothers 27%. Other than this, it was also reported that their 15% victims who had to face such torture by their teachers.

India, being a welfare state, it is the responsibility of the state to protect the healthy and the well-being of the citizens of the nation. The offence of domestic violence not only breaks up a family rather the offence deteriorates the principle of equity, justice and good conscience.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT,2005

The protection of women from domestic violence act, 2005 is an act which was enacted by the parliament to protect the women from domestic violence.[1223] This act defines domestic violence as[1224]:

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

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

[1223] P.K. Das Universal's Handbook on Protection of Women from Domestic Violence, Act and Rules, Fifth Edition. Retrieved on 2nd July, 2020; 12:24 Hours.

[1224] Section 3

ISSN: 2581-6349

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

For the purposes of this section, - (i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "Sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes- (a) insults, ridicule, humiliation, name calling and insults or ridicule especially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes- (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, Stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her Stridhan or any other property jointly or separately held by the aggrieved person; and

(c) Prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

This act defines in section 2(a) aggrieved person as any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

Domestic violence can be treated as a human rights issue and can be a serious deterrent to development. It was therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14,15 and 21 of the constitution to provide for a remedy under the civil law which intendedto prevent the occurrence of domestic violence in the society.The objectives of the bill are stated as followed:

- It covers those sections of women who are or who have been in a relationship with the perpetrator where both the parties are together sharing the household and are related by marriage or consanguinity.
- The bill defines 'domestic violence' as the abuse or threat to abuse which might be physical, sexual, verbal, emotional or economic. Cruelty or harassment in context of demanding dowry will also be covered under this objective.
- The bill provides the provision for the residence order. A woman has the right in entirety to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household.
- The bill allows the magistrate to pass any protection orders in favor of the aggrieved party to prevent the perpetrator from further inflicting domestic violence on the victim.
- It also provides for the appointment of the Protection Officers and registrations of NGOs. This helps in providing the assistance to the aggrieved person/victim in context of providing medical examination, obtaining legal aid, safe shelter, etc.

Since the act has been enacted for serving the victims of the domestic violence and makes their survivorship possible, this act possesses the provision of compensation orders.

The bill was enacted in 2005 but the question here lies is that the bill an instrument of social transformation in India to protect women from domestic violence. As per the National Crime Records Bureau, the first decade of the Act of 2005 has registered over ten lakhs cases across the country under sections pertaining to cruelty by husband and for dowry. Since 2014 the cases relating to abetment to commit suicide have increased by 34 percentages, that is, from 3034 in 2014 to 4060 in 2015. During the decade from 2005 to 2015, a total number of 88467 women have died in dowry related cases, that is, an average of 22 women per day has lost their lives.[1225]

Although the Act has been passed with a very high objective to bring social transformation, it has failed to improve the protection measures to women. It is beyond imagination that 426 cases have been registered in 2014 for violation of protection orders. It has increased 8 percentages in 2015, that is, a total of 461 cases.[1226]

As per, the data of NCRB, a huge number of 89,097 cases related to crime against women was registered across in India in 2018. Sadly, it has increased since the last year as a total of 86,001 cases was registered in 2017. Out of the total crimes registered under the IPC, most the cases

[1225] https://archive.indiaspend.com/cover-story/10-years-of-domestic-violence-act-dearth-of-data-inadequate-implementation-delayed-justice-85613
[1226] Ibid.

were registered under the cruelty by husband or relatives at 31.9 percent.[1227] The figures indicate that not much has improved even after the implantation of the bill "Protection of Women from Domestic Violence Act, 2005". In the period of lockdown, when the entire world is home quarantined due to the corona pandemic, there has been a steep rise in crime against women across the country. The National Commission for Women received 587 complaints from March 23 to April 16, 2020, out of which 239 cases were related to domestic violence. The media reports suggest the number of complaints recorded broke its record of 10 years during the first 68 days of the lockdown. The Hindu stated that that between March 25th and May 31stapproximately 1,477 complaints were recorded.[1228] The same report also states that of the total number of women facing some or the other kind of domestic violence not even 10% seek help from the authorities. The worried National Commission for Women even launched WhatsApp services to enable such need women to seek help. This problem however, is not only in India but almost the entire world is suffering from it. The United Nations has also accepted and acknowledged the sudden rise in cases related to domestic violence and that too on a regular basis. Section 22 of the Protection of Women from Domestic Violence Act, 2005 states "In addition to other reliefs as maybe granted under this Act, the magistrate may on application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence by the respondent."[1229]

The compensation orders provided in the bill is a remedy to stop the offence of domestic violence. But, the question of fact here is, whether the compensation orders sufficient enough to stop the mental agony that one goes through during the course of being the victim of the offence. The offence maybe committed by either sex but mostly it is the women who are left as the victim of domestic violence especially in the orthodox/conservative societies.[1230] Thought the trends have changed and domestic violence against the males are also being witnessed but the rate of this offence as against males are still at a minimal point with respect to the females. The compensation orders punish the perpetrators so that the rate of crime decreases but it is absolutely undoubtful that with the series of assault; battery; verbal and

[1227] https://www.nationalheraldindia.com/national/domestic-violence-tops-crime-against-women-in-2018-ncrb. Retrieved on 2nd July, 2020; 12:43 Hours.
[1228] https://www.thehindu.com/data/data-domestic-violence-complaints-at-a-10-year-high-during-covid-19-lockdown/article31885001.ece retrieved on 10th July 2020 at 17:28pm
[1229] Section 22, Protection of Women from Domestic Violence Act, 2005. Retrieved on 3rd July, 2020; 10:05 Hours,
[1230] Domestic violence and mental health, by Rajesh Sagar, Gagan Hans, department of psychiatry. AIMS New Delhi, India. Retrieved on 3rd July, 2020; 10:12 Hours.

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sexual abuse; etc., a fear accumulates in the minds of the victim. The space for mental agony starts becoming prevalent and there lies a constant threat of not committing any mistake which might lead their partners to inflict harm upon them. The offence may break the victim emotionally and mentally making them prone to the attacks of depression and anxiety. Not only this, but they may fear the society and they might think that the society will look upon them with a shameful manner. The constant thought of society remains prevalent at each time when the harm is being inflicted upon the victim. Even if the compensation deters the perpetrator from committing the offence of domestic violence, still the victims fears the society as to what will people say when they get to know about the heinous act of their partners. This can be one of the reason as to why there still exist some sections of the society who refrain themselves from standing up against the wrongs committed by their partners. They can be referred as silent sufferers.

Considering the backward states like 'Bihar' and not going to a wider ambit, the crime rate of domestic violence is huge but reporting of those crime rates is extravagantly low. The data from National Family Health Service (NFHS) to examine:

- The extent to which there is discrepancy between the prevalence of domestic violence and the rate of reporting in Bihar.
- How the barriers of reporting the offence are connected to the social norms in Bihar?

The study indicates that the lack of awareness may lead to the commission of the offence of domestic violence. More often the norms of the society including patriarchy, religious and cultural beliefs about marriage, and asymmetrical gender expectations, may also result in domestic violence. Many women who do have the will to report the crime stops because of the fear, which may include divorce, family disillusionment, lack of financial resource, or spousal retaliation. The protection of women from domestic violence act, 2005 aims to provide shelter and safety to the woman who has been the victims of domestic violence. The bill has provided a helpline number in thirty-five out thirty-eight district in Bihar has provided the women there with the helpline number to report the offence of domestic violence. Despite the, services that has been provided by the bill to the victims, between 80 to 86 percent of the women were unaware about the existence and functioning of such institutions. As per National Crime Records Bureau, the incident of Dowry Death (section 304B of the IPC) reported in Bihar in the year 2018 was 1107 and that the victims of the offence were 1111. Taking another offence of abetment to suicide into consideration, the incident of the offence recorded were 4 and the victims were also 4 which though is quite low but there can be an assumption made that there might be a circumstance that the victims of the offence was murdered or the crime went

unrecorded/unreported. 2539 incidents of cruelty by the husband were also recorded in the data by the NCRB and the number of victim present were 2603 in number. Although, various legislations are in force to reduce the crime against women, there has been a tremendous increase of crime against women in Bihar. The case of crime against women in Bihar that has been recorded in 2018 is 16920 whereas it was low in the year 2016 and 2017 being 13400 and 14711 respectively.[1231]Despite the helplines that has been provided to the citizens, it is shameful that the people are unaware of these provisions due to the reason including social norms, poverty, lack of education, lack of proper communication, etc. So, it becomes of prime importance to establish proper workshop and training center to help the citizens in knowing their rights and its limitations which will empower them to live with dignity. John F. Kennedy correctly stated:"The great revolution in the history of man, past, present and future, is the revolution

of those determined to be free." This quote also explains that unless one sets oneself free and fight for ones' rights then only one can expect a revolution or change which empowers them with fearlessness and courage.

CONCLUSION

Maya Angelou rightly said "Courage is important of all virtues because without courage, you can't practice any other virtue consistently." Exactly what this quote means is that if one is courageous he/she can practice anything or do anything what he/she wishes to do. If the person isn't courageous then at times he/she may find it difficult to accomplish certain tasks. The same happens in the case where the people are the sufferers of domestic violence. The people who are the victims of domestic violence should understand their very own rights and hence should speak of for it. India is a welfare state and it becomes the responsibility of the government or the representative of the state to protect and cater the needs of the citizens who are unable reach and report to the bill of Protection of Women from Domestic Violence. As recorded in the data by the National Crime Records Bureau, it is quite evident that even after a decade of enforcement of the bill of Protection of Women from Domestic Violence Act, 2005 the scenario has not changed much. The crimes of domestic violence are yet being recorded with an increase in the number of cases. Hence, it can be said that the compensation orders stated in section 22 along with protection orders from section 18 onwards of the Protection of Women from Domestic Violence Act, 2005 has failed to instill fear in the minds of the perpetrators as no

[1231]http://ssa.uchicago.edu/domestic-violence-india. Retrieved on 5th July, 2020; 10:45 Hours.

ISSN: 2581-6349

effective decrease in the crime rates has been witnessed after the implementation of the bill. In other words, compensation orders are still not deterrent.

The various reasons due to which there has been a substantial increase in the crime rates, is not only because of the perpetrators rather the reasons are associated with the victims too. The victims' due to several reasons as stated in the research paper refrain themselves from reporting the crime at an initial stage which further leads to a series of crime of domestic violence has been inflicted on them. The reason why one should out rightly stand for their right to live the life with dignity. Large parts of female population of India who suffer from tortures like cruelty especially marital rape are unaware of that this is a direct infringement of their fundamental right. A critical study of the data shows that out of 29 states and 7 union territories there are states where these incidents of domestic violence are hardly reported, for example there are states like Goa, Mizoram and Nagaland where less than 10 incidents of domestic violence were reported in the year 2018. While on the other hand there are states like Bihar and Uttar Pradesh where the count is in thousands.The reason for this huge gap in the crime rates can be the illiteracy level; poverty; unemployment or the growing tensions with the burden of work or other related issues.

The methods to curb the crime of domestic violence are:

- The legislations that are implemented should be more stringent in nature.
- The victims should speak up and stand for their rights.
- Proper communication of the legislations should be made so that every section of the society should get the awareness regarding the offence of domestic violence with respect to the human rights.
- The victim of the offence should not refrain themselves from speaking up and they should talk to their relatives and friends concerning the matter.
- The victim should take the help of NGOs and the helpline numbers.
- An FIR should be filed to the nearest police station.
- Take help of "protection of women from domestic violence act, 2005" and contact the protection officer of the area and register DIR(Domestic Incident Report).

"You cannot swim for new horizons until you have the courage to lose the sight of the shore". So, if one needs change, the notion of speaking up and being courageous must be more prevalent. If, the victims stand up against the infringement and violation of his rights, then it will create a deterrent effect in the minds of the perpetrator.

ISSN: 2581-6349

VAISHALI SATISH GANORKAR AND ANOTHER V. SATISH KESHAORAO GANORKAR AND OTHERS[1232]

- ISHITA AGARWAL

INTRODUCTION:

A. Overview of the case:

The case of Vaishali Satish Ganrokar v. Satish Ganorkar[1233] deals with Section 6 of the Hindu Succession Act, 1956. The daughters of coparceners are not given any rights statutorily as coparceners *ipso facto* before devolution of interest, implying that no interest can devolve except on the death of the coparcener[1234].

Ipso facto it was held by the High Court of Bombay that by virtue of the Amendment of 2005, all the daughters of a coparcener who are born after such dates would become coparcener by virtue of birth, while the others born prior to the Amendment would only become a coparcener upon the devolution of interest in coparcenary property.

In the present case, the appeal was dismissed as the appellants had no claim in the property since the coparcener was not deceased and the succession had not taken place for the suit property.

B. Brief Facts of the Case:

The appellants (original Plaintiff) are the daughters of Respondent No. 1 and Respondent No. 2 is the bank from which the respondent no.1 had taken a loan which remains unpaid. Respondent No.2 initiated proceedings under the Special SARFEASI Act, 2002 for recovery.

The daughters, therefore, sued to claim and protect their share in the property, mortgaged to the Bank by an independent decision of Respondent No.1. They claim ⅔rd share therein as coparceners of the Hindu Undivided Family (HUF) consisting of themselves and respondent No.1 under the amended section[1235] Hindu Succession Act, 1956 (HSA) which came to be substituted by the Hindu Succession (Amendment) Act, 2005 (39 of 1956) with effect from 9 September, 2005 (HSA).

[1232] **AIR (2012) Bom 101**

[1233] Vaishali Satish Ganorkar & Ors V.Satish Keshaorao Ganorkar & Ors, AIR (2012) Bom 101.

[1234] Werner F Menski, Modern Indian Family Law.

[1235] Section 6, Hindu Succession Act, 1956.

Since the mortgage deed was created by Respondent No. 1 independently, in favour of the bank, the provisions of SARFEASI Act would only apply to him. Hence, the aggrieved daughters have filed the present suit for justice.

C. Issues of the case:

The core issues that have arisen in the concerned matter are as follows:

- Whether the daughters can claim ⅔rd share as coparceners of the Hindu Undivided Family (HUF) consisting of respondent No. 1 and themselves.
- Whether the amendment of 2005 is retrospective in nature.

D. Rules:

Section 6 of The Hindu Succession Act, 1956

ANALYSIS OF THE CASE:

E. Understanding the issue arising in the case:

The primary issue presented before the Hon'ble Court pertains to the coparcenary status of daughters in a coparcenary property with effect to the Amendment of 2005 in section 6 of the Hindu Succession Act, 1956. The Appellants appeals to the court to interpret the amendment and its nature of application in the court of Law to define their share and status in the coparcenary property.

Section 6 of the Hindu Succession Act,1956 states:

"*Devolution of interest in coparcenary property.— (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—*

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004."

F. Interpretation of the Legal Position:

The bare reading of Section 6 reflects that through this provision the daughters of the coparcenary family would get an equal status as a legitimate coparcener as that of a son in the family, ending gender discrimination. However, the term "devolution" is used in the provision which literally implies[1236] either transferring the power to a lower level or simply passing it to a successor or a deputy. The word finds it origin from the Latin term 'devolver' which means to roll down, be thrown or fall by succession[1237]

This term has further opened the grounds for interpretations of the amended section, the term devolution indicates that the interest in the property shall still be transferred to a daughter through succession only upon the death of the predecessor, rendering the claim of equal status to the daughters as redundant.

The appellants' case for claiming ⅔rd right in the suit property is based on the fact that the suit property is purchased from the nucleus of the HUF property. The present appeal lies upon the main premise of the appellants' right in law in the suit property. The section 6 of the Hindu Succession Act, 1946 should be interpreted thoroughly, as the subtitle of the act relates to the devolution in coparcenary property. This implies that the appellants could claim their share, only if the interest had devolved to them through succession. Such devolution may be upon intestate or testamentary succession. It is to be understood at this point that since the provision of making the daughters as the coparceners flows only through the Succession Act (hereinafter referred as HSA), she can be entitled to a property only through succession, which comes upon the death of the Coparcener. However, in the present case, aside from the appellants, who are the daughters, there are no other coparceners to the property of Respondent No. 1.

Now the primary question arises whether they are the legitimate coparceners to the property of the Respondent No. 1 or not. To this the court reflected that as per the amendment of 2005, the daughters are legitimate coparceners upon succession. However, the interest should devolve on the daughters either 'on or from' the 9th September, 2005. In the present case it can be noted that the interest has still not devolved on the daughters, as Respondent No. 1 is alive, proving non -compliance of the requisites of the section 6. The case has no merits and the question of retrospectivity is also a secondary issue here.

G. Analysis of the Ratio Decidendi of the Court:

The court declared that the appellants have essentially filed a suit for a declaration that they are the owners of 2/3 rd undivided interest in the suit property and to nullify the equitable mortgage

[1236] Oxford English Dictionary.
[1237] Chambers Dictionary 20th Edition.

created by Respondent No.1 along with ancillary reliefs under the SARFEASI Act. The court is of the opinion that the case lacks bona fide merits as:

- Firstly, this suit has been taken by the Appellants as the last resort against Respondent No.1 who has denied his daughters of the suit property. The rights and claim of the Bank have progressed far in his favour under the SARFEASI Act, which is beyond questioning and analysis of the court, as delving into the matters of SARFEASI Act is not their concern.
- Secondly, the court held that the proviso under the amendment has been constituted in order to prevent the mischief of application to the non-applicable cases and the present appeal is precisely one such mischief attempt by the appellants. This section has deliberately been made limited in its application to avoid influx of suits that would arise from the dispositions and alienations made over 50 years of implementation of HSA.

The court held that the appellants would not be entitled to any interim relief for the protection of the suit property, the provisions of the Securitisation Act are completely immaterial and irrelevant to be taken into consideration by the present court while deciding the matter pertaining to 2/3rd interest in the suit properties.

The law in status quo as per the admitted facts does not have any rights that can be conferred upon the appellants. Hence, the appeal itself was dismissed and the grand of ad-interim relief was denied.

APPROACH OF THE LEGISLATURE ON THE ISSUE:

It is pertinent to delve into the intention of the legislature in the present case, as it deals with the amendment of 2005, credited for giving women the right to inherit property in a coparcenary family. However, we need to understand the applicability and implementation of the law, for which interpreting the Legislative intention is an important component.

H. <u>The prospective nature of the amendment:</u>

The legislature has deliberately made the act prospective[1238] in application and has conveyed its clear intention through the provisions of the amendment. It has clearly expressed that the amendment does not intend to affect the transactions made prior to the date specified under the provision of law. The legislature defines the rights accrued by an individual in case of disposition and alienation of property to prevent malicious use of the provisions by any gender. HSA came into force 6 years after the enforcement of the constitution, which guarantees equal

[1238] Chandra Pattnaik v. Sarat Chandra Pattnaik, AIR (2008) Orissa 133.

rights to everyone irrespective of their sex through indispensable Fundamental rights. However, mere reading of the principles and provisions of the coparcenary property laws would reflect the inherent gender bias, where females are not made coparceners to the property, did not have a right to call for partition and were excluded from inheritance of property. The legislature after 50 years of such discriminatory laws has finally through this amendment made daughters an equal coparcener as that of a son.

The legislature has prevented such mischief of abusing the provision in non -applicable cases such as the present case. It had further specifically designated a date for the application of the amendment in order to prevent the influx of cases that would arise challenging the dispositions and alienations made in the last 50 years. Had such special applicability not been given to the amendment, all the women born before the amendment would seek their claim in the coparcenary property of their family and appeal to undo the transactions of other members of the coparcenary family.

The definite words in this section indicate the intention to make the daughters coparceners in the coparcenary property of the Hindu family "on and from[1239]" the date in which the Amendment Act came into force. The act guarantees that from the specified date they shall become coparceners; and same rights and liabilities would accrue on them as it would on a son. The reference to the Mitakshara would also be made to include the daughter in that system.

The settled principles of law reflecting the Legislative intention:

It is a settled principle that is followed in the statutory law, that unless a law is made so expressly or by necessary intention it can not be interpreted as being retrospective in implementation. Additionally, to understand the prospectively of the statute we shall also understand that it is a settled principle to not take away the rights that were once accrued to the citizens through the previous legislations into force.

In normal course, the interest in property is always transferred through inheritance, intestate or testament upon a coparcener. His value in a coparcenary property is passed on to the other heirs after the death of the holder. Now, through the unamended act this devolution was by survivorship only for males and was restricted to succession for females. This is the lacuna that the amended act rectified by similar modes of devolution of interest.

Hence, through the amended act the devolution of legal rights would occur; through opening the succession on or after September 9, 2005 in case of daughters born before that, and by birth itself for daughters born after September 9, 2005.

[1239] Sugalabai v. Gundappa A. Maradi, ILR (2007) KAR 4790.

ISSN: 2581-6349

APPROACH OF THE JUDICIARY ON THE ISSUE:

Taking into perspective the sensitivity of this issue and major speculations raised regarding the status of the daughters, the judiciary has taken various approaches to settle the matter through precedents. Hence, the author would deduce every important aspect of the present matter by providing the judicial view given on those aspects.

I. The relevance of the date of opening of succession:

As far as devolution of interest is concerned, the opening of the succession became a major focal point according to the apex court[1240]. As in case where the succession[1241] opened before the date of enactment of the amendment of 2005, its provisions would have no applicability owing to the prospective nature of the act.

In case of Champabai w/o Dashrathsingh Pradeshi[1242], the court primarily considered the date of the opening of the succession to decide whether the wife can claim interest in the partitioned shares as per the amendment or not. The rights are devolved on a person only when the seat of the succession is opened, hence, if it opens before the Amendment was implemented the women cannot claim any interest.

Karnataka District Court once opined that the act would be implemented retrospectively and all daughters irrespective of the date of birth or opening of succession would be entitled to the claim. This judgement was overruled for being flawed, as the superior courts are of the opinion that such applicability would advance the mischief that the act wanted to prevent in the first place.

After extensively analysing the legal position and legislature intention, adopted in the present case, the author would comprehensively deduce the settled rules of interpretation that the judiciary has compounded over time through precedents[1243].

The potential harm that can be inflicted by making the provision retrospective can be gauged from this one case[1244] where the heirs of a deceased daughter had claimed their interests in the suit property for title of interest. The single judge bench in this case submitted that the interpretation to make it retrospective would promote exploitation of the new provisions, with the influx of dishonest litigants claiming an interest in the coparcenary property.

[1240] Sheela Devi v. Lal Chand (2006) 8 SCC 581.
[1241] G.Sekar v. Geetha (2009) 6 SCC 99.
[1242] Champabai w/o Dashrathsingh Pardeshi v. Shamabai Gajrajsingh Pardeshi 2010 (3) ALL MR 262.
[1243] Mahadolal Kanodia v. Administrator General of West Bengal, AIR (1960) SC 936.
[1244] Sadashiv Sakharam Patil v. Chandrakant Gopal Desale, Appeal from Order No. 265 of 2011.

SUGGESTIONS FOR REFORMS:

After analysing the present matter and various relevant precedents with respect to Section 6 of HSA and the Amendment Act of 2005, the author shall propose certain suggestions that might aid in augmenting the laws related to succession and coparceners, reduce the scope of ambiguity and errors by making the provisions more compact.

- Firstly, the primary development should be a uniform codification of the laws pertaining to the matters of succession and inheritance of property. In Hindu Law, the lack of codification for the coparcenary property and HUF family, makes partition and succession a tedious process with limited scope for innovation to suit the emerging needs. The age-old principles often result in putting one party at a disadvantage than the others.
- Secondly, it is observed that the legislation has been incompetent in its attempt to end the gender discrimination in inheritance of property. The solution offered through amendment is half-way sought as the daughters can only inherit property through mode of succession. While the sons are authorised through other modes such as testamentary and survivorship. The discrimination exists nevertheless as the interest can only be devolved to a daughter and it can not exist during the lifetime of the father or the predecessor.
- Thirdly, the act should be amended to define a status of a major unmarried woman in the family and give a wife the right to call for partition as well. By virtue of the marital status of a major unmarried woman, she resides and depends on her father's property yet under law has no entitlement in the interests of the property. Further, a wife does not have a right to call for partition, it can only be asked by the sons and during the process she would be entitled to the share in property.
- Proper guidelines shall be issued to handle the partition cases of the HUF business and property. The partition is very tedious as the property and accounts are maintained a very orthodox joint family manner. The process becomes arbitrary bestowing the Karta with tremendous power and leaving very little scope for claiming self -acquired property or distinguish it in the main accounts.

CONCLUSION

Through the extensive analysis and research, it can be stated with a degree of certainty by the author that the prospective nature of the Amendment Act is indispensable, it guarantees substantive rights to the coparcenary daughters and ends the tyrant vicious chain of gender bias

and discriminatory laws. This might *prima facie* give an impression of putting the other women at a disadvantage, but a comprehensive understanding of the repercussions of making this act retrospective, would justify the prospective nature.

The amendment act has abided by the settled principles of interpretation and it is just for the court to deny the appellant in the present case, the claim on the property of Respondent No. 1 as the interest has not devolved upon them through succession yet. It is the view of the author that the daughters and women of the HUF in general should have an equal claim over the property as that of males, there should be codified laws to protect their interest in the property. The provision safeguarding their interests today, exists only in the HSA which deprives the women to become coparceners through other modes of legitimate inheritance.

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COMBATING INDIA'S WEAK IP ECOSYSTEM

- MADHUMIDHA VISWALINGAM

INTRODUCTION

Any creation or invention we witness now is a result of an idea stemmed from human intellect. One must not just respect but also ensure that due protection is given to such creations so as to allow the creators to yield maximum benefit for their efforts. To recognize this protection various countries have adopted Intellectual Property Right (IPR) laws which may vary in their extent but do contain the same flavour. The gravity of this concept is resonated via the TRIPS[1245] agreement that lays down minimum standards of protection in regards to various aspects of Intellectual Property Rights towards its member nations. India being in compliance with this agreement it is primal to note that it has been ranked 40 among 53 countries in the Global Intellectual Property Index (GIPI) as of 2020 carrying a score of 38.46 % which, looking at the bigger picture, is an improvement in comparison with previous year's data, thus indicating a pathway that could potentially result in stark growth in the years to come. However many have raised concerns in regards to its pace of growth considering India is an important player in the Global Market.

INCEPTION OF IP

As startling as it may sound aspects of IP has been found to have had, although not as widespread as now, role during the 500 BCE in Sybaris wherein patent rights over a 'refinement in luxury' was provided to the creator for one year.[1246] Hence IP is not a recently developed concept but has been through numerous changes through the years in order to adapt to the changing dynamics of the society. A point to be noted is that these changes have not affected the essence of these IP concepts.

In India however, the concept had gained legal recognition during the 1800s as an effect of the Colonial rule. The Copyright Law, Patent law, Trademark law was highly influenced by the English law then, which has now progressed and adapted to the recent beliefs and standards that the government considered appropriate. India being a member of the World Trade

[1245]TRIPS - Trade-Related Aspects of Intellectual Property Rights

[1246]Williams, J. (2020, February 25). History of Intellectual Property: Williams Law Firm. Retrieved June 16, 2020, from https://txpatentattorney.com/blog/the-history-of-intellectual-property/

Organisation (since 1995) and its signatory status to the TRIPS agreement has most definitely impacted its IPR protection laws.

IP can easily be considered as a money minting industry that once properly enforced can bring more pros than cons to the nation. Only in the recent past has India managed to show progress in this field but still, the reach among the public seems to be limited.

WHY IPR IS IMPORTANT

Before we dive into whether slow-paced growth of effective enforcement of IPR laws could potentially have a deterrent effect, one must understand as to why IPR is important and how it can affect the economic growth of a country.

Businesses thrive on creating unique and creative products or bring out innovative ways of packaging which are all concepts that come under IP. It enables a company to milk out commercial benefits from these goods and services they provide.[1247] Hence it adds an integral value to the product serving as an asset to the company. A company's logo, the design of the product and other unique attributes associated with it which distinguishes the said company from another enables a consumer to identify a brand thereby adding value to their company and building a sense of trust between the customer and producer. In order to understand how much a brand value holds let us look into an example of a case between a celebrated fashion brand and a South Korean restaurant –**'Louis Vuitton V. Louis Vuiton Dak'(2016).**[1248] From the name of the case one can guess the issue involved. Louis Vuitton took to the court to file a lawsuit against the restaurant on the grounds that they have not only used a similar sounding name as the clothing brand but also the packing of their products imitated the designer's iconic pattern print. Taking into account of the facts the court ruled in favour of Louis Vuitton the fashion brand and charged the restaurant for trademark infringement. Multi billion dollars tech giant Apple Inc. has also recently found itself to be in a hiccup as Apple filed an Intellectual Property infringement case against Stassen Exports (Pvt.) Ltd, a food company, on the claim that Stassen Ltd had used the iconic apple logo as part of the packaging on a tea brand. There are multiple layers to the case filed by Apple Inc on 21st January in the Commercial High Court of Colombo, but it all boiled down to the defence that the food company had been using the symbol since 2013 and even registered it under National Intellectual Property Organisation

[1247] Why Intellectual Property Rights are Important in Current Era? (2019, June) Retrieved June 17, 2020, from https://www.kashishipr.com/blog/why-intellectual-property-rights-are-important-in-current-era/

[1248] Ortega, M. (2016, April 29). Trademark Watch: Louis Vuitton Fried Chicken Anyone? Retrieved June 17, 2020, from https://www.brandchannel.com/2016/04/29/trademark-louis-vuitton-fried-chicken-042916/

(NIPO). One major argument put-forth by them was that the goods each company is based on falls under different classes thereby not causing any confusion or affecting the brand image or either.[1249] The judgement is yet to be delivered. In attaching IP rights the creator clutches the right over their creation and enjoys protection over it thereby any infringement would be considered a crime for which they are eligible to be compensated via monetary gains or by other means.

Unlike what many believe, robust IPR protection will not automatically assist the economic growth of all countries rather it is more catered towards developing Countries. Possessing an IP right can boost the competitiveness of a product in foreign markets giving an edge to it due to its recognisable brand name, distinct features and so on that could potentially invite collaborations with foreign companies in-turn expanding the company's growth. In simple terms, it paves the path for FDI and trade to flow into the country combined with the effective reinforcement of the TRIPS the domestic innovative sector would be developed by increase R&D and investment.[1250] Opening markets for the import of the latest technology would further enhance its growth. It encourages creators to keep innovating and come out with creative products leading to a strong competitive market. The above mentioned are just a part of the benefits that are attached to the concept of IP.

One must understand that IP does carry a proportion of disadvantage which must not be overlooked for example monopoly pricing, increased cost- for domestic innovation, research and development, etc. New market entrants find it extremely difficult to sustain or create a space for them due to the rigidity on the current market providing a safe haven only for existing players that can yield maximum profit as a result of less competition. Having said that it is important for countries to develop mechanisms in the form of Competitive policies, Competitive practices, etc to reduce this negative effect it has on emerging economies.[1251] Drafting unbiased policies will enable the government to strike a balance in the existing field as a result of which they will be able to yield the best rather than the powerful**.**Now with India

[1249]Lugoda, U. (2020, July 05). Sri Lanka's Stassen makes 'different class' argument in Apple logo issue. Retrieved July 07, 2020, from http://www.themorning.lk/sri-lankas-stassen-makes-different-class-argument-in-apple-logo-issue/

[1250]Falvey, R., & Foster, N. (2008). *The role of intellectual property rights in technology transfer and economic growth: Theory and evidence*. Vienna: UNIDO.Retrieved June 17, 2020, from https://www.unido.org/sites/default/files/2009-04/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth_0.pdf

[1251]Alfarraj, Abdalaziz, (November 30, 2016) Intellectual Property Protection in Emerging Economies and Trade-RelatedIntellectual Property RightsRetrieved June 26, 2020,.from SSRN: https://ssrn.com/abstract=2878138 or http://dx.doi.org/10.2139/ssrn.2878138

having changed its status from developing to developed country[1252] it is important for not just potent but also rapid enforcement of the country's IP policies to solidify its position in global trade and innovation.

CURRENT STATE OF AFFAIRS

India has infact in the past couple of years managed to bring about mechanisms to bolster the existing IP structure and introduce schemes to bring about significant changes to facilitate the same. National Intellectual Property Rights Policy (2016) drafted guidelines to be in compliance with the global standards and up their IP protection thereby strengthening the current set-up which also indented to fuel the 'Make In India' and 'Startup India' initiatives. This policy will provide a single a platform for all matters in relation to IPR thereby creating a synergy to bring out the best plausible solutions to the current predicaments.

IP can be a very costly affair and it seems to be the substantial problem faced by start-up companies that need to develop a strong IP portfolio to sustain in a tough market. As a panacea to this difficulty is the Department for Promotion of Industry and Internal Trade (DPIIT),[1253] which would serve to provide a friendly market space for start-ups. More specifically the SIPP (Startups Intellectual Property Protection) is now the go-to destination for start-ups to address all their concerns in regards to IP that will not only facilitate their protection in the market but also foster their growth as a company. The scheme has now been extended for 3 more years from the existing deadline to succour the entrepreneurs of the nation. The Cell for IPR Promotion & Management (CIPAM), located in Delhi, aims at a serving as a centre in streamlining all aspects in regards to IPR along with seeking out to draft a suitable IP atmosphere in the future.

Recently India, in its means to improve the system of its trademark laws became the signatory of 3 key treaties namely Nice Agreement, Vienna Agreement and Locarno Agreement.[1254] These treaties aim to ease the search for the trademarks and Industrial design. As a part to expedite the process the government has hired 100 Trademark experts, simplified the online

[1252]On 10th February, India, which was classified as 'developing country' as per the United StatesTrade Representative (USTR) list was placed under the status of 'developed country' by the U.S.

[1253]DPIIT was previously referred to as The Department of Industrial Policy and Promotion, which works under the Union Ministry of Commerce

[1254]Saxena, S. (2019, June 12). India Signs Three WIPO Treaties That'll Help Brand Owners With Trademarks. Retrieved July 03, 2020, from https://www.bloombergquint.com/law-and-policy/india-signs-three-treaties-thatll-help-brand-owners

Trademark registration process and most importantly cutting down the review period from a tedious 13 month period to a feasible 8 month period.[1255]

There still remains concerns as to why despite the plethora of efforts taken by the government the IP sector in India still manages to fall behind.

REASONS FOR SET BACK

Implementation of the law is as important as its creation. Many believe that the lack of efficacious enforcement seems to be the root cause of the current snail-paced growth that IP faces in India. A founder of a patent consulting firm in India, Neeraj Gupta, expresses his concern over the deficiency in clarity in regards to the patent law and the need for proper enforcement in IP laws. He had also stated that "*It becomes difficult to chase Chinese companies and enforce IP rights, thereby allowing several Chinese firms to openly imitate IPs of other firms.*"[1256]

It is averred by many within the country that IP, in general, is weak in comparison with other competitors in the global market. For instance, the entertainment industry seems to have faced high losses due to piracy and other copyright infringements leading up to a loss of 3 billion USD on an average per year. The recent amendment to the cinematography bill aims to address the same. It suggests to include penal provisions for duplicating movies copies and releasing pirated versions of movies online for free reducing the market for the movie, significant steps are yet to be taken to pass the bill. At the global level, a whopping 51.6 billion is the estimated loss the online TV and movie industrywould face due to piracy by 2022.[1257]

Apart from that, it is unfortunate to note that India has found itself among the top 5 source economies for fake goods as per the 2019 report released by the Organization of Economic Development and Cooperation (OECD). Countries like the UK and the USA understanding the gravity have managed to up their IP game by drafting stringent rules and maintaining strong IP effectuation conveniently placing them on the top in the GPIC list. The report highlights various aspects like outdated trade secret related laws, weak nature of current copyright law frame and patent laws mainly in terms of the pharmaceutical sector aspect.

[1255]Bhattacharya, A. (2017, February 09). India sucks at protecting intellectual property, according to a new ranking. Retrieved July 03, 2020, from https://qz.com/india/906776/india-sucks-at-protecting-intellectual-property-according-to-the-us-chamber-of-commerces-2017-ip-index/

[1256]Hector, D. (2018, May 07). Lack of awareness about IP laws a worry for the startup ecosystem. Retrieved June 26, 2020, From https://yourstory.com/2018/05/intellectual-property-law

[1257]PTI, 'Indian Film and TV Industry Threatened by Online Piracy' *The Hindu*(Mumbai, 16 December 2009)

The Special 301 Report brought out by the United States Trade Representative (USTR) office places India under the 'priority watch list countries'[1258] stating that "*Over the past year, India took steps to address intellectual property (IP) challenges and promote IP protection and enforcement. However, many of the actions have not yet translated into concrete benefits for innovators and creators, and long-standing deficiencies persist. India remains one of the world's most challenging major economies with respect to protection and enforcement of IP*"[1259].

Among many reasons, the compulsory license on pharmaceutical patents seems to have been the main cause for India to be still considered in such a position. This

Compulsory licensing concept allows the government to grant license of a particular patented good[1260] to applicants based on the satisfaction of certain parameters provided that it is done for the public good for example production of medicine, which falls in alignment with the Doha Declaration.[1261] Article 7[1262] of the TRIPS agreement does provide the member states an option to transfer knowledge for the benefit of the society hence India looks at this concept of compulsory license through this lens and maintains a mutual benefit by providing royalties or remuneration to the patentees, the amount being decided by the controller. The **Bayer vs Nacto case** [1263] is of very high significance when we deal with this concept. Having put forth the argument of the anti-cancer drug being expensive thereby and by other means reducing its accessibility to many, the court found it justifiable that the government had granted a compulsory license to a Nacto a Hyderabad based company to manufacture it at cheaper rates and increase its availability.

At present in India, medicines, agricultural products and atomic energy are excluded from the bars of patent rights. For countries like India, it will serve as a favourable platform for becoming self-reliant in producing and manufacturing medicines by utilizing our rich

[1258]Priority watchlist countries - Countries that USTR believes to have "serious intellectualproperty rights deficiencies"are placed under this list indicating USTR to provide increased attention to them.

[1259]Correspondent, M. (2019, September 20). India: Challenges faced in the protection and enforcement of patent rights. Retrieved June 24, 2020, from https://www.managingip.com/article/b1kbm12wlgsgt6/india-challenges-faced-in-the-protection-and-enforcement-of-patent-rights

[1260]Section 84 of the Patents Act- At any time after the expiration of three years from the date of the [grant] of a patent, any person interested may make an application to the Controller for grant of compulsory license on patent

[1261]The Doha Declaration on the TRIPS Agreement and Public Health, 2001 (Adopted on November 14, 2001)

[1262] Article 7-The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

[1263]Bayer Corporation v. Natco Pharma Ltd., Order No. 45/2013 (Intellectual Property AppellateBoard, Chennai), Retrieved July 01, 2020, from http://www.ipab.tn.nic.in/045-2013.htm

resources. This practice is not well appreciated, more specifically by the business community engaged in pharmaceutical business accusing India of abetting local brands and companies. This was also reflected in the US Senator Orrin Hatch speech in the 2014 GIPC report wherein he accused India of manipulating its own IP system to fortunate the local industries.[1264] The lack of contentment with the current IP structure is why India still remains in the 'priority watch list' in accordance with the USTR report.

Amidst this Corono virus outbreak, it becomes evident why India still promotes compulsory licensing despite multiple oppositions. Creating a patent pool on innovation in relation to such nature would benefit the masses and tie in manufacturers from across the globe will make the medicine readily available to the populace. [1265]

On the more positive note, the report stated that online IP execution in India has improved but still its full and satisfying potential has not been met. Excessive delay in obtaining a trademark is an indicating factor lack of quality enforcement. The report further urges the country to associate itself with the Singapore Treaty on the Law of Trademarks which aims in providing a well defined administrative trademark registration platform.

POTENTIAL MEANS OF IMPROVEMENT

As simple and as general it may sound creating awareness about IP can most definitely bring about a solid difference in the current dynamic of how it is viewed in this country. Many without having enough knowledge on the subject matter aren't aware whether they are infringing another's IP right or in many instances whether someone else is infringing their IP rights. IP rights in the US are complicated yet they manage to hold the top position because the government manages to show such sufficient care towards this field by constantly updating and revamping the system to match global needs and encouraging its creators to file for IP protection which has resulted in a plethora of copyrights, trademarks and patents filed by them annually. With such attention, it is not surprising that America's IP accounts for around 6.6 trillion.[1266]

[1264] Ray, T. J. (2014, March 4). Is the Indian patent regime weak? Retrieved July 01, 2020, from https://www.financialexpress.com/archive/is-the-indian-patent-regime-weak/1230902/

[1265] Intellectual Property Rights in India (2020, May 1).Retrieved July 03,2020,from https://www.civilsdaily.com/story/intellectual-property-rights-in-india/

[1266] Why is IP Important? (n.d.). Retrieved July 05, 2020, from https://www.theglobalipcenter.com/resources/why-is-ip-important/

Even at present many don't think IP offenses are grave indicating why they fail to understand that robbing one's innovation results does not just end up in them losing the monetary or otherwise benefit but also carries various other factors like deteriorating economic growth, lack of competitive edge, etc. While some happen unintentionally there are cases wherein companies urge their employees to steal from other profiting companies to dominate the market which just exposes a toxic market situation. For example, ex-employees of GlaxoSmithKline biotechnology were caught sharing trade secrets to a Chinese based company carrying the same business.[1267] Thus neglecting crimes of such nature can hold heave consequences in the future. It thereby becomes imperative to educated law enforcement officers about the various provisions and also the potential threats IP theft holds.

One useful mechanism would be involving AI regulated platforms that can quickly analyse through billions of documents making it easier for companies to register and also make sure that they aren't infringing another individual's rights. It can also manage and guard online platforms against potentially serving as means for IP theft.

For rapid results, it is high time the government identifies voids in the current IP ecosystem and adapts itself to the changing dynamics. The current schemes meant for such growth will only be possible if these gaps are addressed.

A POSITIVE OUTLOOK

India's current growth trajectory even though might seem snail-paced, has improved in comparison with the previous year's record. The various measures taken have had an impact but it all essentially boils down to the implementation. IP does carry a high level of importance both at the local and international level and meliorating those will hold an impact on the lives of creators and the country. With the recent tension in the Indian border and the pandemic, the government has started looking into mechanisms that can make India self-reliant and IP can definitely serve as a helping hand to accelerate the process. IP does not only improve the economies of the country but also manages to create job opportunity as one can witness in the case of America where the direct and indirect IP intensive industries support 45.5 million jobs that account for 30% of the total employed population, as per data collected in 2014.[1268]

[1267] Intellectual Property (IP) Theft Definition & Examples. (2019, October 29). Retrieved July 03, 2020, from https://awakesecurity.com/glossary/intellectual-property-theft/

[1268] Heer, C., Cerilli, D., & Kutsyna, D. (2020, January 29). Statistics on the Value & Importance of Intellectual Property. Retrieved July 03, 2020, from https://www.heerlaw.com/value-intellectual-property-statistics

As we have resources and we have the man power in order to taste the fruit, all we need is an effective IP ecosystem to bridge the gap for a better future.

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RULE OF CASTE: THE EVERYDAY LIFE OF A DALIT

- **ABHIKARAN DEO AGRAWAL**

"Things aren't what they seem, the river meanders but not its water; the arc is curved but not the arrow, but we judge things based on their appearance",[1269] a verse from a beautiful poem written by Saint Chokhamela, an 'untouchable' poet who has been cited by Nagraj Mangule (director) in his movie *Fandry*. The above-mentioned theme is very much relevant in today's world even though the poem was written in the 14th Century.[1270] The Constitution may seem equal, but in reality, it's not; the various statues and laws may seem equal giving more safeguards to the less privileged lower-class citizens but in execution it's not; a person might be untouchable, but his feelings are not. These are a few contemporary examples which also formulates the central theme of this paper being caste divide and the various problems it brings in our society. With the setting of the movie Fandry at the backdrop, this paper would relate caste with its ensuing violence and examine the role played by law, politics and society in the persistency and prevalence of caste discrimination. The movie Fandry provides a firsthand experience of caste discrimination originating from the system, which makes the viewers rethink their perception of caste giving a glimpse of the personal lives of the victims of such system.

BRIEF BACKGROUND

Fandry (refers to a kind of wild 'Pig') is a very sincere effort in bringing out the everyday life struggles and humiliation a Dalit family faces. It is a story wherein a boy Jabya (the young protagonist) from an 'untouchable' caste strives to impress a socially superior classmate Shalu. It draws a multidimensional image of a village in Maharashtra named Akolner which shackles Jabya and his family for trying to be something bigger than what the society forces them to be. It highlights metaphorically the school as the 'State' where one can learn the ideas of social justice, empowerment, liberty and equality. But a place ideal for civic learning can also harbor a deep sense of caste-hatred.[1271] It can become a platform for oppression, humiliation by creating a hierarchy and placing the people on the list based on their appearance and caste. The

[1269] FANDRY! (Zee Studios 2013).
[1270] Manu S. Pillai, *A Dalit at the temple door,* LIVEMINT (Oct. 21, 2017, 01:06 AM), https://www.livemint.com/Leisure/VVolvdADC2R2XPwsEK4vlJ/A-Dalit-at-the-temple-door.html
[1271] Nilesh Kumar, *The Semiotics of Fandry*, ROUND TABLE INDIA (Feb. 22, 2014), https://roundtableindia.co.in/index.php?option=com_content&view=article&id=7237:the-semiotics-of-fandry&catid=119:feature&Itemid=132

love Jabya has for Shalu is only one sided and their union is possible only in his dreams. When Jabya isn't daydreaming about Shalu, he's out with his best friend trying to capture an elusive long-tailed sparrow with a slingshot. Jabya is determined to catch the black sparrow with the belief that its ashes can hypnotize anyone and can help him lure Shalu to fall in love with him. Here we can see that, the idea of loving a higher class seems so impossible that only magic and other orthodox experiments can only help him achieve his dreams. The black sparrow also symbolizes freedom which roams freely and travel places by not being a slave to the society, but the bird (freedom) forever remains out of reach. The family makes a living by selling handmade baskets, however the father Kachru (literally meaning garbage) also does menial jobs for the upper-caste people such as cleaning houses, delivering stuff and catching pigs. In the extended climax of the movie, Jabya and his family members are called upon to perform their caste-ordained duty. A pig is running loose, and the family must capture it before it causes havoc. Jabya is forced to perform this task in front of his classmates due to which his desire to present a good image of himself is shattered and he erupts in the end.

CASTE AND VIOLENCE

In one of the scenes in the movie, when Jabya is forced to catch pigs in front his school mates he attempts to run every now and then to save himself from the public laughter, shame, dishonor and humiliation, but is met with blows and serious besting from his father for evading work. This is a classic example that whenever a person has tried to ignore his/her caste and has wanted to become something more, they are always restricted whether from their family, the state or the society at large. Caste and violence are complementary in nature, because the struggle to maintain power is very important to maintain dominance and dominance over anyone cannot be maintained without power. Violence helps in attaining that power. Prof. Anupama Rao in her paper, "the death of a Kotwal: The Violence of Recognition"[1272] has talked about a case (the 'Kotwal case') in one of the villages in Maharashtra regarding the prevalent issue of Mandir pravesh (entering of a Hindu temple) and installation of statues of Mr. Ambedkar creating violence and counterviolence. It was a case wherein Ambadas Sawane, a kotwal in the village of Pimpri Deshmukh in Parbhani district, Maharashtra, a Dalit who was bludgeoned to death on the steps of a Hanuman temple.[1273] The five people accused included two Marathas and three Malis all upper caste and identified as Shiv Sena activists. The author has critically

[1272] Anupama Rao, *Death of a Kotwal: The Violence of Recognition,* University of California Press 245 (2009).
[1273] *Ibid*.

analyzed the events happening around this incident alongwith the judgement passed by the district court. She mentions that, "Violence has played a central role in the semiotic density and public salience that the term Dalit has acquired across the last century."[1274]

It is the violence which revolves around these cases which attracts the public eye. An uprising occurs only when an act is followed by violence coupled with the media recognition. Class struggle and the struggle to gain identity in a country which suppresses the lower caste can only be attained by fighting for it. Violence comes in many forms, not only in terms of usage of arms but also by way of resistance against the higher class through words and actions. We have often seen when incidents and events which have been questioned cannot be explained by normal logic and reasoning, people have used violence to answer the same. Similarly, Prof. Anand Teltumbde in his reading, "Atrocities by the State",[1275] has realized that the State which is responsible for protecting the Dalits and lower castes from societal prejudice has become the major perpetrator of caste crime. His paper mentions that how using the label of Naxalism, the police rather the State assumes summary powers to torture not only the individuals but the entire Dalit community. Naxalites have always been equated with terrorists disrupting the internal security of a state. However, a glace at our history books would reveal that it was because of a dispute between peasants and landlord with the latter not giving the peasants their equal share, this phenomenon of Naxalism first occurred. Most of these Naxalites are either Dalit or Adivasis belonging to the tribes and lower classes. Naxalism born in the Naxalbari of West Bengal believed in armed struggle along the lines of Maoist revolution is China. What followed an incident in West Bengal triggered the people extending great support in the states of Bihar, Orissa, Andhra Pradesh, Tamil Nadu, Kerala, Uttar Pradesh and Jammu and Kashmir.[1276] The militant organization in Maharashtra, the Dalit Panther also had the Naxalite influence underscored in its manifesto.

Dalits in order to revolutionize their Ambedkarite Movement realized that violence is paramount in order to attain power in a class struggle, which shows the correlation between caste and the violence it creates. Another important case that can be mentioned here is the Sirsagoan Case,[1277] wherein in 1963 four Dalit women were dragged out of their house stripped

[1274] See id., at 4.
[1275] Anand Teltumbde, *The persistence of caste: The Khairlanji murders and India's hidden apartheid*. Zed, 2010.
[1276] *Ibid*.
[1277] Anupama Rao, *The Sexual Politics of Caste: Violence and the Ritual-Archaic*, University of California Press 229, (2009).

and paraded naked in the village of Sirasgaon, in Gangapur taluka, Aurangabad district. These were supposedly 'punished' because a member of their family Yedu had threatened to harass an upper caste woman. Ironically, Yedu wasn't even touched and it was the women who suffered the punishment of this so-called atrocity at both the ends. This incident goes to indicate that this kind of sexual violence has been normalized as an upper caste privilege which comes at a great deal of imaginable humiliation to the victims. "The court case, subjection and humiliation also illuminated a form of political violence which is referred to as *Caste Violence",*[1278] by Anupama Rao in her paper.

Several incidents in the past (including the ones mentioned above) and present have led to the belief that in a struggle between the ruling and lower class, hatred coupled with resistance always comes at the behest of violence.[1279] Violence can be in many forms be it an actual armed conflict, sexual abuse, physical acts or political demonstration. However, the various dimensions of violence and humiliation suffered by such people inherently makes the people the victim of Caste violence.

CASTE AND POLITICS

Jabya's mother many times in the movie pleases him to work with his father instead of going to the school but he refuses every time. However, Jabya's dying to buy new clothes specifically a pair of jeans to impress Shalu acting on which his mother lures him into working for his father by promising him the change he needs for the jeans. But just like every other politician she never fulfills her promise once the work is done. Even though the mother cares for Jabya and her family, we can see the similarity between her and the various political parties and leaders that exist today (this is not to undermine the nature and love of a mother for her children, just for the sake of argumentation). Here a parallel can also be drawn with the cases mentioned above i.e. the Sirsagoan Case and the Kotwal Case, wherein the reason these incidents caught so much publicity besides the intensity of the case itself is the involvement of the Political parties. While the kotwal case involed members of Shiv Sena as the accused, the Sirsagoan case involed six upper caste Marathas as the perpetrators.

[1278] *Ibid*.

[1279] Sirsagaon Case, Kotval case, Nandigram Village 2008, Polavarm and Vishakha Agency Area in Andhra Pradesh; Navi Mumbai in Maharashtra; Gurgaon and Jhajjar in Haryana - they have all become battlefields in which vulnerable people are pitted against the state.

Parties such as Bahujan Samajh Party, Shiv Sena, Bhartiya Janta party, the Republican party of India got involved in both the incidents taking out various rallies protesting the event, filing representations in front of Chief Minister and creating opportunities for a potential voting bank. We have seen that since the inception of the general elections in 1952 caste has been the biggest vote bank for many political parties. So many parties primarily the RSS were formed on the basis of Hindutva and their propagation of the idea of a Hindu State. A country which is mandated to be secular by its Constitution is ruled by the people opposing the very idea of it. This makes the struggle of the lower caste even more difficult in the political sphere. A Dalit candidate trying to be a part of the system cannot get elected without the majority support from the non-Dalit supporters, therefore only candidates who have been obedient to the demands of the ruling class have been given the opportunity to represent Dalits. Therefore, to bring a change you can either become a part of the system working as per the terms of the ruling class or can be change by becoming a member of an organization which uses the best remedy available being armed conflicts at their disposal. Dalits have achieved positions of economic and political prominence unimaginable prior to independence,[1280] but cumulatively have yet to yield any significant benefit for the majority of Dalits.

Caste politics has also been subtly brought out in the movie, where in one of the scenes Jabya's father Kacharu stands outside the panchayat office listening to the upper caste men and the panchayat is discussing on the ongoing fair at the village. Kachru is only allowed inside to distribute tea. Even in a supposedly democratic space like Panchayat, where everyone is atleast given an opportunity to voice their concerns, lower caste such as the Dalit are clearly expelled and prevented from participating in it. We aim towards an inclusive society but the meaning of inclusive in these villages is the exclusion of Dalits because they are not even considered a part of the society. Further, it is also important to mention here that the house of the Dalit family in the movie Fandry was located at the entrance or outside village away from the local inhabitants. Which indicates their exclusivity from the village, it can also be related with the symbolism used in the Sirsagaon incident. The women were paraded at the 'ves' of the village which is a ritually charged space meaning the gate of the village. And a 'veskar' is the person who is appointed to keep the gate of a village, guarding the village boundary and is usually a 'Mahar' (lower caste).[1281] Not only this even the kotwals are drawn from the Mahar community with

[1280] Smita Narula, *Equal by Law, unequal by Caste: The "Untouchable" condition in Critical Race Perspective*, 26 Wisconsin International Law Journal 312, (2008)
[1281] *Supra*, at 9.

their ritual function as veskars of patrolling the village at night.[1282] This suggests that lower caste specially Mahars and Dalits are construed as outside figurines who are burdened with the task to protect the integrity of the village demarcating them from the public world. Casteism has been normalized to the extent that generation after generation follow the footsteps of their family without knowing and understanding the reason behind their actions and thus society suffers from the vicious circle of caste politics.

CASTE AND LAW

Within three years of the adoption of the Constitution, Ambedkar lamented in the Rajya Sabha (upper house of parliament) on 2 September 1953:

"I am quite prepared to say that I shall be the first person to burn it [the Constitution]. I do not want it. It does not suit anybody. If our people want to carry on, they must remember that the majorities just cannot ignore the minorities by saying: 'Oh no, to recognize you is to harm democracy."[1283]

Even after such an outburst the Dalit continued to consider the Constitution as their holy grail with their hope of a democratic India. Various legislation have come into existence after the adoption of our constitution which specifically deals with lower caste SC , ST and other backward classes including the Scheduled Castes And the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015. Apart from the various provisions in the constitution such as Article 17, Article 21, Article 23, Article 46 amongst others coupled with the directive principles of State policy which ensures safeguards for the lower caste a National Commission for Scheduled Caste and Scheduled Tribes has also been set up pursuant to Article 338.[1284] It has been entrusted with the responsibility of ensuring that the safeguards and protections that have been given to scheduled castes and tribes are implemented. The commission has the powers of a civil court, however, lacks the powers of a criminal court, and therefore cannot enforce its findings. Even though such powerful means of legislations have been established

[1282] *Supra,* at 4.
[1283] *Supra,* at 7.
[1284] Article 338, The Constitution of India.

their effect is hampered by the police's lack of willingness to register offenses or their ignorance of the terms of the act itself.[1285]

Police often escape liability for their own abuses of Dalits and are rarely punished for their negligence in the non-registration of caste-related cases. Incidents such as - seizing of books of Sunita Narayan even though the books were not banned followed by extensive interrogation by the Police, labeling of Shantanu Kamble as a Naxalite and capturing many Dalit students by making fake cases at various police stations in Vidarbha[1286] are a few instance where the police has abused their power and law for their own benefits. An investigation conducted by Navsarjan, an NGO that has been working with Dalits in Gujarat since 1989, exposed the under-reporting of Atrocities Act cases and the biases of officers charged with its implementation.[1287] Further, the Atrocities act is also perceived as a threat to the upper caste interests in Maharashtra, a promise to repeal in 1995 was also made by Shiv Sena activists as their electoral campaign. Furthermore, in terms of India's obligation under internal law the Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee (HRC), monitoring bodies under the United Nations International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, respectively, have both expressed concern over the severe social discrimination still prevalent in India against members of scheduled castes and scheduled tribes. The committees have also suggested some measures that can be taken to improve the situation.[1288]

Even Prof. Teltumbde in his paper has realized that even if the constitution guarantees equal and more safeguards to the lower caste, however, it doesn't consider the violent acts of the executives/Police as atrocity under the Prevention of Corruption Act. Although there is no mention or usage of law in the movie as such, however murals of Dr. B R Ambedkar, Savtribai Phule and Jyotiba Phule have been adorned on the walls of the school. It is construed as a hint towards the dreams and struggle of such leaders for their fight for equal rights thereby creating

[1285] Smita Narula, *Equal by Law, unequal by Caste: The "Untouchable" condition in Critical Race Perspective,* 26 Wisconsin International Law Journal 316, (2008)
[1286] *Supra,* at 7.
[1287] Failure to Meet Domestic and International: Legal Obligations to Protect Dalits, HUMAN RIGHTS WATCH (2007). https://www.hrw.org/reports/1999/india/India994-13.htm#P2126_453882
[1288] *Ibid.*

discomfort among the viewers who believe that we have matured into an equal society. It indeed reminds us that we have only restricted our framers to frames and paintings on the wall.

CONCLUSION

Fandry which is a very common word in Maharashtra means 'Pig or swine.' People relate the lower caste people with pigs and considers them a taboo upon the society. The word Fandry symbolizes impurity, therefore whenever a pig is left loose and accidentally brushes against an upper caste being, they use measures such as '*Gaumutra*' (Cow Urine) to purify them. The 'reel' world of the movie is a depiction of the 'real' world we are living in, where caste and the various discriminating acts committed around it are not hidden. It's funny how we assume that we have never committed any crime or have never been a part of to say nonetheless, however we commit Caste crime everyday by not releasing the suffrage of the people around us, by not allowing them to grow and not changing the traditional thought process passed along through generations. Towards the end of the movie when Jabya and his family where at the point of catching the pig, National Anthem breaks into the background which is being played at the school. Everyone including Jabya and even his father is forced to stand straight with the desperate look of watching the pigs run away. It is the burden of Nationalism which is plunged upon the ones struggling. And any acts of resistance and non-affirmance is considered anti-national. The movie ends with Jabya breaking his limits of tolerance with all the mocking and humiliation around him by throwing a rock at the screen (camera). This indicates their act of resistance and their continuous will to grow even after our refusal of accepting them. Fandry is the story of the life of people around us, it is the story of the people acting in the movie and it is the story of every Dalit family. Through the movie Fandry, this paper has tried to relate certain anecdotes with the problems the people, the village and the country is diseased with. Caste alone itself creates a lot of problems, however caste coupled with violence, politics and non- execution of law, cumulatively makes the victims of caste, essentially the victim of Caste Violence.

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RESERVATION IN INDIA: THE AGE-OLD CASTE SYSTEM OR FACILITATING ACCESS TO DESERVED ONES

- AFREEN ANSARI & ASHNA CHAUHAN

"Unlike a drop of water which loses its identity when it joins the ocean, man does not lose his being in the society which he lives. Man's life is independent. He is born not for the development of the society alone but for the development of his self." -B.R. AMBEDKAR[1289]

ABSTRACT

Reservation in India is a system of affirmative action which has been part and partial of our society providing representation for the disadvantage group in our society in education, employment and politics. Article 15 and Article 16 of our Indian constitution allowed to set quotas to ensure social and educational backwards classes of citizen for their proper representation in public. Reservation is a promise of equality that is enshrined in the constitution of India. Divinity power created us all equal. Seers and sages also considered us as the different body parts of the God which has their equal value on their own. Makers of the constitution also tried to maintained that equality by introduction of reservation system into our nation. In this paper we are bringing the concern of minds towards the incessant reservation by the politicians in our society which is violation of "Right to Equality" in conceivable manner.

INTRODUCTION

Reservation is nowhere a new concept to us its traces and evidences can be seen in old age. India though being a socialistic country has features of caste system. We may fabricate a lot of talent and may witness evolution and development. But, no accumulation can mutate this caste system.[1290]

Our Hindu society is divided into four classes, an accord which we see has its origins in the Rig Veda, which we all are aware is the most important source dates back to 1500-1000 B.C. People formerly were divided on accordance with their occupation as teaching& preaching

[1289] B.R. AMBEDKAR (May 8, 2019, 9:30 AM) https://www.brainyquote.com/quotes/b_r_ambedkar_396096
[1290] INDIAN STATUTORY COMMISSION 3568 (1930)

(BRAHAMINS) kingship and war (KSHATRIYA) business (VAISHAS) lastly, at the bottom are SHUDRAS.[1291]

'According to Kroeber (1950)[1292] 'Castes are a special form of social classes; their customs and laws are rigid and separated from one another. Therefore, it can be said that the beginning of the caste system was in later Vedic period or the 'Brahmanical' period.[1293]

The untouchables usually handled the impure tasks such as the work involving human waste and dead animals. Practise like untouchables barred from entering temples, drawing water from upper-caste wells etc. were there until the reforms of 19th century began. Though the socio-religious movements did not succeed in removing the rigidity of the caste system but the definitely succeeded in ambushing some structural features of it.[1294]

As the result by 19th century many reforms broke out, one such reform was the by-product of proselytizing the natives especially the depressed classes by the Christian missionaries. Many other reforms made it place such as the Madras Province movement in 1852.Jyotiba Phule, a social activist felt the need of reforms within the Hindu fold. In 1860 he called the attention to deplorable condition in which the depressed classes lived and also the discriminatory treatment melted out to them.

The schedule castes are the one of the most oppressed and backward communities in the Indian society, and suffer the stigma of untouchability and discriminatory forms of social exclusion even in the contemporary times. They were referred as BROKEN MEN and PROTESTANT HINDUS by B.R AMBEDKAR and HARIJANS OR CHILDREN OF GOD by GANDHI.

Despite the constitutional provisions and laws the SCs and STs (prevention and atrocities) Act 1989, violence and injuries against untouchables continue till today.

ORIGIN OF CASTE DISCRIMINATION

Hierarchical caste system is divinely inspired to the practice of Hinduism underlying the disclosure on caste. Hierarchical and a discriminatory caste system is embedded in the Vedas. It gives mere knowledge of the social history of caste-based discrimination in India i.e. Varna System. The caste system in Ancient India had been acknowledge since Vedic period around 1500-1000 BCE. Varna concept is mentioned in the *Purush Suktam* verse in Rig Veda (10.90)

[1291] PANDEY R., THE CASTE SYSTEM IN INDIA: 'MYTH AND REALITY 3, (criterion publication New Delhi) (1986)
[1292] KROEBER 'CASTE, ENCYCLOPAEDIA OF SOCIAL SCIENCES 254-257 (Edwin & Johnson Alvin ed.) (1950)
[1293] AHUJA RAM 228-448 (op.cit) (1999)
[1294] PIMPLEY PRAKASH & SHARMA SATISH, STRUGGLE FOR STATUS, 126-150 (B.R publishing corp) (1985)

"यत्पुरुषंव्यदधुः कतिधा व्यकल्पयन् ।

मुखं किमस्य कौ बाहू का ऊरू पादा उच्येते "

"What did the Purusha (i.e. Virat) hold within him? How many parts were assigned in his huge form?

What was his Mouth? What was his Arms? What was his Thighs? And what was his Feet?" [1295]

"ब्राह्मणोऽस्य मुखमासीद् बाहू राजन्यः कृतः ।

ऊरू तदस्य यद्वैश्यः पद्भ्यां शूद्रो अजायत "

"The *Brahmans* were his *Mouth*, the *Kshatriyas* became his *Arms*,

The *Vaishyas* were his *Thighs*, and the *Shudras* were assigned to his *Feet*." [1296]

Later on, Rigveda was interpreted by Manu in his writing in Manusmriti in Verse 1.31.

लोकानां तु विवृद्ध्यर्थं मुखबाहूरुपादतः ।

ब्राह्मणं क्षत्रियं वैश्यं शूद्रं च निरवर्तयत् ॥ ३१ ॥

"In order to expand the creation, brahma brought forth the classes of the Brahmans, the Kshatriyas, the Vaishyas and the Shudras respectively from his Mouth, Arms, Thighs, and Feet." [1297]

Brahmans were entitled to take education and participated in duties as priest. *Kshatriyas* were brave and it is presumed that they are made to provide defence so they always participated as warrior. As per the trading skills of *Vaishyas*, they engage into trade and commerce. *Shudras* were meant to serve the other three higher Varna.[1298] Then comes *Untouchables* or *Dalit* (Broken people) were excluded from four-fold Varna system of Hinduism and formed a fifth Varna termed as *Avarna* (No class). They are scavengers and latrine cleaner and street cleaner. The presence, touch, even the shadow of the Untouchables is considered to be polluting for the other upper three caste. It is believed that they deserve this life because of their karma and as a punishment for sins committed in their earlier life.

[1295] greenmesg.org (May 8, 2019, 1:30PM), https://greenmesg.org/stotras/vedas/purusha_suktam.php
[1296] greenmesg.org (May 8, 2019, 1:30 PM), https://greenmesg.org/stotras/vedas/purusha_suktam.php
[1297] R.G. CHATURVEDI, MANUSMRITI: THE CONSTITUTION OF THE VEDIC SOCIETY 25 (1st ed. 2010)
[1298] Jayaram, *The Hindu Varna System* (May 15, 2019, 10:15 AM), https://www.hinduwebsite.com/hinduism/concepts/varna.asp

This was all about Hindu casteism but if we talk about the Muslim casteism and go through the Muslim scriptures then according to Al-Qur'an in Surah Al-Hujurat (49:13)

يَٰٓأَيُّهَا ٱلنَّاسُ إِنَّا خَلَقۡنَٰكُم مِّن ذَكَرٖ وَأُنثَىٰ وَجَعَلۡنَٰكُمۡ
شُعُوبٗا وَقَبَآئِلَ لِتَعَارَفُوٓاْۚ إِنَّ أَكۡرَمَكُمۡ عِندَ ٱللَّهِ أَتۡقَىٰكُمۡۚ إِنَّ ٱللَّهَ
عَلِيمٌ خَبِيرٞ ١٣

Mankind! We have created you from a male and female and made you into peoples and tribes, so that you might come to know each another. The noblest of you in God's sight is the one who fears God most. God is all knowing and all aware.[1299]

But still people are divided into Sunni and Shia and other sub sects in Islam. With the arrival of Islam in South Asia, the Arabs, Persians and Afghan Mughals were upper caste. Later on, few upper caste Hindus were converted to became their part and was known *Ashraf* (Rich people). Below them, who have cleaning occupation were *Ajlafs*. Lowest were those who converted from Untouchable caste and were known as *Arzals*.[1300]

PROBLEM FACED BY LOWER CASTE IN INDIA

Caste System was introduced in villages so that people can get their needs easily but after the Census carried out in 1818, the British government regulate it at national level.[1301] Caste system was made for the development of lower caste people. Despite of getting their needs to fulfill, they started getting threats by upper caste people.

- Dalits ensure segregation in housing, schools and access to public services.
- Dalits are denied to access to land, forced to work in degrading conditions and are routinely abused by the Police and upper-caste members.
- Dalits suffer discrimination in education, health care, housing, property, freedom of religion, free choice of employment and equal treatment before the law.
- Dalits suffer routine violations of their right to life and security if person through state-sponsored or sanctioned acts of violence, including torture.
- Dalits suffer caste-motivated killing, rapes and other abuses on a daily basis.

[1299] THE QURAN 395 (Farida Khanam, Maulana Wahiduddin Khan trans) (2011)
[1300] GHAUS ANSARI, MUSLIM CASTE IN UTTAR PRADESH: A STUDY OF CULTURE CONTACT (Ethnographic and Folk Culture Society, 1960)
[1301] (May 15,2019, 9:35AM), Wikipedia.org

- Between 2001-2002 there were 58,000 registered egregious abuses against Dalits and Tribal.
- 2005 government report stated there is a crime committed against a Dalit every 20 minutes.
- Dalit compromise most of the agricultural, bonded and child laborers in the county.
- Dalit women face additional discrimination and abuse, including sexual abuse by the Police and upper-caste men, forced prostitution, and discrimination in employment and wages.
- Dalit children face continuous hurdles in education. They were made to sit in the back of classrooms and endure verbal and physical harassment from teachers and other students. The effect of such abuses is confirmed by the low literacy and huge drop outs rates of dalits.[1302]

REVOLUTION TO ERASE DISCRIMINATION

Jyotiba Phule, a social activist found necessity of revolution against social discriminatory curb towards lower caste and their miserable condition. In 1858, Government of Bombay Presidency declared that 'all school maintain at the sole cost of Government shall be open to all classes of its subjects without discrimination.' In result of which scholarships, special school and other beneficial programs were setup for Dalit. But this strategy was not successful because of the dominant behavior of upper caste due to which government decided to turn down the policy.[1303] A Charter was presented by Swami Achhutanand Harihar with seventeen demands including land reform, separate school and separate electorates for untouchables. Another reform was led by Babu Mangoo Ram who was the founder of Ad Dharm movement. Many Dalits joined Ad Dharm movement and made their identity as Ad Dharmis instead of their caste which was taken them as Untouchables.[1304]

COMMITTEES FOR RESERVATION

HUNTER COMMISSION (1882): In Ancient India, reservation was recognized in literary work by providing reserved occupation to particular Varna. In the same way, with the introduction of Hunter Commission headed by Sir William Hunter reservation came into

[1302] (May 19, 2019, 11:17AM), www.dalitsolidarity.org
[1303] (May 20, 2019, 5:12PM), Shodhganga.inflibnet.ac.in
[1304] B. R. AMBEDKAR, ANNIHILATION OF CASTE 57 (Critical ed. 2014)

notice. Jyotirao Phule demanded for reservation in government jobs and free and compulsory education for lower caste.[1305]

FIRST RESERVATION (1901): On 26 July 1902, Shahuji Maharaj was the one who tried to eliminate growing power of Brahmins from society. He gave 50% reservation for Dalit and the Backwards in Educational institutions and government jobs in state i.e. Kohlapur.[1306]

SIMON COMMISSION (1927): This commission brought whole new concept of reservation. The recommendation given by Simon commission was based on the concept of providing reserved seat which will be filled by elections and they continue with the communal representation but they rejected for separate electorate for depressed class.

ROUND TABLE CONFERENCE (1931): The heating topic of the whole conference was how to treat minorities. Firstly, Ambedkar demanded for separate electorates and adult suffrage for Depressed Class but it was settled only for ten years and unfortunately it couldn't reach according to agreement.[1307]

LOTHIAN COMMITTEE (1931): In the same year after the failure of Round Table Conference the Lothian Committee articulated the system of Franchise where people from all section would be represented in the legislature.

A TURNING POINT: MACDONALD'S COMMUNAL AWARD AND THE POONA PACT (1932): The Communal Award of MacDonald formed separated electorates and reserved seventy-eight seats for Depressed Class for twenty years. In opposition of this Award Mahatma Gandhi declared hunger strike till death in revocation of this Award. In result of disapproval of Award and Gandhi's hunger strike, new agreement has been formulated called Poona Pact. This pact demanded for single general electorate for each province of British India and Central Legislature where eighteen per cent seats were acquired by Depressed Class.[1308]

ALL INDIA DEPRESSED CLASSES CONFERENCE AT NAGPUR (1942): British and Indian officers encouraged Untouchables to form their own organization to call up their demands. This Conference was setup for poor, backward illiterate untouchables. They demanded provincial budget for education for the advancement of Untouchables, their representation in legislature and all local bodies, representation on public service commissions,

[1305] Disha, *First India Education Commission or Hunter Commission* (May 26, 2019, 6:18 PM), https://yourarticlelibrary.com/notes/first-indian-education-commission-or-the-hunter-commission/44834
[1306] Akshay Chavan, *The first Reservations in India* (May 26, 2019, 7:00 PM), https://www.livehistoryindia.com/history-daily/2019/1/17/the-first-reservations-in-india
[1307] B.R. AMBEDKAR, ANNIHILATION OF CASTE 121 (Critical ed. 2014)
[1308] B.R. AMBEDKAR, ANNIHILATION OF CASTE 124-125 (Critical ed. 2014)

separate electorates, creation of new separated village for Schedule Caste and establishment of All India Schedule Caste Federation.[1309]

CONSTITUTIONAL ASSEMBLY DEBATE: Ambedkar basically focused on providing privilege and legalizing the "Constitutional Morality" over the traditional, social morality of the caste system. While speaking during Constitutional Assembly, he said, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic."[1310]

RESERVATION POST INDEPENDENCE

In Kerala, the demand for reservation of government jobs was made as early as 1891 with an agitation in the princely State of Travancore against the recruitment of non-natives, mainly Tamil Brahmins, into public service overlooking qualified native people.[1311] In 1901, in Maharashtra reservations were introduced (introduced in princely states oh Kolhapur) by Chhatrapati Shivaji Maharaj he introduced reservations for non-Brahmins and backward classes in early 1902 providing free education and hostels so that everyone can easily receive education. He also asked for free India and abolition of untouchability. In 1902 50% reservations were created for services for backward classes in Kolhapur the first official reservations for depressed classes provided by government. In 1979 Mandal commission was established to assess the situation condition of socially and educationally backward classes.

A report submitted by commission 1980 increasing the quota from 22% to 49.5%. In 2006 the list of backward classes increased the number and also by increasing it up to 60%. In 1990 the recommendation of Mandal commission report was implemented in government jobs by Vishwanath Prasad Singh. [1312]

CONSTITUTIONAL PROVISIONS RELATED TO RESERVATIONS

[1309] *Forgotten Lessons- The All India Depressed Classes Women's Conference, Nagpur, 1942*, Velivada, (May 30, 2019, 5:25 PM), https://velivada.com/2017/03/24/forgotten-lessons-the-all-india-depressed-classes-womens-conference-nagpur-1942/

[1310] B.R. AMBEDKAR, ANNIHILATION OF CASTE 46 (Critical ed. 2014)

[1311] Mr S. Yeshu Suresh Raj & Mr P. Gokulraja, An analysis of reservations system in India, INTERNATIONAL JOURNAL OF RESEARCH (June 2, 2019, 10:08 AM), https://academia.edu/18311102/An_Analysis_of_Reservation_System_in_India

[1312] Mr. S. Yeshu Suresh Raj & Mr. P. Gokulraja, An Analysis of Reservation System in India, INTERNATIONAL JOURNAL OF RESEARCH (June 2, 2019 10:08 AM), https://academia.edu/An_Analysis_of_Reservation_System_in_India

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Untouchability was the most common form of discrimination practised in India. Increase the opportunities of socially enhanced and educational status of the underprivileged communities and uplift their lifestyle was the main objective behind the reservations.

Fundamental rights are basic human right of all citizens of India subjected to some limitations. Right to equality is one such fundamental provided to all citizens of India. Article 14, 15, 16, 17, 18 are some of the fundamental rights highlighting right to equality. Fundamental rights of the Indian constitution are the major foundation of all other basic rights provided to citizens of India. [1313]

Reservation in itself is an affirmative action for the upliftment backward and under developed classes defined by their caste, colour, sex etc. Looking from history point of view reservation was justified because of the ill-treatment they were facing and were being neglected which made it extremely important for some sought of alternative for their improvement, growth and upliftment. But today the backward classes have emerged and are standing strong they have become aware of caste and reservation policies and themselves feel that reservations to be given to the ones economically backward ones who actually need it.

Article 14 of the Indian constitution provides that every person should be given equal protection of law and equality before law. Thus Article 14 uses two expressions equality before law and equal protection of law. Both these expressions have, however, been used in the Universal Declaration of Human Rights. [1314]Equality before law means absence of any legal discrimination against any individual, group, class or race. Equal protection of the law is a more positive concept implying equality of treatment in equal circumstances. However, one common dominant idea of both the expressions is that of equal justice.

Article 15 of the Indian constitution prohibits discrimination, also contains a clause allowing the union and state governments to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the schedule castes and schedule tribes. [1315]

Article 16 of the Indian constitution provides equal opportunity in matters of public employment, permits reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state is not adequately represented in the services under the state and another allowing reservation in matters of promotion for schedule castes and

[1313] DR.J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA 83 (56TH ed. 2018)
[1314] Article 7 of the universal declaration of human rights says: "All are equal before the law and are entitled without any discrimination to equal protection of the law."
[1315] DR. J.N PANDEY, CONSTITUTIONAL LAW OF INDIA 142 (56TH ed. 2018)

schedule tribes.[1316] The practise of untouchability is declared illegal in article 17 of the Indian constitution.

To give teeth to the protections of the schedule castes and schedule tribes mandated by the constitution India's parliament has passed two laws as follows:

1: the untouchability (offence) Act of 1955[renamed the protection of civil rights Act in 1976]'

2: in 1989 new law the scheduled castes and schedule tribes (prevention of atrocities) Act came into force.[1317]

ANALYSIS OF CASE LAWS REGARDING RESERVATIONS

1-NAIN SUKH DAS AND ANOTHER v THE STATE OF UTTARPRADESH

In this case the bench invalidated an Act of the state legislature which provided for elections on the basis of separate electorates for members of different religious communities.[1318]

2-P RAGHUNADHA RAO v STATE OF ORISSA AND ANR

In this case the bench held the requirement of a test in the regional languages for state employment does not contravene article 15, as the test is compulsory for all persons seeking employment.[1319]

3- STATE OF MADRAS v SMT. CHAMPAKAM DORAIRAJAN

In that case, the Madras Government had by a G.O. reserved seats in State Medical and Engineering Colleges for different Communities in certain proportions on the basis of religion, race and caste. The Government defended it for promoting social justice for all sections of people as required by Article 46. The Supreme Court held the G.O. void because it classified students on the basis of caste and religion irrespective of merit.[1320]

4- INDRA SWAHNEY v UNION OF INDIA

This case is popularly known as Mandal Commission Case, the court examined the scope and extent of Article 16(4). The Court has said that the creamy layer of OBCs should be excluded from the list of beneficiaries of reservation, there should not be reservation in promotions; and total reserved quota should not exceed 50%. The parliament responded by enacting 77th Constitutional Amendment Act which introduced Article 16(4A). The article confers power on

[1316] *Id*. at 175-176

[1317] *Constitutional provisions for development of scheduled tribes*, VIKASPEDIA (June 2, 2019, 2:29 PM), https://vikaspedia.in/social-welfare/scheduled-tribes-welfare/constitutional-provisions-for-development-of-scheduled-tribes

[1318] AIR 384,1953 SCR 1184.

[1319] AIR 1955 ORI 113.

[1320] AIR 1951 SC 226

ISSN: 2581-6349

the state to reserve seats in favour in SC and ST in promotions in Public Services if the communities are adequately represented in public employment.[1321]

10 PERCENT RESERVATION FOR ECONOMICAL BACKWARD GENERAL CATEGORY

A bill to amend Article 15 and 16 of The Constitution will be moved by the government. The Indian Parliament has approved the bill for offering 10 per cent quota in education and employment to economically weaker sections in the general category. Though it is cited as a historic bill for reservation for economically weaker sections in Upper Caste. The order of government regarding this bill to provide reservations violates some of the observations made by the Supreme Court in its previous judgements as the Supreme Court has held that mere economic backwardness or mere educational backwardness cannot be the criterion of the backwardness in Article 16(4). The Supreme Court has even ruled in the Indra Sawhney case that the share of jobs or educational or legislative seats reserved for different communities cannot together exceed 50 per cent. Apart from this the bill will help financially weak upper caste, if the economically weaker section is treated par with SC, ST and other large groups from general category then there will be a huge amount of population diving for just 10 per cent seats observing the ration of unemployment. On one hand this bill applies to people from all religions benefitting the upper sections of the caste system particularly we say who are economically weaker, but on the other hand may somehow upset SC, ST and OBCs in some way.

CONCLUSION

Ongoing with the ecclesiastical evaluation, we have wound up that divinity didn't segregate us on the scale meter of casteism in spite of it he created us in unity. Human brought a scale of casteism into the society and sect the people on the scale commensurate with the computation on their work.

Although it all had started and human made division among people. With the expansion of the barbaric condition, violation of human rights of lower caste created demand for the reservation in the society. Somehow it had taken its steps into Indian society but it kept on expanding its descriptive area and there is no determined fixation limit for this reservation. Resolutely arrival of every decision or judgement on disputed reservation matter, it keep on reckon something new in this system which is reason for perishing of its original structure. Prioritisation for

[1321] AIR 1993 SC 477

securing the benefit didn't achieve by the basic structure which is most needed to be deliver, due to which motive for the Right of Equality cannot be fulfilled among people. Providing help to lower caste doesn't mean neglecting rights of upper caste. It may devise injustice to them. The whole sole purpose for reservation is to import equality in the society which was havoc since the ancient period, not to provide a safe stage to perform. So, there is need to tie a rope for the boundaries.

SUGGESTION

No limit on reservation has led to awarding it in private sector as well. Backward classes may have been suppressed but tools like this should not be misused. When God created us all equals, why should we treat each other any different or in this nation only for backwards? Reservation seems to be an agenda for every political party in every election but now acts on the same, the government should rather make good schools and institutions for higher education and the condition for them conducting for availing reservation.

We strongly oppose reservation given on the basis of any caste as it is often misused. Reservation should be given by identifying the economically backwards classes and it would lead to good mechanism and growth.

Corrupted system of nations fundamentally requires some limit ongoing expansion of reservation system. There is need to introduce some measurements taken by the government to compute the economical backwards of people by the income tax department, banking sector, Survey of India to keep checks on their movable and immovable property. Though it will create more work load on governmental authorities but it will be more helpful in protecting the rights of citizens in more efficient way.

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ORGAN TRAFFICKING – A GORDIAN KNOT

- DEVADHARSHANI S. & POONGUZHALI R P.

INTRODUCTION

Human life is one of the ideal and precious creations of God. This valuable piece of art is to be treated well and given the utmost care to protect from dangerous circumstances. The organs and tissues give life and help in the functioning of the human body. Defect in any of the organs may lead to difficulties and dysfunction of the system. The medical treatments and apparatus have been advanced, so the possibility of recovering from many diseases has also been more accessible. Organ transplantation is one such remedy. The process of organ donation has played a vital role in the medical industry as it saves people from succumbing to life. The rate of need for organs has been rising per day, the disparity between the demand and supply for organs paved the way for the illegal modus operandi called organ trafficking. There is no unambiguous data of the organ trafficking worldwide, but the World Health Organization (2004) added that 'globally there is a steady increase in organ trafficking'. Like other countries, India also became a victim of organ trade. A remarkable step made to control the illegal organ trade: The Transplantation of Human Organs Act, 1994. The main constituent of the Act is to stop illegal organ trade for monetary purposes and at the same time promote organ donation awareness. Trafficking modality in the 21st Century became a worse practice, in the form of Transplant Commercialism. Nearly 500,000 people died because of the non-availability of organs in India[1322]. Organ donation is a gracious act, which gives a chance for a second life. Notwithstanding the enactment of Act, illegal organ trade is prevailing in India not only because of monetary value but, also for many unseen reasons. This research work states some of the unseen reasons behind the prevailing illegal organ trade.

RIGHT TO LIFE

Everyone has the right to life, liberty, and the security of a person.' The right to life is reliably a fundamental right. The term 'life' under Article 21 of The Constitution not only adduces the

[1322] Sanchari Pal, Donate Life: *What You Need To Know About Organ Donation in India* The better India, available at https://www.thebetterindia.com/75687/organ-donation-india/, last seen on 09-07-2020

physical act of breathing but also engrosses the right to live with human dignity[1323], right to livelihood[1324], right to health[1325], etc.,

The Directive Principles of State Policy under Article 47 stress an underlined note as a primary duty of state on the enhancement of public health and disallowance of drugs injurious to health. Hence its obligation of the state to preserve the patient's life whether he/she is innocent or criminally liable under the law, the person who is in charge of the health of the community or with due medical expertise must extend their services for protecting life[1326] interpreted as Right to Medical Care, because 'if once life is lost, the *status quo ante* cannot be restored'[1327]

The rudimentary elements of every life to survive is the body itself. Under Article 21, 'Bodily rights' is revealed within the ambit of the right to life. Bodily rights are equipped with the license of one's capacity to make their own decision concerning his/her body and emphasize the significance of personal autonomy, self-ownership, and self-determination of human beings over their bodies.

Every individual has the right to sovereignty over their body. 'Right to security in life'[1328] is incorporated within the bundle of rights that a person has over the parts of his/her own body, but after death, all our body organs will perish and decay, conversely, a new chance of survival and a better quality of life is possible only through an organ donation. The transfer of body organs under informed consent of the deceased or living organ donor within the ambit of a medical emergency or significant therapeutic benefit is widely accepted under the law[1329]and even leads to the right to donate to some unknown person.

Organ transplantation is among the five elite medical miracles in India. It is widely accepted that technological discoveries are both beneficial and hinder the progress of social justice and human rights universally. Organ transplantation is interdependent with legal, medical, and ethical frameworks. This predicament paved the way for illegal commercialisation of human organs across the world for monetary benefit. The scarcity of organs worldwide lifted the professionalized criminals, demanding scrupulous means to obtain donors. As a result of this technology, the basis of humanity was threatened and transpired into organised crime,

[1323] Menaka Gandhi v. Union of India, AIR 1978 SC 597.
[1324] Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180: (1985) 3 SC 545.
[1325] State of Punjab v. Mohinder Singh Chawla, AIR 1997 SC 1225.
[1326] Parmanand Katara v. Union of India, AIR (1989) 2039, (1989) SCR (3) 997.
[1327] M.P. Jain, *Indian Constitutional Law*,1616 (6th ed., 2010)

[1328]B Björkman and S O Hansson, *Bodily rights and property rights*,32(4),journal of Medical ethics,2006, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2565785/, 26/006/2020
[1329]. Ibid

globalized as' Organ trafficking'. It is an infringement of fundamental concepts of secular humanist ethics in standard and biomedical ethics.

ORGAN DONATION - A WILL

Organ transplantation depends on a social understanding and social faith and it requires national and international law safeguarding the rights of both organ donors and organ recipients. Organs like kidney, liver, pancreas, small bowel, lungs, heart can be donated and tissues like cornea, bone, skin, cartilage, tendons, heart valves can also be equipped Worldwide

In the year 1967 in Mumbai the prime cadaver kidney transplantation was successfully made, subsequently in the year 1994 at AIIMS, Delhi the foremost heart transplantation took place successfully, in Chennai first of all multi-organ transplantation effectively done.
In the 21st century, the core exploitation of organ trade and ramparting commercialization of transplantation took place only in Low- and middle-income countries (LMICs). Nearly 70% of Indian people are found to be brain dead, and victims exploded in road traffic accidents[1330]. As a result of this deceased organ donation exposed in India.

THOA - WAY TO CONCLUDE ILLEGAL MORPHIA

A committee under the central government basis in 1994 led to the formation of the Transplantation of Human Organ Act and was amended and notified in 2004[1331]. In the Forty-Fifth year of the Republic, the Indian Parliament enacted this Act in the states of Goa, Himachal Pradesh, and Maharashtra and all the union territories

The Act predominantly deals with the regulation of removal, storage, and transplantation of human organs and tissues mainly, outlaws the exchange of money within the donor and the recipient and prevention of illegal commercial dealing of organs and tissues, for future medical

[1330]G.Abraham; Y.N.V. Reddy; Y.V.Reddy; S.Shroff; M.Mathew & S.Saravanan,*Evolution of deceased-donor transplantation in India with decline of commercial transplantation: a lesson for developing countries*, 3(1), science direct, (2013), available at https://www.sciencedirect.com/science/article/pii/S2157171615311175, last seen on 27/06/2020
[1331] V.Koushal; A.T.Rai; A.K.Gupta, *Organ Donation Promotion in India: A Critical Analysis,* 4(8), International Journal of Health Sciences and Research, (2014), available at https://www.ijhsr.org/IJHSR_Vol.4_Issue.8_Aug2014/33.pdf, last seen on 28/06/2020

purposes[1332]and was implemented for the regulation of organ commerce and kidney scandals in India because of the futile and fraudulent healthcare practices.

This legislation was drafted on resembling means of the UK Transplant Act. Transplantation of Human Organ Act mainly contains threefold,

1. The definition of death also includes brain death.
2. Commercial organ marketing must be stopped.
3. Without the government's permission primary relatives such as father, mother, brother, sister, son, daughter, and wife can donate organs[1333].

PUNISHMENTS AND PENALTIES.

Chapter VI of this Act is embodied with the Offences and Penalties,

- Section 19 - People involved in commercial dealing of human organs shall be penalised for the imprisonment of not less than 5 years but extend to 10 years, liable to pay a fine of not less than 20 lakhs and may extend to 1 crore.
- Section 19 A - Receiving or making payment from the supply of illegal human tissue, finding persons willing to supply organ for payment and any person offers to supply human tissue for payment will be held liable, punished with the imprisonment of not less than one year and may extend up to three years, the fine amount that may be not less than five lakh rupee but may extend up to twenty-five lakh rupees.
- Section 18- Any person is involved in the removal of any human organs besides the authority, penalization may extend up to 10 years, and fine may extend up to 20 lakhs under THOA.
- If a certified medical practitioner is found guilty under the Transplantation of Human Organs Act it will be reported by the Appropriate Authority to the respective state Medical Council to enforce an imperative action which includes removal of the name from the register of the council, in case of a first offence for three years and consecutive offence permanent name removal[1334].

[1332] The transplantation of [human organs and tissues] act, 1994
[1333] Nupur Nadir,*Organ Transplantation law in India*, Legal service India, available at http://www.legalserviceindia.com/article/l224-Organ-Transplantation-Law-In-India.html, last seen on 29/06/2020
[1334] S.18(2), The Transplantation of Human Organ and Tissue Act, 1994.

CADAVER DONOR- AN INCOMPARABLE BOON

The toughest problem for organ transplantation is the availability of organs. Brain death was interpolated in the 1960s, where their heart continues to function, and patients will be under ventilating conditions. The supply of organ donation was increased by the acceptance of brain death but the endorsement of the family members as brain death was a struggle for organ donation.

The most important aspect of this act is the Regulation of Cadaver Donation. Section 3 to 8 of this Act regulates the authority for the removal of human organs or tissues,

- Section 3- Any living donor before his death can donate the organ at any time, in writing with the presence of 2 or more witnesses providing authorisation for the removal of organs. This authorisation for organ donation is a driving license for transplantation[1335]. If such authorisation wasn't made by a person for organ transplantation before death, removal of organs can be legally done by an authorised person who owns the dead body, unless the person has reason to believe that any near relative of the deceased person has an objection to provide the organ for therapeutic purposes[1336].

Before the transplantation of organs from the Cadaver donor, a medical certificate of brain-stem death must be endowed by the board of medical authorities,

(i) The medically registered practitioner, who was in charge of the hospital at the time of Cadaver death occurrence.

(ii)A specialist, appointed by the Appropriate authority from the panel of names approved as an independent medical practitioner.

(iii) A neurologist or a neurosurgeon prescribed by a registered medical practitioner, endorsed by the Appropriate authorities.

(iv) The registered medical practitioner who conferred in treatment with the brain-stem death patient[1337].

[1335] S.3 (2), The Transplantation of Human Organ and Tissue Act, 1994.
[1336] S.3 (3), The Transplantation of Human Organ and Tissue Act, 1994.
[1337] S.3 (6), The Transplantation of Human Organ and Tissue Act, 1994.

HOSPITAL AND MEDICAL EXPERTISE.

The main aim of this Act is to prevent organ trafficking in hospitals. Section 10 to 14 of this act put forth that ' No hospitals or Human Organ Retrieval Centre must conduct any activity related to the removal, storage, transplantation of human organ or tissue' unless the respective hospital or organ retrieval centre is registered under the Transplantation of Human Organ and Tissue Act.

This act also specifies some qualifications for the hospitals to be registered, there must be professional manpower in high standards, with all services and facilities, equipment. Accommodation of Intensive Care Unit (ICU) is the main requirement for registration of hospitals as Human Organ Retrieval Centre under the Act, along with manpower, high-level equipment, greater infrastructure for diagnosis, and maintenance of brain-stem dead patients. Certificate for registration of hospitals is done by the Appropriate Authority, these authorities also have the power to suspend or cancel the registered hospitals licenses in case of breach of the Act.

To regulate the Organ donation Central government enacted the National Human Organs and Tissues Removal and Storage Network[1338], a National Registry to maintain the organ donors' and recipients' information, for the evaluation of the clinical status of human organs and tissues[1339].

'NEAR RELATIVE' - AN EMINENT AIDE.

Administrating the rules for living donors in Section 9 of this act provides a disparate procedure in case of living donation by near relatives and by unrelated donors. The term 'near relative' is prescribed under Section 2 (i) which includes spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson, or granddaughter. Near relatives without monetary transactions can donate human organs or tissues.

Looking at the nature of the order provided by the Authorisation Committee, (mentioned in a suit in the year 2006) it has been initiated that there is no emotional relationship between donor and recipient of the kidney, still, there are other grounds as referred to in Sub-section (3)

[1338] S. 13C, The Transplantation of Human Organ and Tissue Act, 1994.
[1339] S.13D, The Transplantation of Human Organ and Tissue Act, 1994.

ISSN: 2581-6349

of Section 9 of the Act, 1994, for which approval for removal and transplantation of human organs can be given by the Authorisation Committee. Here the Appellate authority failed to recognize the fact, the order passed in is the breach of principle natural justice. In the year 2007 Justice D.N. PATEL, J overlooked upon the facts and circumstances of the case, ordered the respective authority to look upon the petition and decide the application, later on, the petition was allowed and the rule made absolute. Specifically mentioning about if any donor because of affection towards the recipient or for any other special reasons, wishes to donate his kidney, such transplantation is permitted under the law without monetary exchange[1340]. In case of breach of the law, a penalty of amount 10,000 rupees and imprisonment of 5 years is granted.

AMENDMENT

In the 2008 amendment, the serious documentation verification, Round-the-clock accessibility of organs and tissues were resolved and in the 2011 amendment the term 'solid organ', 'Human Organ Retrieval Centre', 'Near Relatives' were given the main scope.

WHY THE RATE OF ORGAN TRAFFICKING INCREASING IN INDIA?

HUMAN TRAFFICKING

India has an accessible market due to which the organ trade has proliferated. This made India flatter as a home for the smuggling of organs. Many inducements exist for the emergence of organ smuggling in India, yet one of the major causes is the occurrence of human trafficking. 'Traffic in humans beings means selling and buying men and women like goods and includes immoral traffic in women or children for immoral' or other purposes[1341]. Human trafficking is of two types,

1. Sex-based - prostitution, pornography, cybersex, etc.
2. Non-sex-based - Domestic Labour, organ trafficking, etc.

Trafficking in humans is a national crime where the traffickers exploit other persons for obtaining gain in organ trade or the traffickers misuse other's organs or body parts for purposes of witchcraft or traditional medicine.

[1340] *Mehul Kishorsinh Jadeja vs Amarjit Singh* (2007) 2 GLR 1780.
[1341] *Raj Bahadur v Legal Remembrancer*, AIR 1973 CAL 522

In the eyes of the law, sexual exploitation and bonded labour is the most debated form of trafficking in humans, while the harvesting in organs is often less concerned. According to the 2016 report of the National Crime Record Bureau, a total of 8,132 cases of human trafficking were reported in India in 2016 under the Indian Penal Code, 1860[1342]. A 15% increase from the number of cases reported in the previous year. In the year 2016, 23,117 trafficking victims were rescued. Of these, the highest number of persons were trafficked for forced labour (45.5%), followed by prostitution (21.5%), and only 2 persons were rescued for the removal of organs[1343]. From the aforementioned facts, it is evident that most of the cases in organ removal are being unaware, only a few come to light.

The trafficking of person protocol of the USA also majorly does not consider human trafficking for organ removal. The act covers if an individual is trafficked for the objective of the smuggling of organs. The report of preventing, combating, and punishing trafficking in human organs, stated that "the extent of the relationship between trafficking in organs and trafficking in persons (and other forms of organized crime) is unclear.[1344]

In Israel, the practice of trading in organs remains prohibited by the organ transplant law but the transgression of trafficking in humans for organ removal survives. To prevent it from further occurrence, the Anti-trafficking law which promulgated in 2006 led to the implementation of the offence of trafficking in humans for organ removal in section 377A(a)(1) in the penal code.

The case of State of Israel v. Muhammed (John) Ben Taha Jeeth (Alen)[1345] was related to the trafficking of humans for organ removal and was set as a precedent for all international cases. In this case, two members of the illegal organ unit obtained consent from a woman to undergo kidney surgery in return for financial reward.

[1342] The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 (Passed by Lok Sabha, 26/07/18).
[1343] Ibid
[1344] *Report of Secretary -General on Preventing, combating and punish trafficking in human organs,* Commission on Crime Prevention and Criminal Justice,15th session, E/CN.15/2006/10,14, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V06/513/17/PDF/V0651317.pdf?OpenElement, last seen on 30/06/2020
[1345] [2007] HC 4044, (Haifa Court)

ISSN: 2581-6349

The crime of organ removal in human trafficking hasn't cropped up yet, in India. The government should constitute a special force to identify the crime and make it come to the surface and implement appropriate laws to stop further incidence.

DEMAND AND SUPPLY

A remarkable issue debatable in every country, affecting many countries' notoriety, the medical industry, and the life of people, despite the presence of various laws, is the smuggling of organs. India has now become a warehouse for the kidney as the rate of organ trading is rising per day. Why is it increasing? One of the causes is a low supply and high demand. Firstly, the majority of the people are not willing to donate organs, and the near relatives do not give consent to donate organs from brain dead people too. Many people restrain from donating because they have hesitation that their religion or culture would accept the practice of organ donation. Global financial integrity says that nearly 10% of all organ transplants are from trafficked organs because the average time for legitimate kidney transplantation in Canada is 4 to 7 years and 3 to 6 years in the USA[1346]. This time gap made people desperate, relinquishing the practice of rectitude and heading toward illegal black markets.

POVERTY

The organ trafficking crime group is a globalized network. The members of this unit are from highly professional crime groups. Neither only the offenders have involved doctors, nurses, brokers, medical support staff, police personnel, and hospital administration, in some cases, the entire hospital is concerned. The brokers are engaged in finding the donor. The donors are usually from poor and vulnerable areas and drought-prone farmer's land, belonging to the same region of the brokers, an ascendancy for them to gain trust in the donors. In semblance of false promises to the poor and illiterate people and hustling them to donate organs. Poverty, unemployment, and lack of income support are the forces driving victims towards illegal activities. These people mainly participate in illegally donating organs to pay off the debts and for children's education or daughter's marriage. In desperation of not getting a donor, people fell into the trap of traffickers, who masquerade as an accredited representative of a charitable

[1346] C.Bain, Organ Trafficking: *The Unseen Form of Human Trafficking*, Acams today (26/06/18), available at https://www.acamstoday.org/organ-trafficking-the-unseen-form-of-human-trafficking/ last seen on 29/06/2020

organ match. According to a study, nearly 70% of the recipients are unregistered donors. Women are the largest sellers of organs. In India, 2000 Indians sell a kidney every year, 96 percent, sell their kidney to pay off the debts.

OTHER REASONS

The approach of migrating to other countries to procure organs is transplant tourism. This method is expensive and quicker to acquire the organs. The personalities of a high standard and well-sourced society engage with transplant tourism for the requirement of donors rather than their relatives, as they do not want their relatives to undergo any difficulties or affliction. In the case of Amit Kumar in 2008, few traffickers acted as a doctor and illegally removed kidneys from people and sold them in Gurgaon to high paying patients. Another instance in 2007, a fisherman was involved in illegal organ trading after losing his business in the tsunami.

Nowadays, Hospitals are involved in organ trafficking. They remove the organs without the approval of the patient. Cases also prevail, where patients get admitted for a particular surgery and get operated for kidney removal. People with less awareness about organ trafficking get prone to malicious advertisements of hospitals. Murdering or making unconscious organs is not uncommon.

The prime weakness for the curb of organ trafficking is diabetes. India is one of the countries with the highest diabetes affected patients. Severe diabetes eventually leads towards kidney transplantation and non- availability heads towards the black market. Nearly 772 million people are experiencing diabetes.

The rate of diabetes is increasing by 12-18% in urban and 3-6% in rural, over the last 30 years. To overcome people needs to keep them active and prevent obesity. Minors are restricted from donating organs or tissues before attaining majority but in certain exceptional circumstances, the donation is permissible. Likewise, in the case of *Strunk vs Strunk*[1347], an insane boy was allowed to donate his organs to his brother who was critically ill though he was unable to give consent. Therefore recognizing the organ donation of minors and insane persons will satisfy the supply level and slightly reduces the chances of organ trade.

[1347] [1969] SW.2d 145, 445 (**Court of Appeals of Kentucky)**

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Implementing bountiful methods is not rewarding but, every plan must be able to curb the practice, so to vanquish the organ smuggling from further occurring, The government should form a group to create awareness among people about brain death and organ donation. It is essential to enlighten the poor and illiterate people and make them donate organs.

PROBLEMS FACED THROUGH ORGAN TRAFFICKING

Benefits attained through organ trafficking are very minimal and experienced by limited people. The organ traffickers are the only benefited people, while the country, donors, and recipients suffer enormous difficulties. One of the prime issues is financial exploitation. The victims receive only half of the actual promised payment. The price of the organ differs from person to person based on wealth, necessity, etc. Secondly, the issue is the surgeries are not taking place in hygienic and cleaned areas with proper medical equipment. These illegal acts usually take place in either vehicle or warehouse. Due to unclean-lined and unhygienic troubles, the recipients or even the victims are prone to several infections. To evade from remunerating more money to the specialized physicians, the traffickers appoint young nephrologists. As these Nephrologists are with less experience, it may sometimes lead to medical complications. The middlemen involved in transportation are unhygienic because of which the organs or tissues become prone to infections or viruses and may cause disease or even lead to the death of recipients. The problems prevail even after the transplantation, the post-care treatments, is essential to make the organs function flawlessly. For kidney transplantation, the cost of dialysis is high, so many declines to take treatment, or some may take it for a short duration. Improper post-care treatment leads to complications or death.

LOOPHOLES PRESENT IN THOA ACT

The economy of various products is down juxtaposition to organ trafficking ascribable to the loopholes existing in the THOA Act. The Indian Parliament is necessary to make amendments in ensuing areas to reduce organ trafficking in our country. To prevent organ commercialism, only the near relatives mentioned in section 2(i) were permitted to donate organs by the act. The ambiguity is allowing the wife as a legal donor because any two persons can pretend to be married and prepare a forged certificate. There are many people in the poverty line, people ready to bluff for money. Benefaction of organs under love and affection was granted in a case by the Supreme court which even allows the poor to donate organs for the rich; permitting donation under love is a facile way for traffickers to accomplish the illegal trade.

The commitment of Indian hospital administration and government in the declaration of brain death is merely skipped. Proper infrastructure and medical equipment for organ transplantation are lacking in most of the hospitals. The trade between buyer and seller is justified as a good by the medical social ethos and the medical establishment willing to accept commercial organs and ready to terminate a successful cadaver recuperation program without proper grounds. These defects in the act will decrease the transplantation rate and enhance the black market.

To avert the organ trafficking the THOA formed an authorisation committee to ensure the transplantation between donor and donee out of love and affection is genuine but, the committee has not disclosed any of the information about legal or illegal transplantation to the public. Disclosing to the public about the statistics of transplantation will make society aware of smugglers. The relationship between donor and donee and about the transplantation can also be a path to control the smuggling so that any objection by the public can be considered and make a way out for illegal practice.

According to the THOA act Organ retrieval committee, i.e. NGO is not recognized by the act. The NGO plays a major role in the transplantation of cadaver organs. By appointing a counsellor of their fund to convince the near relatives for donation. This helps in increasing the supply and fills the gap between demand and supply, thereby a way to stop organ trade so, recognizing NGO in the statute is essential.

Enforcement agencies like the police cannot arrest traffickers without a warrant as it is a non- cognizable offence. This is one of the ambiguities present in the act, offences like organ trafficking take place with utmost secrecy and if the crime comes to light the police must make an immediate action to stop it or else the offenders cannot be captured so it is essential to issue power to take immediate action by making the offence cognizable, Another ambiguity present in the act is the punishment which is very less strict, It should be more severe as these traffickers play with the life of the human body.

The parliament must make an amendment that covers every existing loophole in the act and shut the doors for organ trafficking in India.

GLOBAL STATISTICS

The demand for organs is intensifying day-by-day. Living tissue needs to be cooled when the blood supply reduces, then transplanted for implantation within a limited period to the recipient.

ISSN: 2581-6349

- In the UK every year nearly 900 people become organ donors but unfortunately nearly 6000 people wait for appropriate organs.
- In the US approximately 5500 people are brain-stem-death donors, but currently, 122,592 patients are in a waiting position for organs or tissues.
- In India annually around 1.5 lakh people are admitted due to road accidents, and end their life by brain death. The adversity of 2 lakh kidneys, 50,000 hearts, and 50,000 livers is needed for transplantation in India every year.

The international organ trade, the global community raised Asia as the hub of organ trade. Worldwide the illegal organ traders are named as "organ hunters", they are the major players in the illegal buying and selling of human orgasm and tissues. Many countries have activated new legislation to halt the crime.

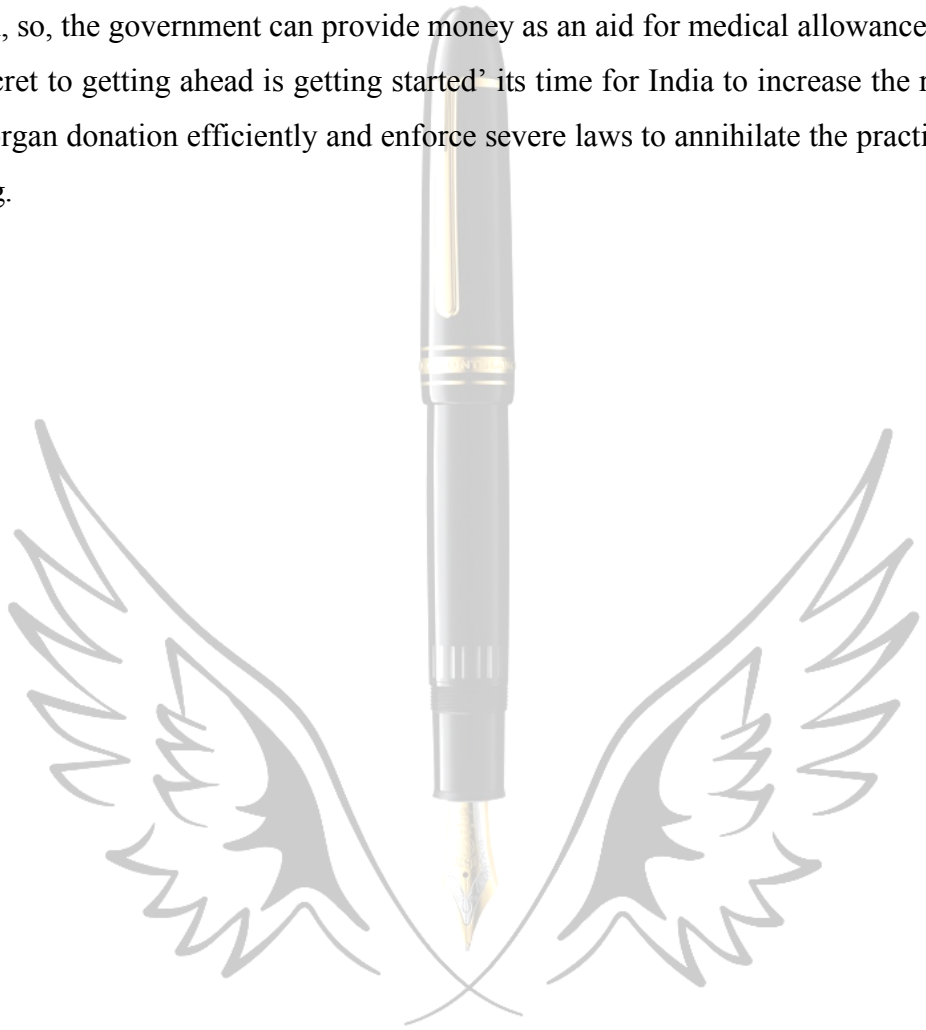
The Declaration of Istanbul on Organ Trafficking and Transplant Tourism (DoI) Turkey (2008). Compared with the previous international guidelines, the Declaration of Istanbul can be viewed as an important way forward toward a clear stand by the international physician community against transplant tourism.

CONCLUSION

The legitimate medical practice of transfer of organs turned to illegal practice affecting every country's reputation despite the presence of various laws and units from prevailing. To vanish the path and eradicate the system, our Indian Parliament must enforce fair, favourable, and austere laws and rectify the loopholes prevailing in the THOA Act. The restraining of transplant commercialism will be satisfied with the presence of strict rules. Crossing of borders and traveling overseas must be permitted only for legitimate purposes, frequent examinations need to be held to ensure no illegal activities are transpiring. The respective state governments should create a team to locate the places where organ trafficking takes place and make the appropriate decision with the consent of the state to suspend the action. One essential step to prevent the poor people from falling prey to the trafficker is fostering awareness about organ donation and revealing the unknown facts of illegal organ donation. The transplantation of cornea is roughly 45,000 annually while the need for corneas is 100,000, from this, it clearly explains that much transplantation is in waitlisting due to less supply, to suffice the gap between demand and supply, the government needs to tap the backlog of brain dead people and promote organ donation. Encouragement of near relatives for the transfer of cadaver organs is

a crucial element for satisfying supply. Many countries like the USA, UK have implemented various proposition to increase the supply of organs, in Singapore, it is legal to pay the donors, while in India the act prohibits only the transfer of money from recipients as the act is done in good faith, so, the government can provide money as an aid for medical allowance.

'The secret to getting ahead is getting started' its time for India to increase the resources to promote organ donation efficiently and enforce severe laws to annihilate the practice of organ trafficking.



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LAW AND SOCIAL TRANSFORMATION: MADRAS DEVADASIS (PREVENTION OF DEDICATION) ACT, 1947 AND THE SOCIAL CHANGES IT FUELLED

- **MALLIKA TEWARI**

ABSTRACT

The presented paper deals with the "Social transformation fuelled by the Madras Devadasis (Prevention of Dedication) Act. The main objective is to study how this Act directed attention towards negative impact of Victorian values in the Indian society and shows how those values are detrimental for Indian traditional arts. The paper also talks about 'religion vs. morality' and how instead of respecting the religious sentiments, the legislation stereotyped all devadasis as prostitutes. This paper also deals with caste-based segregation within the devadasi system. The paper also examines the efficiency of the act in uplifting underprivileged victims of the devadasi system.

INTRODUCTION

The Madras Devadasis (Prevention of Dedication) Act (also known as the 'Tamil Nadu Devadasis (Prevention of Dedication) Act' or 'The Madras Devadasi Act') was enacted on 9 October 1947. This act made it illegal to dedicate girls to Hindu temples and gave devadasis the legal right to marry.

A 'Devadasi' or 'Devaradiyar' means "servant of God". These women were dedicated to God, thereby considered to be given in marriage to God, meaning that they could not marry any 'mortal'. The girls who become Devadasis are dedicated to the goddess Yellamma, who is otherwise known as Renuka, Jogamma, or Holiyamma. They are known by names such as – *Maharis* in Kerala, *Natis* in Assam, *Muralis* in Maharashtra, *Patras* in Odisha, *Devalis* in Andhra and *Jogatis* in Karnataka.

HISTORICAL BACKGROUND:

The Devadasi system can be traced back to the 7th century, in the southern India during the period of the Cholas, Chelas, and Pandyas. Most *Puranas* contain reference to this system. Renowned Chinese scholar Hiuen Tsang also mentioned those girls leading religious processions, playing music, offering flowers to the Deity throughout the day at the famous Sun Temple of Multan in Sind. Their references were also found in some of the Indus Valley

findings. For instance, according to Sir Mortimer Wheeler the bronze figurine of 'The Dancing Girl' depicts a temple dancer[1348]. This is a reference to Devadasis. The system was more prevalent in the peninsular region of India, as compared to the Northern India.

During the ancient period they were well treated and respected, and held a high social status in the society. It was common for them to be invited to be present at or initiate sacred religious rituals. They enjoyed prosperity along with the flourishing temples and empires.

With transition of India into modern times the practice of Devadasi succumbed to cultural traps. The period of fifth-sixth centuries A.D. is said to mark the end of ancient and the beginning of medieval phase in the Indian history[1349]. From this period, certain economic factors played a decisive role in paving the way for new social and political structure[1350]. Their once regal status was bogged down in caste discrimination and poverty. Over the course of time their services shifted from Gods to earthly gods and lords like priests, kings, feudal lords and rich men. Devadasis became more of sex slaves and child prostitutes who are dedicated to temples when they are as young as four or five years old. Poor parents saw this practice as a means of income, so they pushed their young daughters into this profession, thinking that the man who buys them might provide for their livelihood.

Once the girl attains puberty, her parents inform the community, which in turn helps them find a landlord or someone wealthy to "take" the girl. The man, in return, takes care of the financial needs of the family, partially or fully, as long as he uses her for sex. Apart from this, there are other reasons for example: In case of Mudamma, her parents vowed to dedicate their first child to Huligamma, if it were a girl. This is a common practice when there are no sons in the family. Also, if the girl's family had some property, a marriage to the Deity would ensure that the property stays within the family[1351].

Almost all of these girls are Dalits, with a majority belonging to the Madiga and Valmiki castes, two of the most underprivileged castes in India. These women, who were once considered sacred, were not allowed to enter temples. What started as a holy practice became a vicious cycle, because a devadasi mother is supposed to sacrifice at least one of her daughters or face

[1348] *Devadasis,* SHODHGANGA, (August 19, 2019, 10:45 AM). https://shodhganga.inflibnet.ac.in/bitstream/10603/72215/14/14_chapter%208.pdf

[1349] D.D. KOSAMBI, AN INTRODUCTION TO THE STUDY OF INDIAN HISTORY 317, (2nd edition 1975).

[1350] R. N. NANDI, RELIGIOUS INSTITUTIONS AND CULTS IN THE DECCAN 13, (1973).

[1351] Umashanker Kalivikodi, *Devadasi- An exploitative ritual t*hat refuses to die, THE HINDU, (Aug 19, 2019, 11 AM) https://www.thehindu.com/news/national/devadasi-an-exploitative-ritual-that-refuses-to-die/article19821606.ece.

the wrath of their deity[1352]. To end this agony the 'Madras Devadasi (Prevention of Dedication) Act was brought into force in 1947.

INFLUENCE OF VICTORIAN VALUES AND PROPOSITION AND ENACTMENT OF THE 'DEVADASI ABOLITION BILL'

The bill that became this act was 'Devadasi Abolition Bill'. Many Devadasis opposed the bill stating that they didn't consider themselves to be prostitutes. What they asserted had a point; by 1947, the way a Devadasi was treated was based on their caste; Devadasis from higher castes enjoyed royal status, they were still treated like their medieval counterparts. On the other hand, Devadasis from lower castes fell into the shackles of the illicit. The westerners had generalized the concept of 'Devadasi'. Rather than taking a studied approach, they generalized the devadasi culture to immoral trades without considering the religious aspect involved in it. Commercial prostitution has been present in India, just like most parts of the world since ages, and it should not be linked to the group of devadasis, just because they share a few similarities to brothel lifestyle, their origins differ a lot. Even in vernacular languages devadasis and prostitutes have been considered to be different professions. There have been no evidences of them being called prostitutes in other vernacular references.

Dance has always been an important part of Indian heritage, and devadasis were the torch bearers of such an ancient art by combining it with religion. Devadasis were women dedicated to Temples, whose sacred position was later degraded in society because of loose morals of their patrons. When Dr. Muthulakshmi Reddy proposed the devadasi abolition bill to the Madras Legislative Council in 1930[1353], some devadasis objected to the bill because they considered themselves to be learned artists rather than prostitutes. This objection was a clearly showed that not all devadasis existed as vulnerable damsels, but had the privilege to be highly learned in their art form.

Thus, we come to know that amongst their community Devadasis had opposing views regarding the 'Devadasi Abolition Bill'. Many believed that since the draft bill (Devadasi Abolition Bill) was introduced in the pre-independence era (1930), it did not take into consideration the religious values attached to this practice. In the nineteenth century, issues such as sati, child marriage, and widow remarriage were heavily discussed in public debates

[1352] Indrani Nayyar-Gall, *How 10,000 Devadasis live their lives in Karnataka,* TIMES OF INDIA (Aug 19, 2019, 12:10PM) https://timesofindia.indiatimes.com/city/bengaluru/sexual-servitude-to-the-gods/articleshow/63660465.cms.

[1353] Bindu S. Rao, *Dr. Muthulakshmi Reddy, the Devadasis, and the Events that shaped Post-Colonial Bharatanatyam*, 9 IJSER 774, 775 (2018).

and judicial processes. The South Indian society had mixed opinion about the devadasi system, and reform movements influenced by Victorian values were prominent. These movements critiqued many Hindu social and religious practices, one of them was the non-conjugal sexual relationships of devadasis with men.

In the 1890s, Indian "reformers" started a 'social purity movement' that dislodged the devadasis from their social space, and labelled them as a morally inferior and fallen woman. This movement also came to be known as the anti-nautch movement. The word nautch is an Anglicized form of the Hindi word 'nach', which means 'dance'. Devadasi dance was sometimes referred to as 'Tanjore Nautch', and eventually the term nautch denoted any genre of public dancing by a female[1354]. The "anti-nautch" movement began in South India to confine all females in the service of the home and nation. The restriction of women's lifestyle choices as per Victorian societal norms also resonated deeply with indigenous Brahmanic patriarchy. By the 1920s, the anti-nautch movement had reached its apex.

During this time Ragini Devi, a missionary from London stepped into the scene to educate Indian women regarding importance of arts like dance, singing which were considered impure according to the western 'Anti-nautch' movement. Many higher caste Devadasis joined this movement stating that they are fighting to keep the art alive. But for the Legislative Council the main concern was the deteriorating conditions of the less fortunate Devadasis.

Mutthulakshmi Reddy proposed the first 'Devadasi abolition bill' to the Madras Legislative Council in 1930. But the 'Devadasi Abolition Bill' was passed only during the premiership of O.P. Ramaswamy Reddiyar's Congress led Government on 9 October 1947. Periyar E.V. Ramasamy was instrumental in getting the bill passed, owing to the strong protests from some Devadasis he suggested that the 'Devadasi Abolition Bill' be introduced only as a Private Bill and not a Public Bill. In this way, the Tamil Nadu Devadasis (Prevention of Dedication) Act was passed in 1947.

According to the act it extends to the whole of the state of Tamil Nadu. The words 'Tamil Nadu' was replaced by 'Madras' by the Tamil Nadu Adoption of Laws (Second Amendment) Act, 1969.

[1354] *Social Reform and the Disenfranchisement of Devadasis,* ACCELERATED MOTION: TOWARDS NEW DANCE LITERACY IN AMERICA,(Aug 20, 2019, 8:40 AM) https://acceleratedmotion.org/dance-history/bharatanatyam/social-reform-and-the-disenfranchisement-of-devadasis/

However, this act led to huge outcry among some artists as it blatantly declares dancing by a woman in any procession of a Hindu Deity as unlawful. As per the Section 3(3) of the Madras Devadasi Act, 1947[1355] :-

" (3) Dancing by a woman, with or without kumbhaharathy[1356], in the precincts of any temple or other religious institution, or in any procession of a Hindu deity, idol or object of worship installed in any such temple or institution or at any festival or ceremony held in respect of such a deity, idol or object of worship, is hereby declared unlawful."

Also, in the Act more emphasis is given to forms of worship rather than prostitution (The word is mentioned only twice). This gave rise to opinion that this was a part of Anti-nautch propaganda. Many folk artists found this to be a pro-western move.

Also the act only prescribes punishment for the girl who has become a Devadasi and the people who abetted this act under section 4(1) :-

"4. (1) Any person having attained the age of sixteen years who after the commencement of this Act performs, permits, takes part in or abets the performance of any ceremony or act for dedicating a woman as Devadasi or any ceremony or any act of the nature referred to in Section 3, sub-section (2) , shall be punishable with simple imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both.

Explanation: The person referred to in this section shall include the woman in respect of whom such ceremony is conducted".

The Act has no provision for punishment of the male patrons who abuse the girls and under whose pressure the Devadasis are forced to provide sexual favours. In reality, the women coming from the tradition were dedicated to temples as children and put in a place where they had to follow certain mode of life. It was the male patrons who were sometimes abusers of the sacred system and who escaped unpunished, but, the term 'Devadasi' has come to represent a woman with loose morals.

IMPACT OF MADRAS DEVADASI (PROHIBITION OF DEDICATION) ACT ON THE SOCIETY:-

When the act came into force it was met with mixed reactions. Artists were condemning it by drawing similarities with the Anti-nautch movement. Also, since section 3(3) of the act declares temple dancing unlawful it met with heavy criticism. They said that the act deals with only one

[1355] Tamil Nadu Devadasis (Prevention of Dedication) Act, 1947, *Tamil Nadu Act 31 of 1947 (India)*
[1356] Kumbhaharty = *puja, worshipping the god through chants and prayers.*

ISSN: 2581-6349

facet of the tradition of Devadasi, it does not take into consideration the religious sentiments attached to it. Thus, this act prompted the artists to tackle the anti-nautch movement. The consequence of this had a profound impact, it brought a Cultural Renaissance. Experts in different artforms came to the realisation that they have to try hard to keep the artform from getting extinct. Many artists started touring various parts of the country; teaching budding dancers, musicians, painters; and thus, propagating the religion of art. This is also considered to be the start of gender neutrality in artforms. Men performing arts was usually frowned upon but during this time only men could perform without the fear of being labelled a prostitute.

'Madras Devadasi Act' is also one of the first acts in India which deals with prostitution. This act in a way brought a change in people's opinion regarding rights of a prostitute. It gave a new outlook regarding equality of rights. By taking action for their betterment it established that no matter what profession one belongs to law is equal for everyone. This act is also one of the very few acts which was enacted keeping in mind the condition of devadasis who were pushed into prostitution. It also set new examples since it dealt with a religious issue, implying that law is above religion and if religion exploits a person then that person should have a legal remedy.

This Act also dealt with the theme of caste discrimination. When the bill was introduced some Devadasis (mostly upper-caste) opposed it by saying that not all devadasis are prostitutes and that it was a problem only concerning the lower strata. But, by preferring betterment of lower caste devadasis it made sure that everyone's voice is heard and that serving and striving for advancement of weaker sections is one of the primary objectives of law.

Madras Devadasi Act, 1947 also inspired other state legislatures to pass acts to protect the rights of people who were trapped in such religious shackles. Following acts were passed after the Madras Devadasis Act :-

- Bombay Protection (extension) Act, 1957
- The Karnataka Devadasis (Prohibition of Dedication) Act, 1982
- The Andhra Pradesh Devadasis (Prohibition of Dedication) Act, 1988

One of the negative impacts of the Madras Devadasis includes stereotyping of all the devadasis. As mentioned earlier since this tradition began as a pure and sacred way of worshipping Lord many women still practiced that form and hence were not related to prostitution at all. They argued that they were not being given right to practice their religion. Also, they had to face social embarrassment because the act failed to distinguish between a devadasi and a

prostitution, outrightly banning it. Ever since the act was passed since practice of Devadasi was banned many women (who were not sex slaves before) entered prostitution.

Though the Madras Devadasis Act led to major cultural renaissance it failed to fulfil its objective, which was to curb child prostitution and human trafficking. This is mainly due to lack of Government initiatives. Also, the compensation amount given to the victims is meagre, the promised help hasn't reached many. According to National Human Rights Commission there were 4,50,000 devadasis in India in 2013. Another commission led by Justice Raghunath Rao revealed that there are about 80,000 devadasis in just Andhra Pradesh and Telangana. The pension amount promised to them was Rs. 5000 however, its execution by Karnataka State Women's Development Corporation has been haphazard[1357].

In the case of Vishal Jeet v. Union of India and Ors[1358], 1990 the petitioner filed a writ petition under article 32 of the Constitution of India by way of public interest litigation seeking directions for :-

(i) inquiry against police officials under whose jurisdiction the malady of forced prostitution, Devadasi system and Jogin traditions were flourishing and
(ii) for rehabilitation of the victims of this malady.

In this case the three judge bench headed by Justice Pandian held that :-

(i) The Advisory Committee should go deep into devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.
(ii) The malady of prostitution is not only a social but also a socio economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.

This case threw light on how the Act is still not properly implemented and how the State Government has a lacklustre approach regarding help to be provided to young girls who are pushed into prostitution.

RECOMMENDATIONS

[1357] *Elusive pension pushes devadasis into distress,* THE TIMES OF INDIA, (Aug 19, 2019, 4:30 PM) https://timesofindia.indiatimes.com/city/bengaluru/Elusive-pension-pushes-devadasis-into-distress/articleshow/34700042.cms
[1358] Vishal Jeet v. Union of India and Ors, (1990) 2 SCR 861 (India).

In my opinion the Madras Devadasi Act of 1947 was an Anglophilic way of looking at Indian culture. The act generalising Devadasi practice as prostitution is like comparing *mangalsutra* to a necklace. The religious sentiments were not taken into consideration. Instead of banning the whole tradition they should have banned the part where girls are given to male patrons for money, because the practice has more to it other than that.

At the time when anti-nautch movement was at its zenith such a legislation was controversial move. It was discouraging for artists, especially dancers and singers. Also, the act declares temple dancing as unlawful, but it was a common way of celebrating festivals and praising the lord. They did not consider how it was a sacred practice before human morals were corrupted. Also, the original Devadasi culture (without the prostitution part) was successful in providing eminent personalities in the field of dance and music. These include Bharat Ratna awardee M.S. Subbalakshmi and Padma Vibhushan Balasaraswathi. These artists were born to Devadasi mothers and yet they were known for their devotional songs.

The act does not talk about rehabilitation for girls who were pushed into this system, even though majority of these girls and women belong to lower-income group. The act has no provisions regarding punishment for the men who us devadasis as sex slaves. The situation needs a better solution for the perpetrators of the crime to be punished rather than innocent girls and their poverty-stricken families. This bigotry of having to prove a woman's chastity to men in order to be respected is a drawback. Men who avail and some times force these services are not put under the same scanner as women. Stringent action should be taken against such people. There is no improvement in the condition of devadasis because the real culprits, the men who buy them, are let free. Also, the punishment prescribed for abettors is nominal (6 months imprisonment or Rs. 500 fine). Such a punishment leads to no deterrence.

CONCLUSION

The Madras Devadasis (Prevention of Dedication) Act of 1947 declared the practice of Devadasi unlawful. The act sparked pro-dance movements and gave rise to the issue of respect for traditional forms of arts. This act represents the impact Victorian societal values had on the Indian legal system and how it blended with Indian patriarchy. Irrespective of whether they were involved in flesh-trade or not, there was a blanket ban on all devadasis.

The act puts the whole blame on women, even though some of them have been forced to be devadasis due to family or traditional pressure. The men who exploit them managed to escape unscathed. It was yet another effort to separate women from the field of arts by questioning their morality. The opinion of devadasis on this Act was heavily dependent on their caste. This

signified the deep-rooted caste discrimination system in religious activities. Devadasis from upper caste have still managed to protect the sanctity of this profession, they were not pushed into sex-trade. However, underprivileged women from lower caste had to bear the brunt of moral degradation of aristocracy.

On the social front the legislation irked artists and launched debates regarding the significance and purity of Nautch (dance). It brought many artists together and India went through a cultural roller coaster. On the legal front, it failed to make any impact because of loopholes like no punishment for the male patrons and trivial nature of punishment fails to make an impact. Absence of proper rehabilitation facilities for the devadasis also undermined the efficiency of this Act. In this way the Madras Devadasis Act impacted the Indian society.

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IMPACT OF RELIGION IN LAW MAKING

- REHAN AHMAD & PRAKHAR AGRAHARI

A CHALLENGE

Religion is considered as the most basic element of man making; it is the base of human life, which does not always mean to follow a belief or to perform a ritual, but to follow an ideology of life which helps people to establish a connection with the divine. Followers of a religion follow a certain type of living, perform certain rituals and abide by the laws of the particular religion. These laws of religion often clashes with the laws of the country or the state as the laws of the religion are often interfered by the laws of the country and the country can compel the person not to follow that law of the religion. When religion enters the boundary of law, it is on the people to follow their religion and are compelled not to break any law of the country. Law and religion are intertwined and before the concept of state, there was religion and its duties. In ancient times, where there was no concept of democracy and state, religion was playing a vital role in maintaining law and order at different parts of the world.

Legal history is connected to different civilizations and its development over time and has a wider context of social history. Historians of the 20th century studied thoroughly and viewed the legal history in a much more contextualized manner. They scrutinized legal institutions as a complex system of rules which change, adapt, resist or promote certain aspects of civil society. By analyzing on going cases or settled cases, historians began to analyze legal institutions, practices and procedures which gave us a more complex picture of law and society. India is a country of diversity and religious tolerance which is established both in law and customs. Religion has always been a part of Indian society, almost every individual associate themselves with a religion. According to the Indian census, 80% of the individuals are Hindus, 13.4% are Muslims, 2.3% are Christians and 1.4% are Sikhs.[1359] The very basic reason of India being such a huge diverse country is assimilation and social integration of religions brought to the region by traders, travelers, immigrants, and even invaders and conquerors.John Hardonin his book 'History of Religions in India'has said for the Hindus who welcomed all the religion and gave equal respect that "The most significant feature of current Hinduism is its creation of a non-Hindu State, in which all religions are equal."Buddhism and Jainism are considered to be the continuations of Shramana traditions, while modern Hinduism is a continuation of the

[1359]Religion, Census of India 2001, Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, Government of India.

Vedic tradition. In ancient time India had two philosophical thoughts; the Shramana religion and the Vedic religion, which existed side by side for thousands of years. These traditions were mutually influential.

India is a secular and religious tolerantstate, The Indian constitution declares the country to be a secular republic state and it must uphold the right worship and propagate any religion freely but with reasonable restrictions for the sake of morality, law and order. The right to freedom of religion is a fundamental right as well. Indian citizens have been tolerant to every religion; however inter-religious marriage is not practiced in many parts of the country, there has been a sharp hike in religious disputes and other religious conflicts that are political rather than ideological in nature.

India is proclaimed as a "sovereign socialist secular democratic republic" state in the preamble. The word secular was added into the preamble in the 42nd Amendment Act of 1976 which commands for the equal treatment and tolerance of every religion. India is not a religious state i.e. it does not have an official state religion; it gives the right to practice, preach, and propagate any religion. It was held in ***S. R. Bommai vs. Union of India***[1360], that secularism was an integral tenet of the Constitution. According to Indian constitution right to freedom of religion is a fundamental right and it also suggests Directive Principle, a uniform civil code for its citizens. However this has not been implemented until now. The Supreme Court ***in PannalalBansilal v State of Andhra Pradesh, 1996***[1361]held that the enactment of a uniform civil code all at once may be counterproductive to the unity of the nation, and only a gradual progressive change should be brought about.

Many religious communities govern themselves by their own personal laws. Personal laws exist for Hindus, Muslims, Christians, Zoroastrians, and Jews, Buddhists, Jains and Sikhsfor legal purposes follow Hindu personal law. Brahmoism is the only Indian religion that has been covered under secular civil law starting from Act III of 1872.

Law and Religion connectivity

Religion is an essential element of human life; Rituals, worship and other activities are principal organizers of social life. Law and religion are two interconnected dimensions of human survival, two linking sources and systems of value and vision that exist in all human societies, irrespective of time, place, and culture. Law and religion, Justice Harry Blackmun

[1360](1994) 3 SCC (Jour) 1.
[1361](1996) 2 SCC 498.

once wrote, "are an inherent part of the calculus of how a man should live" and how a society should run.[1362] The contents of legal and religious systems, of course, can differ dramatically over time and across cultures; at points, they can converge or contradict each other. But these two systems are always present.[1363]To assimilate this contact, one must move beyond the positivist notions of law and the privatalist notions of religion that tend to overpower the modern West. Among many scholars today, law is considered simply as a body of rules and statutes planned to administer society. Religion is considered simply as a set of doctrines and trainings made to guide one's conscience and religious society. By these definitions, law has no place in the domain of religion; religion has no place in the system of law.

Such ideas of law and of religion are too thin for us to see how these two scopes and sciences are related. Observed in its widest terms, law contains of all norms that govern human conduct and all activities taken to frame and respond to those norms. Such norms embrace moral commandments, statutes made by state, family rules and regulations, commercial conducts, communal customs and various other social rules. Even viewed in narrow aspect, institutional terms, law comprises of more than simply the state rules. On the one hand, law is the collective activity by which specific norms are framed by legitimate authorities and represented by persons subject to those authorities. The procedure of formulation of law includes legislating, adjudicating, administering, and other conduct by legitimate representatives. The procedure of legal representation involves obeying, negotiating, litigating, and other conduct by legal subjects in reply to those norms.[1364] On the other hand, plentiful institutions also the state are often involved in this social activity of law formulation and representation. The customs, rules and procedures of churches, colleges, clubs, corporations and other non-state associations are just as much a part of a society's legal system as those of the state.

Similarly, religion cannot be summarized as simply to personal belief or ecclesiastical action. Observed in its widest terms, it embraces all beliefs and actions that bother the ultimate origin, gist, and aim of life, of existence. It involves the answers of man's heart, soul, and mind to exposure, to transcendent values, to, what Rudolf Otto once called, the "idea of the

[1362] Harry A. Blackmun, Foreword, in The Weightier Matters of the Law: Essays on Law and Religion ix (John Witte, Jr. & Frank S. Alexander eds., 1988) [hereinafter The Weightier Matters].

[1363] Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion (1993); John Witte, Jr., A New Concordance of Discordant Canons: Harold J, Berman on Law and Religion, 42 Emory L.J. 523 (1993), reprinted in The Integrative Jurisprudence of Harold J. Berman 99 (Howard O. Hunter ed., 1996).

[1364]Harold J, Herman, Law and Revolution: The Formation of the Western Legal Tradition 4-5 (1983); 2 Herman Dooyeweerd, A New Critique of Theoretical Thought 298-330 (D.H. Freeman & W.S. Young trans., 1969); Jerome Hall, Comparative Law and Social Theory 78-82 (1963).

holy."[1365]Observed in narrow aspect institutional terms, religion embraces faith, cults, set of rules, and confessional communities.[1366] A faith expresses the accepted set of beliefs and values regarding the ultimate origin, meaning, and aim of life. A cult describes the suitable rites, rituals, and ways of worship and dedication that give expression to those beliefs. A set of rules and regulations defines the suitable individual and social habits of those who own the faith and practice the cult. A confessional community explains the group of persons who follow and live out this faith, cult, and set of rules and regulations, both on their own and with fellow believers. By this explanation, a religion can be very traditional or new closely narrowing or loosely scattered, atheistic or believers, polytheistic, or monotheistic**.** Important thing to see is that religion contains beliefs and the social articulation, application, and explanation of those beliefs.

The Veiled Alliance: Law and Religion

Close relations among law and religion have been comprised and continually changed from the beginning of time. As indicated by regular strict law – a law driven from a confidence in God or in divine powers – ethical quality and legitimateness are installed in religion. Sacred law defines a space for human decisions and legal circumspection in the verbalization of a celestial divine order. Such a characteristic strict crystal of law – noticeable in the works of philosophical masterminds in various religions, for example, St Augustine, Thomas Aquinas and Maimonides – has not exclusively been a regulating marker of a decent confidence and an upright conduct, yet in addition the outright rule for dutifulness and defiance to human-made law.

Prodded by post-medieval science and the justification of law as science, natural law, as unmistakable from what has stayed as religious natural law, has been secularized, especially since the fourteenth century ad. In a steady procedure, which was engraved, inter alia, by the sixteenth-century Copernican revolution, trailed by such rationalizations of confidence as in seventeenth-century Descartes and Kant's ways of thinking of the eighteenth century, religious ethics and religious law were recreated dependent on human awareness and objectivity. While the significance of religious faith was recovered as a major aspect of human experience,

[1365]Rudolf Otto, The Idea of the Holy: An Inquiry into the Non-Rational Factor of the Idea of the Divine and Its Relation to the Rational (2d ed. 1950).
[1366] Leonard W. Swidler, Human Rights in Religious Liberty From Past to Future, in Religious Liberty and Human Rights in Nations and Religions vii (L.W. Swidler ed., 1986).

questions revolving around the presence of God were set apart as special and isolated from the routinely discerning undertakings of humankind. Subsequently, human law and religion were recognized from each other. Whichever human lawful categories we develop, they are essentially a matter of our own morality and cognizance.

The fractional separation of law from religious dicta and its development as a 'self-sufficient' proficient field have framed law as a decision setting. Accordingly, a concept of divine sovereignty, an earthly scared religious ruling authority, was supplanted by an idea of the mainstream state's power. Especially during the seventeenth century and onwards, the latter was envisioned as a total of individual wills embedded in authoritative allegorical relations. Although religious institutions could have been isolated from the state through different institutional arrangements, which may significantly change starting with one nation then onto the next, religious identities and virtues of religious faith have remained solidified in state law and its lawful belief system. Henceforth, an additional reasoning underlying this volume is that any comprehension of modern law should deconstruct an envisioned separation among religion and modern state law.

These genealogical aspects of religion in law and law in religion that have been clarified above are not logically requested in a direct trustworthiness of teleological modernity. Rather, they are complementary in any historical period, notwithstanding some noteworthy change in the intimacies of law, religion and power in different historical periods.

Role of religion in defining Human Dignity--- Source of Human Rights

At a time when human dignity is being dishonored in innumerable forms in societies throughout the world, often in the name of religion, It is vital that we re-emphasize this significant value and, more importantly, assert it in our daily lives. All religions identify human beings as primarily equal, whether this is understood as a result of their status as children of God (Judaism, Christianity, Islam), of their indicator of the Divine (Hinduism), or of their mutual nature and desire for happiness (Buddhism). Respect for human dignity is an essential principle of all religions. With that equality comes as a belief that all humans deserve a simple level of respect and dignity, regardless of their background.

This principle rules out inequality amongst people on the grounds of race, ethnicity, ancestry, socio-economic status, gender, or disability; a growing number of people believe it also rules out inequality on the grounds of sexual orientation. If seen confidently, the principle of equivalent dignity demands for respect for all human beings, even with the cultures or lifestyles

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that are most alien to us. Recognition of the equal worth of all is essential in constructing a world community of wholeness and peace in this age of globalization.

Since respect for human life and dignity is important to all religious societies, it also supports the freedom of thought and expression, which must be recognized as a fundamental principle of religion. As it is very well said "It is in accordance with their dignity as persons-that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility-that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom." [1367]The significant characteristic of a human being is the ability to think, analyze and to express the thoughts and feelings in words or by other means. To chain the freedom of thought and expression is to cut off the root of a person's humanity; it is to trim the essence of being human. However with the freedom of religion and conscience, it is seen that some religious leaders and institutions have, for reasons of culture or politics, failed to identify this. Today all major religious societies support this freedom also as an inalienable human right. The defense of civil liberties is a religious as well as a civic obligation.

Every religion states that a human's relationship with the Almighty or the sacred must be liberally chosen; it is the outcome of a personal assessment that cannot be forced from without. While some spiritual leaders and institutions have not satisfied this principle, it is, nonetheless, implied in the very fundamentals of religion. Genuine religious commitment can develop only out of a personal commitment that is willfully made.

In modern times, even in those societies that have had hesitations historically about this principle, the overpowering majority of leaders and devotees of all major religions firmly assist the liberty to make a willful choice of whether and how to improve one's relationship with any religious tradition or with none, identifying such liberty as an undeniable right and a vital foundation for an honest religious commitment.

Religion doesn't simply establish a significant wellspring of present day human rights; it additionally comprises a specific philosophy in present day patriotism and law. Mostly since the nineteenth century, patriotism has used religion for its political purposes. Through lawful orders country states have confined strict legends to unite a national ethos. In view of the reality that they are sociopolitical powers that include and reflect solid human wants and desires,

[1367]Second Vatican Council, Declaration on Religious Freedom, 2

religion and nationality were entwined to merge a political system that assembles individuals with various interests towards what might be seen as a typical open objective.

In this cutting edge period law is commonly considered as the essential wellspring of social control. As needs be, an inquiry is constantly placed into the connection between laws from one viewpoint and religion from other, then again that what is the degree to which law may appropriately be utilized to uphold religious values? This inquiry, which conveys with it a large group of other auxiliary inquiries, is critical one in the domain of different parts of constitutional laws. Roscoe Pound, the leader of the American school of sociological jurisprudence, has described the process as follows:

The major agencies of social control are morals, religion, and law. In the beginning of law these are not differentiated. Even in so advanced a civilization as that of the Greek city-state the same word is used to mean religious rites, ethical custom, the traditional course of adjusting relations, the legislation of the city, and all of these looked as a whole; as we should say, including all these agencies of social control under the one term which we now translate law.[1368]

A more relevant example for adherents to the Judaeo-Christian tradition than Pound's Greek city-state would be from the Israel of old Testament days where the law, the Torah, was the religion.[1369]

As a result of propelling secularization, the important inquiry currently identifies with the fundamental association, assuming any, between strict qualities and the substance of law. The discussion on this inquiry was revived more than twenty years back by a lecture delivered by Lord Devlin entitled *The Enforcement of Morals*[1370] which attacked certain jurisprudential assumptions of the *Report of the Committee on Homosexual Offenses and Prostitution* (the Wolfenden Report)[1371].

CONCLUSION

The centrality of religion in modernity will as a major challenge that surpasses issues of violence and terrorism. The vision show and contend for the interaction between religion as a comprehensive and dynamic transnational wonder and modernity that is both opposed by,

[1368] POUND, SOCIAL CONTROL THROUGH LAW 18-19 (1942).
[1369] See, BERMAN, THE INTERACTION OF LAW AND RELIGION 24 (1974).
[1370] Devlin, *The Enforcement of Morals* (Maccabean Lecture in Jurisprudence of the British Academy 1959). It has been noted that the current debate between utilitarianists and moralists is ''a carbon copy of that earlier dialogue, a century ago, between John Stuart Mill[On liberty(1859)] and Mr. Justice James Fitzjames Stephen [*Liberty, Equality, Fraternity (1859)].*'' LAW AND MORALITY – A Reader 1 (1976).
[1371] Report of the Committee on Homosexual Offenses and Prostitution, Cmnd. 247 (1975).

established and created through religion. Law is a significant field wherein these persuasive associations have been trans historically comprised. The standard story of secularization has harmed our comprehension of both law and religion by rendering each tremendous to the other. Despite what might be expected, the various chronicled associations, the proceeding with basic equals, or more all the genealogical connections among law and religion propose new pathways for investigating the equal importance of these two basic classes and the pertinence of both for the understanding of modernity. Law and religion the two of them try to establish or if nothing else outline human awareness and conduct in all circles of private and public activity. They are for the most part wellsprings of rule making, settling and execution. The two of them insert dutifulness and commitments, authority, establishment and lawful belief system as establishments of their upkeep and predominance dependent on a severe structure of orders. They are both induced through composed and oral intergenerational in some cases transnational writings that are enforceable through specialists and are enforceable to definitive relating and elective hermeneutics. The comprehensive explanatory and disciplinary pretensions of both law and religion are moderated by the presence and constant interaction of multiple systems.

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DOMESTIC VIOLENCE: A BURGEONING MENACE IN TIME OF COVID-19 PANDEMIC

- **PALAK PANDEY & ANANT VIKRAM SINGH**

ABSTRACT

"Domestic violence: The dark truth of the society."

A woman gets married then leaves her house and parents to go and stay with her husband, all she asks in return is respect and safety, but unfortunately there are many women for whom this is just a dream. The adage "there is no place like home" stands a myth. Women are subjected to violence and abuse in their matrimonial homes which make their lives miserable. This inhumane practice now raises alarm, there has been a horrifying global surge in the cases of domestic violence because since last few months the world is at standstill under nationwide lockdown to prevent and slow down the transmission of novel Coronavirus disease (Covid-19). The lockdown has exacerbated the risk of violence and created a worrisome situation. There exist constitutional safeguards which form the pillar of justice and assure security to the vulnerable but utter heedlessness make all the laws go in vain as the cases are left unreported due to social stigma, major dependency, and non-availability of platforms or resources.

It is regrettable to witness a mammoth catastrophe that has pushed gender concerns out of the focus. The growing everyday menace now stands aggravated during the sinister pandemic due to lack of protocol. The present article will address all the issues raised above and will talk about the measures taken by the governments at Central and State level to control the situation of domestic violence before it turns into another pandemic. It also sheds light on the guidelines of the Hon'ble Court to curb the violence and also suggest some realistic measures to help the victims.

Keywords - Domestic Violence, Abuse, Covid-19 (lockdown), Law enforcement.

INTRODUCTION-

"There is one universal truth, applicable to all countries, cultures and communities: violence against women is never acceptable, never excusable, and never tolerable."

- United Nations (former) Secretary-General, Ban Ki-Moon

Domestic violence is a serious human right violation, it is gender based violence where a power is misused by a male to dominate or gain control over his spouse. The term domestic violence is used in many countries to refer to intimate partner violence. It is a pattern of coercive control

and not simply an argument that one person exercises over other. Abusers intimidate, manipulate, terrorize and often use physical, psychological, sexual violence (marital rape), emotional insults, and economic deprivation as a way to dominate the victims. The violence is perpetrated by, and on, both men and women. However, most commonly the victims are women. Globally, 1 in 3 women worldwide have experienced physical and/or sexual violence by an intimate partner or sexual violence by any perpetrator in their lifetime. But most of this is intimate partner violence.[1372]

Domestic violence in our country is rampant and many women face it every day in some form or the other. According to the Crime in India Report 2018, published by the National Crime Research Bureau (NCRB), a crime is recorded against women in India every 1.7 minutes and a woman is subjected to domestic violence every 4.4 minutes. Majority of cases (31.9%) against women are registered under cruelty by husband or his relatives.[1373]

The violence against women constitutes a violation of their human rights and fundamental freedoms under Article 14, 15, and 21 of the Indian Constitution and also impairs the enjoyment of these rights & freedom. Article 14[1374] gives equal rights to women as that of men, Article 15[1375] prohibits discrimination of any kind on basis of sex, and Article 21[1376] protects the life and personal liberty of an individual impliedly; women have full power to live their life without any intrusion in their personal liberty. Domestic Violence is also recognized as a specific criminal offence under section 498-A[1377] of the Indian Penal Code. This section deals with cruelty by a husband or his family towards a married woman with punishment for three years of imprisonment.

Also, a major law **'The Protection of Women from Domestic Violence Act 2005'** was enacted by parliament which came in force on 26th October, 2006 to curb the violence in domestic household and protect the interest of women.

LEGAL PROTECTION UNDER THE ACT:

According to sec.2 (a) of the said act the aggrieved person is any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any

[1372] COVID-19 And Violence Against Women What The Health Sector/System Can Do, WHO (Apr. 7, 2020) https://apps.who.int/iris/bitstream/handle/10665/331699/WHO-SRH-20.04-eng.pdf.
[1373] 1, Crime in India 2018, XII (2018) https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf.
[1374] IND. Const. art. 14.
[1375] IND. Const. art. 15.
[1376] IND. Const. art. 21.
[1377] IND. PENAL CODE § 498A (1860).

act of domestic violence by the respondent. The act seeks to cover all women who live together in a shared household, related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.[1378] Domestic relationships involve persons belonging to both sexes and include persons related by blood or marriage. The wife, sister, widows, mothers are all entitled to get legal protection under the Act.

Women in live-in relationship are also protected under domestic violence act, given they fulfill the four conditions as mentioned by the Supreme Court in the case of *D. Velusamy*[1379] and must have lived together in shared household as per sec.2(s) of the domestic violence act. The act has a retrospective effect and covers all cases committed before the enactment of the law.[1380]

- Procedure To File A Complaint

The ability to report the cases of domestic violence is a universal right; a complaint can be made by any person of the society. According to Sec.4 "the information is to be given to the protection officer by the aggrieved or any person who has reason to believe that an offence of domestic violence is being committed; such person will be exempted from civil/criminal liability for giving information in good faith". The officer who has reported the case shall first check that the case must fall under Sec.3 of the act which defines domestic violence. He also has the duty to inform the aggrieved about the rights and services available to her under the said act[1381].

- Against Whom The Complain Can Be Filed

As per the act, respondent can be 'any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner'.[1382] This section does not exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provision of the act though not specifically mentioned.[1383] No restrictive meaning is given to the term 'adult male or relative'; insinuating that the act also covers female relatives as well as minor under its umbrella.[1384]

[1378] Protection of Women from Domestic Violence Act, § 2(f), (2005).
[1379] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[1380] V. D. Bhanot v. Savita Bhanot, (2012) 3 SCC 183.
[1381] Protection of Women from Domestic Violence Act, § 5, (2005).
[1382] Protection of Women from Domestic Violence Act, § 2(q), (2005).
[1383] Sandhya Wankhede v. Manoj Bhimrao Wankhede, (2011) 3 SCC 650.
[1384] Hiral P. Harsora v. Kusum Narottamdas Harsora & Ors., (2016) 10 SCC 165.

MAJOR FACTORS ASSOCIATED WITH DOMESTIC VIOLENCE:

The continued existence of domestic violence is morally indefensible. It affects the women's well being, deteriorating their physical as well as mental health. Women who have been physically or sexually abused by their partners report higher rates of a number of health problems. For example, they are 16% more likely to have a low-birth-weight baby. They are more than twice as likely to have an abortion, almost twice as likely to experience depression, and, in some regions, are 1.5 times more likely to acquire HIV, as compared to women who have not experienced partner violence.[1385] Domestic violence affects women across the life span from sex selective abortion to forced suicide. It leaves them in a state of trauma from which it gets really difficult to move on in life.

The psychological mindset that 'the marriage is a sacrament' and women has to do anything to keep up the marriage leads to the more number of cases of domestic violence as the victims do not step forward to raise their voice against it and are reluctant to lodge any complaint. They fear their marriage may fall apart, or they may be subjected to more violent incidents. According to the NFHS study, "52 percent of women and 42 percent of men believed that a husband is justified in beating his wife".[1386] A woman resigns her fate to the never ending cycle of enduring violence and discrimination as a daughter, a sister, a wife, a mother, a partner, a single woman in her lifetime. This non- retaliation by women coupled with the absence of laws addressing women's issues, ignorance of the existing laws enacted for women and societal attitude makes the women vulnerable. The reason why most cases of domestic violence are never reported is due to the social stigma of the society and the attitude of the women themselves, where women are expected to be subservient, not just to their male counterparts but also to the male relatives Till the year 2005, the remedies available to a victim of domestic violence were limited. The women either had to go to the civil court for a decree of divorce or initiate prosecution in the criminal court for the offence punishable under Section 498-A. In both the proceedings, no emergency relief is available to the victim. Also, the relationships outside the marriage were not recognized. This set of circumstances ensured that a majority of women preferred to suffer in silence, not out of choice but of compulsion.[1387] People in society

[1385] Global And Regional Estimates Of Violence Against Women, WHO, 2 (2013) (https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf;jsessionid=68CBCF66E25642B543AE310BFD0064B1?sequence=1.

[1386] National Family Health Survey 2015-16, International Institute for Population Sciences, 514 (2017). https://dhsprogram.com/pubs/pdf/FR339/FR339.pdf.

[1387] Bhartiben Bipinbhai Tamboli v. State of Gujarat, (2018) SCC Online Guj 19

often treat it as a private matter, but human rights framework provides a tool to challenge this mindset and relabel it as a collective problem that society as a whole must address.

➢ Key Factors:

- Lower level of education- When people are not well educated, they have orthodox thinking, where they accept ideologies of male sexual entitlement and lower status of women, and consider patriarchy the only system acceptable in the society. Husband tries to control his spouse in the relationship by hook or by crook, ignoring & denying the fact that women are as equally important and powerful as men.
- Antisocial personality disorder- Recent data suggest that personality disorders, especially antisocial and borderline, are strongly related to the manifestation of violent acts.[1388] When the person witnesses the violence at early age they think it is acceptable and they further continue it without thinking of the consequence. The fundamental personality dimensions that increase the risk of violence are, impulse control, affect regulation, threatened egotism and narcissism and paranoid cognitive personality style.[1389]
- Excessive/Harmful use of alcohol- It must be noted that alcohol consumption do not directly leads to domestic violence rather just escalate the process as the person lose control of his/her behavior and inhibitions after consuming alcohol in excessive or harmful amount. Whereas, its consumption directly affects cognitive and physical function; reducing self-control and leaving individuals less capable of negotiating a non-violent resolution to conflicts within relationships.
- Marital discord and dissatisfaction- The problem of domestic violence arises when there is lack of concord or harmony between the partners because of one's controlling behavior. Man thinks he has control over all the activities of the wife and this may fuel the violence.

There are many more factors which are associated with the offence of domestic violence or can be said that the list is never ending. Though, aggression and lack of self control are major and constant. Problem where women are not treated equally and deprived of their rights is striking high every day. The surge in cases can be seen since the last few months or can be said that there has been an increase in number of domestic violence cases since the lockdown has been imposed to prevent and slow down the transmission of novel coronavirus. In the situation of

[1388] Konstantinos N Fountoulakis et al., Personality Disorder And Violence, NATIONAL LIBRARY OF MEDICINE (last visited May 18, 2020) https://pubmed.ncbi.nlm.nih.gov/18281846/.
[1389] Joe Lowenstein et al., Borderline Personality Disorder And Emotion Dysregulation, BMC, (Oct. 13, 2016) https://bpded.biomedcentral.com/articles/10.1186/s40479-016-0046-0.

ISSN: 2581-6349

pandemic far from taking a break, there is no stop for the abusers. WHO has issued a notice where it declared the surge of cases as a serious concern in the time of pandemic.

COVID-19 AND THE LOCKDOWN:

Covid-19 is a respiratory disease caused by novel coronavirus. It can range from the common cold to more serious illness which may also be fatal. The virus can spread from person to person primarily through droplets of saliva or discharge from the nose released into the air when an infected person coughs or sneezes. Noting that at present, there are no specific vaccines or treatments for COVID-19. Top notch medically equipped countries around the globe are struggling to find its cure. Hence, to prevent the transmission of this fatal virus social and physical distancing is effective. Countries from around the world started taking preventive measures from national quarantine to school closures. The Government of India took the stringent action and imposed a nationwide lockdown on 24th March, 2020 as a mitigative step to control the spread of infection. As the lockdown was imposed all the activities around the country came to halt, everyone was asked not to step out of their houses unless necessary. The businesses shifted to work from home policy, factories were shut and all were compelled to stay inside their homes to keep themselves safe.

Everyone came together as one nation to fight this deadly virus and to stop its transmission by leading a life under lockdown but ironically it had become an arduous journey for few, the survival of some women in the lockdown has become difficult as they are caught up with the abusers and are left with no means to save themselves when they are subjected to violence. Hence, some people in general are not only grappling with the pandemic but are also fighting the monster inside their houses to survive this lockdown.

LOCKDOWN EXACERBATED THE RISK OF DOMESTIC VIOLENCE:

Lockdown was imposed as a distancing measure to control the spread of covid-19; people were encouraged to stay at home. But the motive "Stay home. Stay safe" turned ironic in the context of many women as they have to live in close proximity with the perpetrators of violence. With all the members stuck in houses together 24*7, the victims are now more exposed to violence and many women are being used as tools to vent anger. The lockdown had not just fueled the violence cases but made women more vulnerable to physical and mental harm.

The cases since nationwide lockdown i.e. from 25th March, 2020 have increased tremendously. World Health Organization has reported 60% increase in emergency calls by women in respect to domestic violence. From March to May 311,477 number of complaints were made by

women; which is the highest in a ten year period. In April and May of the total complaint received by the National Commission for Women (NCW) 47.2% were related to domestic violence as compared to the data from January to March which was 20.6%; approximately 586 complaints were just made in the first phase. Talking about the national capital in the second week of April, the Delhi Police recorded a "total event count" of 2,446 that pertained to the "event type: women". Nearly 2,500 women in Delhi called emergency helpline numbers of these calls over 1612 pertained to domestic violence. The rate of increase of domestic violence cases seems exponential.

One way of telling that how lockdown has caused havoc is through newspaper headlines. These make interesting reading; *'**Domestic Violence: another invisible lockdown**'* reads one paper, whereas '***Domestic violence complaints at a 10-year high in India during Covid-19'*** reads another. From the northern part came this telling line: *'**Coronavirus crises: No lockdown for domestic violence'***, on the other hand Bengal reported *'**Domestic violence see a spike in cases**'*. Notably a headline from Vadodara reported: *'**Domestic violence cases rise by 11% during lockdown'***. One in the searchlight of India during phase-1 of lockdown claimed ***'Domestic violence cases up 21% since lockdown'.***

All the headlines from different regions of various newspaper shows that domestic violence amidst lockdown is taking place of shadow pandemic and is emerging as a serious concern. Fueled by social distancing, economic uncertainties, no work, stress and anxiety caused by pandemic, the cases of domestic violence are increasing abruptly. There are heated arguments leading to violence and cruelty. The couples who are married for a long time without any incident of violence are also witnessing domestic violence in the time of lockdown. The disruption of social and protective network and decreased access to services has all contributed to the risk of violence for women. Women have less contact with family and friends who may provide support and protection from violence. The disruption of livelihoods and ability to earn a living, including for women (many of whom are informal wage workers), had decreased access to basic needs and services, increasing stress on families, with the potential to exacerbate conflicts and violence. Also suggested by WHO, as resources become scarcer, women may be at greater risk for experiencing economic abuse.[1390]

If the lockdown continues for 6 months, 31 million additional gender-based violence cases can be expected. For every 3 months the lockdown continues, an additional 15 million additional cases of gender-based violence are expected, Projections show that if violence increases by 20

[1390] Supra 1.

per cent during periods of lockdown, there would be an additional 15 million cases of intimate partner violence in 2020 for an average lockdown duration of 3 months, 31 million cases for an average lockdown of 6 months, 45 million for an average lockdown of 9 months, and 61 million if the average lockdown period were to be as long as one year.[1391] Going by the figures and the data mentioned, this can be inferred that domestic violence is taking the shape of another public health emergency.

According to UNFPA-

- The COVID-19 pandemic is likely to undermine efforts to end gender-based violence through two pathways:
    - Reducing prevention and protection efforts, social services and care.
    - Increasing the incidence of violence.
- COVID-19 pandemic is likely to cause a one-third reduction in progress towards ending gender-based violence by 2030.

The consequences majorly depend on the victim, the age group, the intensity and frequency of the torment that they are subjected to. The consequences will not only affect the victim but will also hamper the nation's growth and productivity. The petrified victims will be left under a constant fear, threat and humiliation as a consequence of an atrocious violence.

➢ Lack of Protocol:

The laws were already in force to protect the victims of domestic violence from the abusers, but looking at the current situation caused by the covid-19 lockdown it was a dire need that a new protocol should had been issued by the government while imposing lockdown. Lack of proper guidelines to officers and shelter-homes had created irksome situation. Social workers, women's organizations and NGOs were left helpless as they could not reach out to the vulnerable in the time of pandemic amidst strict lockdown to provide services.

There are many incidents of domestic violence reported during the nationwide quarantine; one such incident from Chennai is of Parvathi where she was trashed by her husband as she was unable to provide him with alcohol, later ran to the nearest police barricade to seek help. There she asked the officer on duty to take her to the police station but to disappointment she was told by the officer to 'Go home and sort it out, the police and courts are shut for 21 days.' She was left with no means but to live in the trauma that for 21 days she had no measure than to

[1391] Impact Of The Covid-19 Pandemic On Family Planning And Ending Gender-Based Violence, Female Genital Mutilation And Child Marriage, UNFPA, 4 (Apr.27, 2020) https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19_impact_brief_for_UNFPA_24_April_2020_1.pdf.

accept the violent behavior of her husband. Many such incidents occurred as the officers did not had any proper guidelines to deal the cases of domestic violence at the time of pandemic, moreover the police were overburdened with the corona situation which hampered the proper investigation process and without paying proper heed the victims were asked to stay down and sort the situation themselves until the corona situation recedes. They were not provided with protection officer, shelter homes or reliefs as the police were unaware of their duty towards the victims of domestic violence.

THE MEASURES TO CURB THE MENACE OF DOMESTIC VIOLENCE:

The United Nations Secretary-General has urged the governments around the globe to put women's rights in the center of their efforts in fighting coronavirus, which means increasing investment in online services and civil society organizations, making sure judicial systems continue to prosecute abusers. He asked for setting up emergency warning systems in pharmacies and grocery shops, declaring shelters as essential services and creating safe ways for women to seek support, without alerting their abusers.

The Supreme Court along with the High Courts of various states considering the growing number of cases has stepped in to look into the matter. On April 18, the Delhi High Court dealing with the petition of *All India Council of Human Rights Liberties and Social Justice*[1392] directed the Centre and the government in Delhi to hold top-level meeting to deliberate on measures to curb domestic violence and protect the victims during the lockdown. After the order of the Court, the government took effective action and all the ONE STOP CENTERs were asked to get linked with local medical teams, police, and National Legal Service Authority. The Delhi government put in place a protocol to tackle cases of domestic violence during the lockdown: once a survivor reaches out to the helpline, her complaint is taken down and then forwarded to a counselor who is required to establish a phone communication with the victim on account of the lockdown. The counselor is empowered to conduct sessions with the woman and her spouse or family if required. However, in case the woman is a victim of sexual or physical assault, the telecaller is required to inform the police about the case, and assist in filing a First Information Report. The counselor is further required to inform the protection officer Delhi to allow them to file an incidence report.

On the same date, the Jammu & Kashmir high court taking suo moto cognizance of petition for domestic violence case issued a large number of directions to authorities under the Protection

[1392] All India Council of Human Right Liberties & Social Justice v. Union of India & Ors., (2020) SCC Online Del 537.

of Women from Domestic Violence Act, 2005 (PWDVA), particularly referring to the duty cast upon the government under Section 11(a) of the enactment to "take all measures to give wide publicity to the provisions of the law through public media including the electronic and the print media for protection of rights of women who are victims of violence of any kind occurring within the family, and offered a slew of directions including creating a special fund and designating informal safe spaces for women like grocery stores and pharmacies, where they could report domestic violence/abuse without alerting the perpetrators."[1393]

Under the aegis of NALSA, sustained efforts are being made by the State Legal Service Authorities (SLSAs) across the country -

- To provide free and competent legal services to the citizens.
- Legal services at various levels are being spearheaded by NALSA under the supervision of Justice NV Ramana, Executive Chairman of NALSA.
- NALSA, in coordination with the Ministry of Child and Women Development, has issued directions to SLSAs to collaborate with One Stop Centers (OSCs) established in each State for providing legal assistance to the women facing domestic violence issues.
- The focus has been to provide legal assistance as well counseling services to victims and the needy.
- Delhi State Legal Services Authority (DSLSA) is collaborating with Mother Dairy booths, pharmacists and chemists throughout the national capital for information on victims, and has also launched an app 'Vidhik sewa' to deliver legal aid.

It cannot be denied that the measures are not being taken by the Governments to control the situation, but there seems no light at the end of the tunnel. Men do not seem to be scared of the consequences of their act. The cases are rising, leaving victims petrified. The continuous rise in cases after government launched online portal and numbers show many shortcomings. These measures are not adequate and realistic to the rural women. The situation of rural areas is more terrifying as there is no proper means of communication available to them. There is a huge gap between the men and women who have access to cell phones and internet. There are fewer female internet users in India as compared to males; it is almost half of the 258mn male internet population and this high disparity is more evident in rural areas.[1394] Such huge gender gap in the use of technology punctures the measures adopted by the Government and shows the

[1393] In re: Court On Its Own Motion v. Union territories of J&K and Ladakh through Secretaries Social Welfare Department, (Jun. 29, 2020, 10:45p.m.) https://theleaflet.in/wp-content/uploads/2020/04/Suo-Moto-PIL_18042020.pdf.

[1394] India Internet 2019, IAMAI, 6 (2019), https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf.

inability of the rural women to report the violence cases through online portals or newly issued helpline numbers.

Government lacked apathy while imposing the lockdown and did not look for the repercussion which may arise when the victim are locked down with the abusers. They didn't provide any specific guidelines at first to deal with the matter of domestic violence in the time of complete nationwide quarantine. Later the government provided the helpline numbers and the app but had ignored the fact that only 20-25% women in the country have access to the internet or cell phones. There are many cases which are still unreported; this ominous silencing could be regressive and implosive in the long run.

SUBMISSION:

It is the need of the society that the women must be looked upon as an equal sex. The stigma enrooted in the society for a longtime that women are weaker and man are tend to be oppressive has to be broken. The domestic violence incidents traumatize victims for their entire lifetime breaking them physically as well as mentally. The lockdown which was imposed as a preventive measure to keep people safe and to stop transmission of novel coronavirus is turning horrifying and dreadful for the victims of domestic violence as they are not safe within the four walls of their house which was supposed to guarantee them absolute safety. It is worsening the plight of women stuck with the abusers. The stress of confinement, financial constrains and lack of proper platform amplifies violence and the cases have surged shockingly.

A step was taken by the government to send the victims of the violence to the shelter home to provide them with proper care and facilities, here I would like to support the concern that was raised by Ms. Grover, a leading feminist lawyer that "**why it is for a women to leave her house and go live in the shelter home at the time of the pandemic when there are chances that she might get infected with the virus even when she was the victim and the people who are the perpetrators get to live in the house peacefully and left unpunished**?" It should be the abuser who should be sent away, the victim must live with her family and children in peace after what all she had suffered. Government along with NCW and other NGOs should keep a proper follow up of the victims all the time and try to provide fast relief to them. The accused must be directed to provide immediate relief in way of maintenance to the victim for the time being. Administration should keep track of the usefulness of the measures launched; by maintaining record of all one stop centers effectively and must see that the protocols are being followed efficiently. There should be public enlightenment through mass media.

There is a need of provision in law with more pliable remedies to offer within the framework of civil and criminal law, and as said "The Magnitude of the problem is absolutely enormous and that should motivate and mobilize us to take action now."

ISSN: 2581-6349

VIOLATION OF ARTICLE 21 (RIGHT TO SPEEDY TRIAL) WITH SPECIAL REFERENCE TO MILITARY VETERANS (ESMs) AND THE ISSUANCE OF THEIR DISABILITY PENSION

- **DEEKSHITA DAS**

"WE NOT ONLY FIGHT A BATTLE AT THE BATTLE FIELD, BUT WE ALSO FIGHT ANOTHER BATTLE WITH OUR OWN GOVERNMENT." Hence this has been quoted out of empathy towards those disabled and wounded military veterans who have given their life for the protection and peace of the people of their country. Their basic rights have been snatched from them arbitrarily. [1395]

The main problem is that the veterans fight for decades after decades for their disability pension. Either they are completely ignored for their needs or they have to fight a real long fight for their disability pension. Hence their constitutional right to Speedy Trial U/A 21 of the Indian Constitution has been also violated.[1396]

The problem in India are more off practical basis, because in India the laws are available but they are not being applied as they should have been.[1397] Whereas the conditions in U.S.A in comparison to India is much better and up to date. The United States of America respect their soldiers a lot and hence has many protections for them. The researcher would, hence try to find out solutions for this problem leading to indifferent treatment to soldiers thereby, making a comparative study between both the countries.[1398]

Therefore the aim of the research shall be to find ways to uplift the conditions of the military veterans in India, thereby protecting their constitutional rights and providing them a speedy disposal of their cases and the required justice which they deserve.[1399] The research should also aim to make a comparative study of the laws in India as well as that of the laws in United States of America in order to find, where India is lagging behind and whether India needs to liberalise its laws in order to show more respect to the nation servers.

[1395] Anand Patel, Government Fighting its own disabled soldiers over pension claims, (India Today), 31st October, 2018.
[1396] James Jay Carafano, U.N's Disability Treaty won't protect the rights of the Wounded Veterans, (The Heritage Foundation), 24th November, 2013.
[1397] *Ibid.*
[1398] UN Peace Keeping, Peace Keeping Operations, (Indian Army, Government of India).
[1399] *Ibid.*

PROTECTION TO MILITARY VETERANS AS PER INDIAN SCENARIO.

Indian Army has traditionally remained connected to its Veterans and Veer Naris. Respect to our Martyrs, who have given their supreme sacrifice, has always been a part of Indian Army's ethos and culture.[1400] As a consequence of this ingrained value system, the welfare of Veterans and Veer Naris remains an important Key Result Area (KRA) in the Indian Army. Towards this our efforts for the welfare of our ex-servicemen and Veer Naris, have been reviewed and revitalised. DIAV has been re-energized, both in terms of its role and charter.[1401] Today DIAV is a fully functional and responsive organization, which not only addresses the concerns of the Veteran community in a holistic manner, but also looks after the delivery of care and compassion to our Veer Naris. DIAV endeavours to redeem the grievances, especially those related to pension, health care and other entitlements to our veterans/Veer Naris with min delay. Concurrently, the Directorate is looking at the concept of welfare in its broader context to address the aspect of 'expectations and aspirations'.[1402]

Though India has many laws and rules constitutionalised for the military veterans who have given most of their years in service of the country but in practical, they face a lot of problem. The research here is to focus on the Ex-Service Men i.e. the military veterans who have fought and is still fighting decades after decades for their basic necessities of livelihood. The research here would mainly focus on the struggle the military veterans face in their own country for the issuance of their Disability Pension. The veterans claim that apart from fighting a battle with the enemies in the battle field, they again have to fight another battle with their own country's government for a mere amount of money i.e. their disability pension. There are many instances in India, where we have examples of military veterans who are fighting with the government for their disability pension.[1403]

In spite of this scenario in India we have a series of Central Schemes which have an unrecognizable contribution to the issues of the veterans. A list of the schemes for the Welfare and Rehabilitation for the Ex-Servicemen are given below-

1.	Armed Forces

[1400] United Nations Seventieth Anniversary, 70 Ways The UN Makes A Difference, (United Nations), New York, 2015.
[1401] Government of Canada, Programs and services administered by other organizations.
[1402] *Ibid.*
[1403] Veterans Affairs Canada, Comparison to Other Countries.

ISSN: 2581-6349

2.	Raksha Mantri Ex-Servicemen Welfare Fund (RMEWF)
3.	Armed Forces Flag Day Fund (AFFDF) - Financial assistance for treatment of the listed serious diseases.[1404]
4.	Financial Assistance to Institutions involved in Rehabilitation of the Disabled ESM
5.	Modified Scooter Grant
6.	Prime Minister's Scholarship Scheme.[1405]
7.	Reservation for ESM in Central Government posts
8.	Resettlement Training
9.	Reservation in Allotment of Oil Product Agencies under 8% Defence Quota[1406]
10.	Self-Employment Options
11.	Children Education Concession
12.	Other Concessions
13.	Grievance Redressal Mechanism

Protection to Military Veterans in the International Platform.

The United Nations has been at the forefront of the fight for full equality for persons with disabilities, promoting their participation in social, economic and political life.[1407] The UN has shown that persons with disabilities are a resource for society, and has negotiated the first-ever treaty to advance their rights and dignity worldwide: the 2006 Convention on the Rights of Persons with Disabilities, which has been ratified by more than 150 countries.[1408]

[1404] Veterans Affairs Canada, Comparison to Other Countries.
[1405] Legal Service Corporation, America's Partner for Equal Justice, (Legal Services to Low-Income Veterans and Military Families).
[1406] *Ibid*.
[1407] TITLE 38, Veterans' Benefits, Enacted as Title 38, U.S. Code, 2nd September 1958
[1408] Raksha Mantri's Committee of Experts, "Review of Service and Pension Matters including Potential Disputes, Minimizing Litigation and strengthening Institutional Mechanisms related to redressal of Grievances" (Ministry of Defence Report), 2015.

ISSN: 2581-6349

However the UN has a huge contribution to the peacekeeping forces all over the globe. In this peacekeeping operations, India has a considerable amount of contribution to the UN Peacekeeping Forces.

The Indian Army's participation in the UN peacekeeping operations spans a period of 57 years covering 43 UN Missions, in which over ninety thousand Indian soldiers have served in various parts of the world. In support of UN peacekeeping endeavours, the Indian Army has contributed outstanding force commanders, elite military contingents, impartial observers and dedicated staff officers. Their devotion to duty and excellent performance has been widely acclaimed.[1409]

Time and again, India has risked the lives of its soldiers in peacekeeping efforts of the United Nations, not for any strategic gain, but in the service of an ideal. India's ideal was, and remains, strengthening the world body, and international peace and security. India has also offered one brigade group to the UN Standby Arrangement Systems.

Indian troops have taken part in some of the most difficult operations, and have suffered casualties in the service of the UN. Professional excellence of the Indian troops has won universal admiration. India has taken part in the UN peacekeeping operations in four continents. Its most significant contribution has been of peace and stability in Africa and Asia. It has demonstrated its unique capacity of sustaining large troop commitments over prolonged periods.

Presently, India is ranked, as the third largest troop contributor to the UN. The Indian government has honoured its soldiers for gallantry, whilst serving the noble cause of world peace.[1410]

Time and again, India has risked the lives of its soldiers in peacekeeping efforts of the United Nations, not for any strategic gain, but in the service of an ideal. India's ideal was, and remains, strengthening the world body, and international peace and security. While approaching our participation in different peacekeeping operations, we have based ourselves on the basic principles given below: -

- All means for the peaceful settlement of disputes should be exhausted before establishing a peacekeeping operation.[1411]

[1409] *Ibid.*
[1410] Alok Asthana, "It's Time to Openly Talk about the Problems Faced by the Indian Armed Forces", (THE WIRE), 7th November, 2017.
[1411] Press Trust of India (PTI), "Disabled war veterans' organisation writes to Army over disability pension issue", (The Economic Times), 4th July, 2019.

- Peacekeeping operations should strictly adhere to principles of the UN Charter, in particular the principles of full respect for the sovereignty and territorial integrity of States, and non-intervention in their internal affairs.
- Peacekeeping operations should be considered only at the request of the member states involved and should be under the command and control of the UN.
- Resources for peacekeeping activities should not be at the expanse of resources for development activities of the UN.
- There should be no hesitation in ending those operations, which have been overtaken by events or become inconsistent with their mandates.
- It is also important to ensure that the distinction between peacekeeping operations and other activities of the UN, including humanitarian assistance, is maintained at all times.
- The anticipated duration of a peacekeeping mission should be tied to clear objectives and realistic criteria to end the mission and an exit strategy.[1412]

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Countries, which participate in UN Peacekeeping Operations, have to provide not only the military expertise but also have to be politically acceptable. The range of sensitive peacekeeping operations India has participated in is testimony to India's image in the world.

India has always contributed generously to UN demands for peacekeeping. Known for their equanimity and forbearance, Indian troops have proved popular everywhere. The first call came early enough, when India sent troops to Korea to form the Custodian Force (India), which functioned under the Neutral Nations Repatriation Commission headed by Major General (later General) KS Thimayya, DSO in 1953-54. This was a delicate task, involving the repatriation

[1412] Sanchari Pal, "Dear Indians, Here's How we can help Our Disabled Jawans Get their Due", (The Better India), 3rd December, 2016.
[1413] *Ibid.*

ISSN: 2581-6349

of Prisoners of War. This was followed by a stint at Gaza to keep Israeli and Egyptian forces apart.

The largest (and longest serving) contingent was sent to the Congo in 1961. A complete independent brigade group, it helped bring about peace and thereafter enforce it - which involved light to heavy engagements with motley groups beefed up by white mercenary columns. One most cherished compliment came from an adversary. The mercenaries themselves conceded, in later writings, that the Indian contingent's activity curbed their style. Mention was made of a certain tenacity of purpose in combat.

India has sent battalion groups, engineers, medical teams, mil observers and staff personnel to Cambodia, Sierra Leone, Rwanda, Lebanon, Ethiopia-Eritrea, Congo, Sudan and Golan Heights. Observers and staff personnel have made their contributions to the international peace efforts in Central America, Iran, Yemen, Iraq, Kuwait, Liberia, Lebanon, Mozambique, Congo, Ethiopia-Eritrea, Sudan and Golan Heights. After Korea (1950-52) and Congo (1960-63), India again sent a brigade group to Somalia and Congo displaying its resolve to support international community in peace and security issues.

India has also provided able leaders for various missions in General Thimayya in Korea & Cyprus, Lt Gen Dewan Prem Chand in Cyprus & Namibia, Lt Gen Satish Nambiar in Yugoslavia, Maj Gen Inderjit Rikhye in Sinai, West Irian & Yemen, Maj Gen PS Gyani in Yemen, Sinai & Cyprus, Maj Gen V Jaitley in Sierra Leone Maj Gen LM Tiwari in Lebanon, Maj Gen (now Lt Gen) Rajender Singh, SM, VSM in Ethiopia-Eritrea, Lt Gen RK Mehta, PVSM, AVSM, YSM, VSM as Military Adviser to the Secretary General in UN HQ, Lt Gen JS Lidder, UYSM, AVSM in Sudan and Maj Gen Bikram Singh, AVSM, SM, VSM as Divisional Commander in Congo apart from many a contingent commanders.

However the UN has also taken steps in field of protecting the Human Rights of the people. Since the General Assembly adopted the Universal Declaration of Human Rights in 1948, the United Nations has helped to enact dozens of legally binding agreements on political, civil, economic, social and cultural rights. By investigating individual complaints, the UN human rights bodies have focused world attention on cases of torture, disappearance, arbitrary detention and other violations, and have generated international pressure on Governments to improve their human rights records.

But however UN has also sanctioned for a treaty i.e. United Nations' Convention on the Rights of Persons with Disabilities which has right now a controversial stand which claim not to protect the rights of the wounded veterans, but however the supporters of the treaty is hell bound to make it a success.

ISSN: 2581-6349

CONSTITUTIONAL RIGHT TO SPEEDY TRIAL (ARTICLE 21)

The philosophy of Right to Speedy trial has grown in age but its goals are yet unforeseen. Right to Speedy Trail is a concept which deals with disposal of cases as soon as possible so as to make the Judiciary more efficient and trustworthy. The main aim of Right to Speedy trial is to inculcate Justice in the society. It is the human life that necessitates human rights. Being in a civilized society organized with law and a system as such, it is essential to ensure for every citizen a reasonably dignified life. Thus every right is a human right as that helps a human to live like a human being. The very basic purpose for which every state machinery sets up the court system is to award justice to the victims of crimes. The constitution of India imposes heavy duty on the judicial system for providing legal mechanism to deal with problem relating to imparting justice. The setting up an independent judicial system, inclusion of fundamental rights and directive principles of state polices further shows the commitment of our constitution makers in making the judicial system an effective organ of state machinery on which people can rely with trust and hope of justice.[1414]

The right to a speedy trial is first mentioned in that landmark document of English law, the Magna Carta. Article 21 declares that "no person shall be deprived of his life or personal liberty except according to the procedure laid by law." Justice Krishna Iyer while dealing with the bail petition in Babu Singh v. State of UP1, remarked, "Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial' whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings." Right to speedy trial is a concept gaining recognition and importance day by day.

Speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution and any accused who is denied this right of speedy trial is entitled to approach Supreme Court under Article 32 for the purpose of enforcing such right. And this Court in discharge of its constitutional obligation has the power to give necessary directions to the State Governments and other appropriate authorities for securing this right to the accused.

SOLUTIONS AND FUTURE PROSPECTS.

[1414] INDIAN CONSTITUTION ACT, 1950.

We should find ways to uplift the conditions of the military veterans in India, thereby protecting their constitutional rights and providing them a speedy disposal of their cases and the required justice which they deserve. The research should aim to make a comparative study of the laws in India as well as that of the laws in United States of America in order to find, where India is lagging behind and whether India needs to liberalise its laws in order to show more respect to the nation servers.

The objective is therefore to work on the following enlisted issues-

- The Court System Delay in India must be worked upon and the speedy disposal of the cases in such matters should be improved.
- The AFTs decision must be scrutinised and investigated by higher authorities if parties or victims ask for any such appeals.
- Strict Committees and Boards must be set up in order to look into the matters where the military veterans are truly aggrieved by the system and justice should be rendered.
- Comparatively to U.S.A in India also, more departments must be made and Acts must be passed in order to ensure protection of the rights of the military veterans while and after service.
- Since they serve and fight for our motherland, their respect should not be only in papers but also in practicality.
- A vivid comparison should be made between both the countries and try to find out where India is lagging behind in serving the country's soldiers which are the good and positive things that India can adopt from U.S.A in this matter.
- India should adopt the rules and norms mentioned under United Nations' Universal Declaration of Human Rights and ensure the rights of the victims.

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A STUDY OF SURROGACY IN INDIA

-DIKSHA GARG & ANDREW SALDANHA

"To express Choice, Agency, or Control over my own reproductive choices is Not My Place, it is Selfish, it makes me Inferior, it makes me Incomplete, it makes me Un-Woman."

- *Alice Minimum*

INTRODUCTION

The notion and identity of a woman is very closely entrenched with the ability of females to reproduce. All societies, especially one as traditionally oriented as India, often link the "completeness" of a woman with her ability to reproduce. In doing so there is an obvious ignorance of the disabilities a woman may encounter in the process of childbirth and there is an absolute disregard of the autonomy that a woman has over her body. Evidently, there is no single document which recognises reproductive rights, however, on a closer observation one finds that various elements of the reproductive rights are recognised under the ambit of human rights itself. It has been internationally recognised that reproductive rights and health are an intrinsic part of the human rights bestowed to all humans inhabiting the planet.[1415]

"***Reproductive Rights,"*** stipulates, not just the freedom to reproduce and procreate but also recognises the choice of the parent(s), in deciding the method of reproducing. Reproductive rights are basic rights accorded to couples and individuals, to decide, free form discrimination, coercion and violence whether to have children, how often and when to do so, and having access to the means of acquiring necessary information to make a sound decision.[1416] It is thus clear, that while reproductive rights may not be explicit, they are not whimsical either. They are a troupe of freedoms and entitlement that are recognised within the national laws, international laws, and humanitarian laws. The ability to make and execute a *choice*, is thus pivotal to the exercise of reproductive rights.

CHANGING TRENDS OF REPRODUCTIVE RIGHTS

[1415] United Nations Human Rights Commission. Reproductive Rights Are Human Rights A Handbook For National Human Rights Institutions available at :- https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf

[1416] Para 7.3, International Conference on Population and Development (ICPD) Programme of Action.

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Political actions and claims surrounding the reproductive rights focus mainly on contraption, abortion, sexual violence, and maternal mortality, to mobilize the cause of reproductive rights. While these are essential components to reproductive rights, one cannot ignore the aspects of infertility and other such obstacles which may hinder an individual or couple from conceiving in what is identified as the "natural way." In a global study based on 47 demographic groups and various health surveys conducted in lesser developed countries, it was found that nearly 186 million married women were infertile.[1417] Another study points out that nearly 8%-10% couples in the world face issues of infertility, thus showcasing that infertility is a serious issue.[1418] The recognition of infertility as a medical issue affecting the lives of millions across the globe instead of veiling it under the guise of social stigma, has changed the course of the application of reproductive rights. Even from a domestic perspective, the trends of infertility in India is staggering. With its wide diversity in terms of proper access to healthcare and the differences in lifestyle the problems of infertility in India varies in tribes and communities etc.[1419]

The problems surrounding infertility gave rise to exploring the new areas of conceiving and parenting by means of adoption and surrogacy. Relatively, adoption is considered a more socially acceptable means of parenting than opting for surrogacy, which brings to light various psychological, physical, and moral challenges. This article discusses the various legal and ethical issues surrounding the concept of surrogacy in India.

SURROGACY IN INDIA

In India, as is the case everywhere else, there is a monumental pressure on females and young couples to bear children to ensure the continuance of their bloodline. This excessive pressure coupled with the biological inability to reproduce, gave momentum to the rapid growth of the Assisted Reproductive Technologies [ART].[1420] There are various forms of ART such as artificial insemination, In-vitro fertilization, embryo transfer etc. One of the most popular forms of ART, in India, is by way of surrogacy.

[1417] Nachtigall R.D. [2006], "International disparities in access to infertility services", Fertility and sterility
[1418] Katole A, Saoji AV. Prevalence of primary infertility and its associated risk factors in urban population of central India: A community-based cross-sectional study. Indian J Community Med [serial online] 2019 [cited 2020 Jul 8];44:337-41. Available from: http://www.ijcm.org.in/text.asp?2019/44/4/337/270816
[1419] Ibid.
[1420] Sama Team [2007], "Assisted reproductive technologies in India: implications for women", Economic and political weekly.

Surrogacy comes from the latin term "surrogatus" meaning a substitute, i.e., acting on behalf of another. It is a highly scientifically advanced method, which enables couples and individuals to have genetically linked children, if they are unable to reproduce naturally. Surrogacy is viewed as one of the more efficient ways to overcome problems of biological infertility. Ideally, surrogacy is identified as an agreement between the carrier and the intended parent(s), whereby the carrier accepts the sperm of the male and agrees to carry the foetus to full term. The detailed definition for the same, comes from the ART bill of India, which goes as follows: *"an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gamets belong to her or to her husband, with the intention to carry it to the term and hand over the child to the person or persons for whom she is acting as a surrogate."*[1421]

The surrogacy industry is India has seen a rapid and lucrative growth in India, so much so, that India was considered to be the surrogate capital of the world, claiming for it to have become an industry worth Rs.25,000 crore.[1422]It is necessary to note that, while surrogacy and ART in India have thrived, there has been a lag between the medical facilities and access available via the government and via the private sector in India. This lag creates a sense of inequality. While surrogacy is propagated in terms of a profit-making business, the socio-legal notions of surrogacy remain highly controversial. While India legalised surrogacy in 2002, identifying the widespread presence of the surrogate market in India, we have yet to develop a sound legislation which serves the needs and protects all parties involved in an arrangement of surrogacy.

TYPES OF SURROGACY

To understand the nature and consequences of the various enactments it is necessary to identify the kinds of surrogacy as envisaged by the Law Commission Reports.[1423] The commission identified two essential kinds of surrogacy – Commercial Surrogacy and Altruistic Surrogacy.

[1421] Yashomati Ghosh, "Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma", Vol. II.Issue 1, 2011 Journal of Law Teachers of India (83 to 92) at 85.
[1422] Law Commission of India, 288th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to A Surrogacy," (August, 2009).
[1423] Ibid.

By the terminology, it is effectively clear that commercial surrogacy operates as a financial transaction affording a monetary compensation to the surrogate mother while altruistic surrogacy stems out of love and does not have any monetary compensation involved.

LEGISLATIVE JOURNEY OF SURROGACY

The judiciary has defined the transaction of commercial surrogacy as a "form of surrogacy in which the gestational carrier is paid to carry a child to maturity in her womb."[1424] It is interesting to note that, the court in the instance case not only recognised the concept of commercial surrogacy but also identified the irregularities and risk that the parties in a surrogacy agreement my be faced with in presence of the various irregularities. By shunning the notion of surrogacy by terming it as simply a "money making racket," the Indian society has put surrogate mothers at a great risk. In subsequent cases as well the court has pointed out the need to develop a sound legal framework to ensure safety and health of surrogates.[1425]

In line with the *obiter dicta* and *ratio* of the court, the **ART Bill of 2008** was developed under the able guidance of the Indian Council for Medical Research[ICMR].[1426] The bill of 2008 was scrutinised and deliberated upon thoroughly to formulate the **ART Bill of 2010**,[1427] which was further revised into the **ART Bill 2013**.[1428] However, the Bill of 2103 was marred with controversies.

As per the bill of 2008 and consequent bill of 2010, surrogacy was defined as a contractual relation. Under section 2(cc), the bill defined surrogacy as "a contract between person or persons availing of assisted reproductive technology and the surrogate mothers."[1429] The bill

[1424] Baby Manaji Yamanda v. Union of India (2008) 13 SCC 518
[1425] Jan Balaz v. Anand Municipality and Ors. AIR 2010 Guj 21.
[1426] Indian Council of Medical Research, The Assisted Reproductive Technology (Regulation) Bill – 2008 (Draft) Ministry of Health and Family Welfare, Government of India, available at:- https://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf . (Last visited July. 5, 2020) [hereinafter Draft Bill 2008]
[1427] The Assisted Reproductive Technologies (Regulation) Bill – 2010 (Draft), Ministry of Health & Family Welfare, Govt. of India, New Delhi & Indian Council of Medical Research New Delhi, available at:- https://main.icmr.nic.in/sites/default/files/guidelines/ART%20REGULATION%20Draft%20Bill1.pdf. (Last visited July 5, 2020) [hereinafter ART Bill, 2010]
[1428] Assisted Reproductive Technology (Regulations) Bill 2013, (Tentative Draft) Date Jun. 27, 2013, Legislative Department, Ministry of Law & Justice, Government of India available at:- https://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf [hereinafter ART Bill 2013]
[1429] Supra, at 13

presented in 2013, the process of surrogacy was made by placing government as the middleman. A professional surrogate will be hired by a government-recognised ART bank and not private fertility clinic. The questions pertaining to the monetary award for surrogacy would be negotiated by the government. Another greater ignorance incorporated in the bill was the exclusion of the homosexual and live-in couples. India being recognised as a "surrogacy capital," is bound to be inviting foreign couples and of all genders and sexual orientations and this reality ought not to have been taken away from the legislation itself.[1430]

As mentioned earlier, in the exercise of reproductive rights revolves around dimensions of choice and that of consent. The act of 2010 laid emphasis on an "informed choice" but the act of 2013 instead focuses on a written consent only. The process of surrogacy is mentally and physically challenging for a surrogate mother and the intended parents as well. An informed consent implies that the nature and consequences are communicated to both parties and the same has been articulated by them. Owing to the special circumstances of surrogacy a proper and informed consent is pertinent. The bill should have thus, focused on a written and informed consent.

The act of 2013 was later followed by the reports of the law commission and the **Surrogacy Bill of 2016**.[1431] The bill of 2016 clearly and explicitly banned surrogacy for commercial purposes, citing that "selling of a womb" or "renting of a womb" is highly derogatory and morally questionable. Instead, the notion of an altruistic surrogacy was allowed, by way of which only a "close/near relative" who already has a child of her own, would be allowed as a surrogate mother. No expenses other than some necessary medical fees would be supplied to the surrogate mother. The bill additionally, provided a criterion to choose a surrogate mother. Lastly, the bill provided that only couples suffering from problems of infertility and have been married for at least a period of five years, would be allowed to opt for surrogacy as a viable choice.

[1430] Vidya Krishnan. "India's draft surrogacy Bill bars homosexuals, live-in couples"**.** Livemint [serial online] 2013. Available at: www.livemint.com/Politics/ZsS2zs7KvqHlk4FCguW0EN/Draft-surrogacy-Bill-bars-homosexuals-livein-couples.html \

[1431] The Surrogacy (Regulation) Bill – 2016 (Draft), Ministry of Health & Family Welfare, Govt. of India, New Delhi & Indian Council of Medical Research New Delhi, available at:- https://www.prsindia.org/sites/default/files/bill_files/Surrogacy%20%28Regulation%29%20Bill%2C%202016.pdf (Last visited July 5, 2020) [hereinafter, Bill of 2016]

As must be apparent, the bill was not a solution to the requirements of surrogates and intended parents in India. It was rather restrictive and intrusive. The exercise of reproductive rights must be a private and informed matter, but the dictation of state on such norms violates the sense of privacy entitled to individuals. The debates surrounding the ban of commercial surrogacy became another controversial area, which will be discussed further on.

Certain contentions of the bill were dealt with in the **Surrogacy (Regulation) Bill, 2019**.[1432] The bill of 2019 allowed any "willing" woman to pose as a surrogate. The bill also significantly relaxed the five-year limit placed on couples, stating that was an unreasonably long duration. Thirdly, the bill aimed to set-up a regulation board "National Surrogacy Board" at the centre and state level. However, the bill maintained that commercial surrogacy would be banned in India. Additional limitation was placed, allowing only Indian couples, Indian-origin married couples and Indian females could be a part of the surrogacy agreement.

The consecutive legislations and guidelines made, showcase that while India desires to establish a framework, much is left to be desired. For instance, the mandate of the bills to ban commercial surrogacy, rather than attempting to regulate it, is not just ignorant but also violative of various constitutional norms and international guidelines.

CONSTITUTIONALITY OF THE SURROGACY (REGULATION) BILL, 2019

The constitutionality of any piece of legislation depends upon the legislative competency of the parliament and whether the legislation stands in violation of any fundamental rights or constitutional norms. The bill in its present forms fails to meet the necessary requirements to maintain constitutionality. The provisions of banning commercial surrogacy especially contradicts the provisions of equality, freedom and life as established in the constitution.

Article 14[1433] of the constitution of India mandates equality, irrespective of caste, creed etc. The provisions of the said article allow for a classification to be created, but the said classification must be based on certain criteria and the said criteria must have a nexus with the object of the bill.[1434] The bill however, creates a distinction based on marital status, sexual

[1432] The Surrogacy (Regulation) Bill – 2019 (Draft), Ministry of Health & Family Welfare, Govt. of India, New Delhi & Indian Council of Medical Research New Delhi, available at:- (Last visited July 5, 2020) [hereinafter, Bill of 2019]

[1433] **Article 14** : 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

[1434] Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 9 SCC 1.

orientation and nationality alone. This discrimination in no way suffices the need of regulation of surrogacy in the country as is established in the title of the act. Furthermore, by employing a blanket ban on matters of commercial surrogacy, the bill exposes surrogate mothers to a greater threat of exploitation, which ought to be protected by the said Article. While there is a need to protect the child in the womb of the mother, it is also important to ensure that essential medical and legal facilities if required.

There is an additional arbitrariness included by excluding homosexuals[1435] and couples staying in a live-in relation from the scope of the bill. With the developments brought by legalisation of homosexuality, more thought must be given to create an inclusive framework for the same. It must also be realised that live-in relations are being slowly normalised within our culture and are not a crime.[1436]

By creating an atmosphere of exclusion and claiming that inclusiveness is against our ethos, the bill is in violation of the right to life and dignity as identified under the **Article 21**[1437] of our constitution. In the case of *Maneka Gandhi v. Union of India*[1438], the court has clearly identified that "life," as found in Article 21, means more than mere animal existence. Through the present bill there is a violation of this article by discriminating and shunning one group of people. Additionally, there is not much being done to afford the care of the surrogate mother. By enforcing altruistic surrogacy, the sate is ignoring the mental turmoil and the consequent physiological stress, that a female experiences during and after pregnancy. While it may be true that no amount of compensation can be deemed fit for the birth of a child, the alternative paradigm of the surrogate mother cannot be ignored. The choice of helping another should not be at the expense of herself.

Ever since, the scope of the said Article has been enlarged to include various other rights and freedoms under its ambit. Recently, the court has also identified the right to privacy as a part of the fundamental rights under Article 21.[1439] In line with this, the reproductive rights must

[1435] Surrogacy for Gay Couples is Against Our Ethos: Sushma Swaraj, The Quint, available at: https://www.thequint.com/india/2016/08/24/union-cabinet-surrogacy-regulation-bill-2016-sushma-swaraj-against-our-ethos-commercial-surrogacy (last visited on July 6 2020).
[1436] Devidas Ramachandra Tuljapurkar v. State of Maharashtra & Ors,2015 Indlaw SC 361.
[1437] **Article 21:** Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law
[1438] 1978 SCR (2) 621
[1439] Justice K.S Puttaswamy v. Union of India Writ Petition (C) No. 494 of 2012

also be identified as personal and private rights.[1440] If the consenting adults are wanting to exercise their freedom and right via surrogacy, then the interference of the state is highly questionable.

By allowing altruistic surrogacy, the state may try to champion the cause of ethical dilemmas, however, it puts at-risk all woman who may be willing to act as surrogate mothers. In the history of economical bans, one can easily observe that it amounts to virtually nothing. Prohibition or ban on any notion only propagates it via illegal and unchecked means, which is more dangerous in case of surrogacy. In the past, there have been attempts made to regularize surrogacy, but the widespread nature of surrogacy will diffuse the purpose of any legislation made to restrict the "market" as it exists. Instead of imposing a ban, the state must develop guidelines to regulate surrogacy within the country. It may start by including surrogacy and recognising the need for devising and incorporating medical and legal facilities for all woman involved.

CONCLUSION

Surrogacy has existed in India from times immemorial, in fact one may even find a mention of it in our mythologies and religious texts. Despite this, there is an obvious distaste and stigma against surrogacy within our society. This has caused that ambit of our society to be ostracised in many ways. In the present, the state has a choice to include surrogacy and include it as a whole. Imposition of a ban leaves larger parts for arbitrariness and exploitation which is deeply violative of fundamental freedoms awarded under Part III of our constitution as well as various international conventions.

The exercise of reproductive rights must be viewed above moral and ethical dilemmas as they create subjective grounds for discrimination as is with the case of surrogacy in India. Instead calculation and conclusions must be made on the basis of the realities of the day and requirements of the people of the country. There is no requirement for over-enactments which creates a situation of a surveillance state, there is a need for one comprehensive legislation which ensures inclusivity and sufficiently punishes exploitation.

[1440] Supra at note 21

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THE CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 1977: A WAY TOWARDS REGIONAL COOPERATION ON TRANS-BOUNDARY WATER DISPUTES

- **ANSHU SINGH**

"Water is a common heritage, the value of which must be recognized by all. Everyone has the duty to use water carefully and economically."
-European Water Charter

ABSTRACT

The paper presents perspectives from Asian subcontinent to address the issue of "Transboundary Water Disputes" which are set to increase in near future due to decades of bad water management, overuse, population stress and climate change etc. The shared water resource are mostly governed by specific multilateral agreements / treaties etc entered into by concerned states. However, these agreements do not provide for concrete enforcement mechanism or default liabilities of non compliant state. Furthermore the agreements and treatise are often influenced by asymmetric political power connotations. When it comes to using a water resource, each riparian state wants to build dams, reservoir to achieve maximum utilization from water but ignores its adverse affect on other riparian states as well as the water resource itself. Absence of a dedicated regional institution for settlement of transboundary water dispute is to be noted too.

The paper then explores and discusses key provisions of The Convention On The Law Of The Non-Navigational Uses Of International Watercourses 1977, which is the only global instrument which codifies modern law principles for settling dispute and sharing of an International Shared Watercourse. It also calls for harmonizing existing and future water agreements with the convention to make them more comprehensive by incorporating principles and measures such as equitable and reasonable utilization of water, obligation to not to cause significant harm, fact finding commissions and establishing a joint institution for dispute settlement.

It is argued in the end that the convention ratified or otherwise can provide a way forward towards more peaceful settlement of transboundary water disputes while promoting spirit of cooperation and community of interest among nations with respect to optimal utilization and preservation of shared water resource. The same is necessary of present time and future generations.

Keywords : Transboundary water dispute, Water dispute settlement, Convention on the law of the non-navigational uses of international watercourses 1977, Equitable and reasonable utilization, Principles of allocating shared water, Hydro politics, Hydro-cooperation.

I. INTRODUCTION

Freshwater is a precious commodity and its possession bestows power rendering it as a strategic commodity in geopolitical context. But what happens when there is a shortage of this precious commodity and what happens if the same is being shared between more than one nations. The Middle East, North Africa and South Asia are all projected to experience water shortages over the coming years because of decades of bad management and overuse. By the year 2040, the situation may become worse when whole of Asia, a region shared by world's two most populated countries will face extreme level of water stress.[1441] One of them being India which has already fallen into the high water stress category.[1442] The end result of it all is the inevitable water crisis which gives way to increasing water conflicts and disputes between countries, within countries or communities over access to the water resources.

(A) Transboundary Water Disputes

It is important to understand that water as a global common resource often does not respect national boundaries hence the term 'Trans-boundary Waters' which means any surface or ground waters which are located across boundaries of two or more States.[1443] Approximately 40 percent of the world's population lives in river and lake basins that are shared between two or more countries. There exists 263 transboundary lake and river basins which cover nearly

[1441] Water stress occurs when the demand for water exceeds the available amount during a certain period or when poor quality restricts its use. Water stress causes deterioration of fresh water resources in terms of quantity and quality; see "Understanding Water Scarcity: Definitions And Measurements", Global Water Forum (7th May,2012), available at:http://www.globalwaterforum.org/2012/05/07/understanding-water-scarcity-definitionsand-measurements/

[1442] TianyiLuo and Robert Young (et al.)"Aqueduct Projected Water Stress Rankings."Washington, DC: World Resources Institute, (2015) , available at :http://www.wri.org/publication/aqueduct-projected-water-stresscountry-rankings.;http://www.wri.org/resources/data-sets/aqueduct-projected-water-stress-country-rankings

[1443] Article 1, Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes, 1992.

one half of the Earth's land surface and account for an estimated 60 per cent of global freshwater flow.[1444] In Aisan subcontinent, India's trans-boundary riparian policies affect four countries - Pakistan, Nepal, Bhutan and Bangladesh - on three river systems - the Indus, the Ganga and the Brahmaputra-Mehgna. China's riparian policies affect nine countries to the south - Pakistan, India, Nepal, Bangladesh, Myanmar, Laos, Thailand, Cambodia and Vietnam - on five river systems - the Indus, the Ganga, the Brahmaputra, the Salween and the Mekong. Thus the population, income, and livelihood of millions of people worldwide are interlinked and interdependent.

Where a river passes through several states, each state owns that part of the river which runs through its territory, these are called riparian nations- those nations across which, or along which, a river flows and only they have the legal right, apart from an agreement, to use the water of a river. The upper-riparian nations (out of which water flows) often claim "Absolute Territorial Sovereignty" over waters, typically claiming the right to do whatever they choose with the water regardless of its effect on other riparian nations.. Downstream riparian nations (into which river flows) are affected due to this. These states also claim their right to the "equitable and reasonable utilization" of the transboundary river. They desire a more just approach to allocate the waters and often advocate the principle of "no significant harm" desiring water flow upriver to be preserved in its near-natural state until it reaches their downriver territory.[1445] It is to be understood that management of transboundary waters/ rivers does not take place in a vacuum but rather in a complex political and economic framework. Hence, clash of interest causes friction between the states leading to water disputes.

(B) Hydro-politics and transboundary water as component of National Security

Water along with food and energy now forms part of the 'New Security Agenda'[1446] and term national security is moving beyond territorial and military framework.[1447] Just like oil, it is becoming a source of future conflicts between upper riparian and lower riparian states in a

[1444] See UN Water for Life Decade , Transboundary Waters ; available at : www.un.org/waterforlifedecade.
[1445] Aletta Brady , "Mid river States: An Overlooked Perspective in the Nile River Basin" International Water Law Project (26th September 2016), available at :http://www.internationalwaterlaw.org/blog/category/transboundary-rivers/
[1446]Institute for Defense Studies and Analyses (IDSA) Task Force Report "Water Security for India: The External Dynamics" (2010), p.18
[1447] In 2013 UN Water Analytical Brief - "Water Security and the Global Water Agenda", it was observed that water is in itself a security risk; and acknowledging water insecurity could act as a preventative measure for regional conflicts and tensions. The report said water security could contribute to achieving increased regional peace and security in the long term. See , Harriet Baigas" Water Security & the Global Water Agenda" A UNWater Analytical Brief, United Nations University, (2013), p.1

region. It is used as a leverage to exert pressure over neighboring countries with common water sources. There are instances where upstream nations threaten to cut off or cut off downstream flow as pressure tactics. The case in point is Indus river basin between India Pakistan. India, when decided to go ahead with its pending hydro-schemes and projects on the Indus's upper reaches which falls in its territory, insisted that flow will never be affected. This definitely brought Pakistan under pressure which in turn approached the World Bank under the Indus water treaty.

The exploding population, looming water crisis, poor water quality and management, or increasing risk of floods /droughts due to climate change might cause regional and sub-regional instability and tensions in respect to a transboundary water resource and will inevitably increase water disputes in future.

Presently the trans-boundary water disputes are generally resolved using negotiations, discussions, bipartite agreements and treaties. An analysis of legal architecture of transboundary rivers show that Asia is home to 57 transboundary river basins. Out of this 25 river basins are covered by some sort of wide or partial agreements for their use, management or allocation. However there are 32 river basins which are still a not covered by any basin agreement.[1448] It is important for policymakers to be more aware of possible future conflicts and identify ways to mitigate and avoid the dispute through international water law and international and regional treatise. The paper explores the possible way forward in mitigating future water disputes by adopting The Convention on the Law of the Non-Navigational Uses of International water courses 1977[1449], which has now codified the contemporary principles of allocation of shared water resources between two or more states.

II. THE CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 1977

[1448] United Nations Environment Programme and others, "Atlas of International Freshwater Agreements", p. 51-76.Available at http://www.transboundarywaters.orst.edu/publications/atlas/; also cited inUN Watercourses Convention global initiative, online user guide,"The Legal Architecture for Transboundary Waters".http://www.unwatercoursesconvention.org/importance/the-unwc-global-initiative/(accessed on 15th April 2017).

[1449] Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter UN Water convention), adopted by the General Assembly of the United Nations on (21st May 1997). Entered into force on: (17th August 2014) , See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, and Supplement No. 49 (A/51/49).available at : http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

It was adopted by the United Nations General Assembly on 21 May 1997 for use and conservation of all waters that cross international boundaries, including both surface and groundwater. From the time of its drafting, the Convention took more than 17 years to enter into force on 17 August 2014. It was designed to serve as a framework for more specific bilateral and regional agreements relating to the use, management and preservation of transboundary water resources.[1450] It was also designed to help prevent and resolve conflicts over international water resources and to promote sustainable development. It addresses issues such as flood control, water quality, water pollution and puts an obligation upon states to take measures to protect, preserve, and manage international watercourses and in case of any damage also provides for remedy and compensation.

The UN convention is the only global instrument which codifies modern law principles for settling disputes and sharing of an International Shared Watercourse. It has following principles incorporated, which are also " Pillars " of international law on shared water resources:

(a) Substantive principles :

- Principle of equitable and reasonable utilization
- Obligation to not to cause significant harm
- Duty to cooperate

(b) Procedural principles:

- Duty to exchange information
- Duty to notify
- Principle of Consultation and negotiate.

A) Principle of equitable and reasonable utilization and participation (Article 5 and Article 6)

Article 5 states that basin states shall utilize an international watercourse in an "equitable and reasonable manner" in their respective territories. This duty is further supplemented by putting an obligation on them to use and develop the watercourse in such a way so that they can "optimally and sustainably utilize" it while ensuring adequate protection of the watercourse. Thus the convention lays down the right of the states to utilize the watercourse as well as duty of the states to cooperate and participate in development and protection of the international watercourse. It aims to reconcile conflicting interests across international borders, so as to

[1450] Article 3 of the UN Convention, supra note 9

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'provide the maximum benefit to each basin state from the uses of the waters with the minimum detriment to each."[1451]

The principle have two main elements:

- First it seeks to determine the "lawfulness" of the proposed use of water, by establishing the objective (which should be equitable and reasonable) sought to be achieved by the states.
- Secondly, to determine the reasonableness of use i.e. whether use qualifies as "equitable and reasonable ", and to balance the needs of each state, it takes into consideration various prescribed factors like – geography, hydrology, climate, or historical, social, economic elements in relation with a basin state, dependent population, effect of particular use on the watercourse and feasible alternatives, whether any measures are taken to preserve or develop the watercourse etc.[1452] (as laid in Article 6).

B) Principle to "Not to Cause Significant Harm"

Article 7 "Obligation not to cause significant harm," requires that member states "in utilizing an international watercourse in their territories take all appropriate measures to prevent the causing of significant harm to other watercourse states" and compensate sharing states for any such harm.[1453]

According to Stephen McCaffrey (special rapporteur of ILC draft committee) this is "the most controversial provision" of the Convention, with conflict stemming from the fact that a state may have legitimate uses for a watercourse in its nation that can negatively impact other nations.[1454] For example: upstream State A has not significantly developed its water resources because of its mountainous terrain. The topography of the downstream states on the watercourse, B and C, is flatter, and they have used the watercourse extensively for irrigation

[1451] The concept of limited territorial sovereignty is strongly reflected in the principle of equitable and reasonable utilization , see Article IV of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at the 52nd Conference, Helsinki, Finland, August 1966, reprinted in S Bogdanovic, International Law of Water Resources : Contribution of the International Law Association (1954-2000) (Kluwer Law International 2001) at 89.
[1452] Article 6 , UN Convention , supra note 9
[1453] Article 7 , UN Convention, supra note 9
[1454] Stephen McCaffrey "The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: prospects and pitfalls." World Bank Technical Paper (1998), p.19-21; available at :https://www.unece.org/fileadmin/dam/env/water/cwc/legal/unconvention_mccaffrey.pdf also see " Introductory Note On The UN Convention on the Law of the Non-Navigational Uses of International Watercourses" available at : http://legal.un.org/avl/ha/clnuiw/clnuiw.html

for centuries, if not millennia. State A now wishes to develop its water resources for hydroelectric and agricultural purposes. States B and C cry foul, on the ground that this would significantly harm their established uses.[1455]

C) Duty to Cooperate and Duty to Exchange Information

The duty to cooperate in resolving disputes, or in utilization of waters is reflected in Article 8 of the convention which states that "Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse."[1456]

Article 9 talks about duty to exchange information of readily available data and information on the condition of the watercourse regularly. This helps in enhancing mutual cooperation.

D) Principles of Notification, Consultation and Negotiation

These principles are found under Article 11 to 18 of convention. Accordingly every riparian state in an international watercourse is entitled to prior notice, consultation and negotiation in cases where the proposed use by another riparian of a shared watercourse may cause serious harm to its rights or interest. However, naturally, most upstream countries often oppose this principle.

The aim of these procedural rules are to inform about the proposed project in detail, notify, and respond to the possible effect of such use. The core of these procedural underpinnings is to encourage the transparency of a proposed project and to ensure that it is for maximizing the benefits with no significant adverse effects to the other watercourse states. The ICJ has explicitly supported the view in numerous cases that states are under the obligation to consult and negotiate in the event of any conflict whatsoever in undertaking any project on an International Water Course.[1457]

E) <u>Dispute Settlement and Compensation for Transboundary Harm</u>

Article 33 of the Convention offers mechanisms for dispute settlement between watercourse States, including negotiation, mediation, conciliation. It calls to establish Joint Watercourse Institutions as a forum for dispute settlement by the states. Submission of the dispute can also

[1455] Ibid.
[1456] Article 8 , UN Convention, supra note 9
[1457] North Sea Continental Shelf Cases 1969 ICJ 1, Fisheries Jurisdiction1974 ICJ Rep 3 and Gavcikovo-Nagymaros case 1997 ICJ Rep 7.

be made to an impartial fact finding commission (with one member nominated by each concerned party and one member from different nationality) in case negotiations fail. It also stresses upon adopting arbitration or conciliation to reach an agreement. Where all above alternatives are exhausted or where such intuition is not established, parties can submit their dispute to the International Court of Justice by adjudication.

Article 32 gives locus standi to people natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse. It states that the watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such people,in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.

III. CONCLUSION: FROM HYDRO POLITICS TO HYDRO COOPERATION

There is an optimistic opinion that water, by its very nature, tends to trigger cooperation rather than conflict.[1458] Where earlier it was feared that it would trigger conflicts and wars, now it is seen as an opportunity to bring out peace and cooperation among the world community with respect to water resources. A recent report "Water Cooperation for a Secure World" published by Strategic Foresight Group concludes that active water cooperation between countries reduces the risk of water disputes. This conclusion is reached after examining trans-boundary water relations in over 200 shared river basins in 148 countries.[1459] Despite the complexity of the problems, water disputes can be handled diplomatically. Nations value regional, bilateral and multilateral agreements because they make international relations over water more stable and predictable. However, what is important now is the peaceful settlement of the emerging water disputes which are increasing internationally as well as at national level due to the looming water crisis, climate change and population boom.

There is a consensus among experts that international watercourse agreements between states need to be more concrete, setting out measures to enforce treaties and incorporating comprehensive dispute resolution mechanisms. The Convention on the Law of the Non-

[1458] Peter HGleick"Water and Conflict: Fresh Water Resources and International Security." International Security vol-18 (no.1) (1993) p.79–112

[1459] Strategic Foresight Group Report "Water Cooperation for a Secure World" (2013) ; available at :http://www.strategicforesight.com/publication_pdf/20795water-cooperature-sm.pdf

Navigational Uses of International Watercourses can serve as a potential instrument to realize this need.

The convention promotes entering into multilateral agreements with respect to shared water resources by harmonizing such agreements with the basic principles of the present Convention. It serves as a model blueprint of provisions which can be adopted by states to reach at a more comprehensive and efficient agreement/treaty in accordance with modern principles on shared watercourse. It sheds the age-old principles of absolute riparian rights and promotes more inclusive and peaceful settlement of water disputes based upon spirit of cooperation among states. It highlights the need to approach water resources as a component of "community" and a part of "human security".

Unfortunately the treaty has been ratified by only 36 countries with India, China, Pakistan, Bangladesh, Nepal, Bhutan etc being non-signatory to this convention, remain outside its scope.[1460] The insufficient attention that was paid to the Convention following its adoption have contributed to misunderstanding and low levels of awareness among states and international actors of the Convention's content and value.

However this should not undermine its potential to influence the shared water agreements between states by providing a comprehensive framework to protect and promote the optimal and sustainable utilization of international watercourses for present and future generations. It is only by establishing joint mechanisms, fact finding commissions, regional institutions for dispute settlement and by developing joint measures and procedures for optimally utilizing the water resource, one can move towards "regional integration" and "integrated management of transboundary waters".

[1460] Current status of United Nation's Convention on the Law of the Non-Navigational Uses of International Watercourses and its Entry into Force, refer: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en

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AMATUER BUTCHER-WHAT COLOURS DO THEY REFLECT IN CONSTITUTIONAL SPECTRUM BEFORE PCA

- **MUKESH M.**

1. INTRODUCTION

India is a country of valour. Our customs, tradition, religion and philosophies has left us so many valuable cultures which we are following in gratitude to the legacy of our country. We have provided equal value and dignity to all human being and even non-humans in the country. India is the one country which is the earliest to preach the greatest value of vegetarianism to the world. As early as 1500-600 Isha Upanishads, professed; "The Universe along with its creatures belong to the land. No creature is superior to any other. Human beings should not be above nature. We inherited rich cultures of compassion. Some of few ultra-conservative cultures, we deprived with dignity if the grund norm found them unconstitutional. In our Indian jurisprudential system, there is a field called sports law which is emerging with its brand international conventional commitments to our country. Most of the sports that we play came from the west. But, we ourselves had rich traditional proponents of traditional sports. One of the quite or not much spoken about sports are those which involving animal sports. Animal rights activists describe it as "AMATEUR BUTCHER" meaning killing of animals for entertainment. Are Indian animal sports amateur butcher? It has been discussed in this article the long ongoing legal battle of animal sports law in India in conflict with Animal Rights in India and the such sports in contravention to animal rights legislation.

2. <u>Constitutional rights to animals</u>

The advocacy of animal rights finds its way back to the observations of Jeremy Bentham in the year 1789 in his creation of "An Introduction to the principles of morals and legislation in the year", who interrogatives the mankind of how the lack of faculties of discourse and reasoning deters the claim of right, which should be on the basis of relative ability to suffer. Following him Peter Singer, brought an anti-speciesist revolution that condemned the anthropocentric society with human exceptionalism.[1461] The animal turn being a substantial shift to the studies

*STUDENT, Chennai Dr. Ambedkar Govt Law College, Pudupakkam. I thank my professors and seniors to have inspired me. All errors, however solely remain mine.

[1461] Emillie Dardenne, *From Jeremy Benthem to Peter Singe*r, 7/2010 Varia, Revue d'e`tudes benthamienneus Journal,(2010)

of general interest of animals take them closer to human beings bridging a gap of possession of cognitive faculties of animals with humans, throws light on scientific evidence of the emotions of animals. Some animal law jurisprudence prefer animals are to be considered as marginal cases like infants, Unborn foetus and physically impaired who are within the scope of constitutional consideration though there has been a lack of discourse as in the case of animals.[1462] Emotions such as distressed behaviour of an animal when its companion dies, the mourning of elephants especially African elephants exhibiting the burial rituals, similar to humans are proven prints of animal turn.[1463]

It was held by the hon'ble Supreme Court of India in several cases such as '*Karnail Singh and others v. state of Haryana'* [1464]that the animals are legal entity to have conferred with constitutional rights and any infringement without indispensable necessity would be a violation of article 21 of the constitution. In the case of *'Animal Welfare Board of India v. Nagaraja'*[1465] it was held the Tamil Nadu Regulation of Jallikattu Act 2009(TNRJ) was repugnant to Prevention of Cruelty To Animals Act 1960(PCA) and confirmed violations of animal rights would be a serious infringement of constitutional promise conferred on them. The constitution of India directly has restored to its citizens the duty of protecting and improving the natural environment including forests, Lakes, Rivers and wildlife and to have compassion for living creatures[1466]. As per Section 11 of the Prevention of Cruelty to Animals Act (1960), treating animals cruelly including beating, kicking, overriding and overloading torturing constitutes the subjecting of animals to unnecessary pain or suffering. Employment of an animal when it suffers from infirmity wound, or disease, doping of animals, keeping them chained unreasonably are also said to be in contravention to the section. It also lists the responsibilities of owners not to fail to provide animals with sufficient food, drink or shelter not to abandon it in such a way that it suffers pain confines them or incite them to fight or beat any other animal for the purpose of amusement and not to promote shooting events. The act also penalizes the practice of performing Phooka or Doom Dev or any other operations to improve lactation that is injurious to health of the animal. Part V of the act provides restrictions on the exhibition and training of the performing animals. The Indian Penal Code has explicitly provided against

[14621462] Jessica Eisen, Animals In Constitutional State, Volume 15 Issue 4, International Journal of Constitutional Law, Pages 909-954,19th FEB, 2018.

[1463] Anne Peters, Sasika Stucki, Livia Boscardin,The Animal Turn and the Law, Verfassungsblog On Matters Constitutional; Apr 14, 2014; https://verfassungsblog.de/the-animal-turn-what-is-it-and-why-now/

[1464] ***Karnail Singh and others v. state of Haryana'*** 2019 SCC OnLine P&H 704.

[1465] ***'Animal Welfare Board of India v. Nagaraja'*** ,(2014) 7 SCC 547.

[1466] Art 51(G), Indian Constitution, 1950

Mischief by killing or maiming animal or poisoning and rendered codification of its criminalisation under section 428 and specified animal such as elephant, camel, horse, buffalo, Bull, cow and Ox to be subjected under the same would be considered its aggravation under section 429. The highest of all animal rights provisions is that the inter alia extension of Article 21 of Indian Constitutional application to animals in the case of *'Animal Welfare Board of India v. Nagaraja'* in the case of *'Sri Subhash Bhattacharjee v. the State of Tripura'* [1467]the High Court of Tripura banned the animal sacrifice for religion finding that "any customs, usages and traditions contrary to the constitutional spirit cannot be a source of law Doctrine belief or tradition which is extraneous redundant accretions to religion holds no place to be adhered in the name of religion". When the merits of the notification of Government of India banning the exhibition of five animals including bears, monkeys, tigers, Panthers and dogs for Circus under Section 22 of the PCA 1960 was challenged before the High Court it was held that "Circus animals are forced to perform unnatural tricks are housed in cramped cages, subject to fear, hunger, pain, not to mention the undignified way of life they have to live with no respite"[1468]. The modern animal law jurisprudence suggest a shift from the rights based approach that obliges the law to provide rights to animals to a duty based approach which extends the responsibility of humans to protect animals with their rights conferred though it may be palpable or tangible.[1469]

3. Indian animal sports law in contravention to animal rights;

There are many animal sports in India of their historical significance, cultural importance and traditional import, performed in India. Some of which are banned by the apex court in contravention to the Prevention of Cruelty to Animals Act 1960. The traces of animal sports are graduated long back in history. However, legal Trends of animal sports are in emerging stage in a conflict with animal rights in India. Jallikattu is a bull taming game where a fast moving Bull is corralled with ropes around its neck marked by the act of bravery. It was banned by the Supreme Court of India in the case of *'Animal Welfare Board of India v. Nagaraja'* at which the court found there was a serious violation of PCA since nearly 80 percentage of the bulls are subjected to ear mutilation, the twisting and biting of the tail bones which are sometimes imputed or dislocated with extreme pain to instigate the bulls for a better

[1467] ***'Sri Subhash Bhattacharjee v. the State of Tripura'*** WP(C)(PIL) No.02/2018, Decided on 25th July 2018.
[1468] ***N.R. Nair And Ors., v. Union Of India & Ors.,*** AIR 2000 Ker 340.
[1469] Jessamine Therese Mathew & Ira Chadha-Sridhar, *Granting Animals Rights Under The Constitution; A Misplaced Approach? An Analysis In Light Of Animal Welfare Board Of India v. A. Nagaraja*., 7NUJS LAW REVIEW.349(2014).

performance in Jallikattu. There was also poking of bulls with wooden Spears, tiny knife used for cutting the ropes, the roads were often pulled, resulting in their blooding. There were serious violation of animal rights with the participating Bull doped with Irritant solutions been rubbed in their private parts, as to agitate them and to disorient them. The collection yard was not big enough to accommodate the bulls and some of which petrified animals got pounded by the crowding of people (spectators) and are left in streets without owner's care. The arena should be of 8 feet but it was five and half feet in violation to the guidelines. The entire scenario not been video recorded, the worst of all that the bulls made stood in a long line for 8 hours without shade, food and water. there where water in the arena but the bulls were not allowed to go and drink water to prevent them lose place in the long queue. All these findings compromised Supreme Court fair enough to conclude the conduct of Jallikattu in contravention to Section 11(1)(a) of the Prevention Of Cruelty to Animals Act. The Tamil Nadu Regulation of Jallikattu Act 2009(TNRJ) was one of the animal sports legislation. It was found repugnant to PCA and held unconstitutional by the Supreme Court of India which happened in accordance with Article 246(1) when found a State Law cannot be implemented without disobedience to parliamentary legislation. Taking note of the Madras High Court order in the case of *'k. Muniyasamidevar v. Dy Superintendent of Police'*[1470] rendered by justice Banumathi which threw light on formal direction of banning all types of Jallikattu, Rekla race involving entertainment that is incompetent with PCA contradicting to the prior order the Madras High Court which directed the officials through a writ petition, the conduct of Manjuvirattu or Jallikattu. In the case of *'S. Chokkanathan v. The District Collector'*[1471], however it was noted that the said order valid only for that event to the said period, since the issue was pending before the Supreme Court. The Supreme Court in 2014 also banned bullock cart racing in Maharashtra for the same reasons of cruelty to animals. [1472]The Bombay High Court in 2012 March imposed a ban on bullock cart race.

Maharashtra was the earliest state to pass legislation to licence the race courses with Maharashtra Race Courses Licensing Act 1912 followed by Maharashtra Dog Race Courses licensing Act 1976. Even after the Supreme Court's ban on the bullock cart race in Maharashtra, states such as Tamilnadu and Andhra Pradesh hostel where the bullock cart races are conducted, are also to be glanced. The Madras High Court declined to pass a stay to bullock cart races though it was stated by petitioner that the recent amendment to PCA allows only

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[1470] ***'k. Muniyasamidevar v. Dy Superintendent of Police'*** 2006 AIR (Mad) 255,
[1471] ***'S. Chokkanathan v. The District Collector'*** (2011) 3 KLT 595.
[1472] Vishwas Kothari, *Supreme Court bans bullock cart races*, Times Of India, May 8 2014.

Jallikattu but, Bullock races are still been banned by the Supreme court. There are also growing trends of Greyhound racing and cock fighting in the states of Maharashtra, Tamil Nadu, Punjab Haryana and Andhra Pradesh. India has got pluralistic customs that allow different animals and birds into sporting. Important and Interesting concerns are whether if it is possible to bring all them into PCA's statutory obligations.

Greyhound racing involves the dogs to race to catch an artificial or mechanical rabbit. In India Punjab Haryana is where the sport is very popular. This sport is legal in many countries such as Ireland, Australia, New Zealand and United States. This sport in which the greyhounds are released from a cramped cage or kennel is alleged by animal rights activists that the greyhounds sustain serious injuries while training including breaking of legs and backs, head trauma and even electrocution.[1473] The issues of legality of this Greyhound racing broke out seriously after the formal ban. The High Court of Punjab and Haryana issued notice to Union Ministry of environment and forest animal welfare Board of India and the Punjab State Animal Husbandry Department to issue rules on Greyhound racing.[1474] When this is the case in Punjab, Maharashtra repealed its Maharashtra Race Courses Licensing Act 1912 that regulated dog races licensing. The dog races are being emerging instrument for animal sports amusement in Maharashtra since bullock cart races were band. On February 23 2020, there was an exciting conduct of Greyhound race in Kolhapur district of Maharashtra[1475]. In June 14 2019, Pune city based animal rights organisation filed a petition before the Supreme Court seeking for a ban on Greyhound racing in India which is still pending before the apex court.

When Greyhound racing is a substitute animal sport which is conducted in states Punjab and Maharashtra, similar trends of cock fighting is blooming in the coastal regions of Andhra Pradesh and in Tamilnadu during the colourful festivities of Shankranti.[1476] There were heavy gambling among the participants and the organiser of betting, tie a small knife in the legs of cock and they fight each, other resulting in severe injuries in the end of the game. The cruel game of cock fight was first banned by Madras High Court in the case of *'S Kannan v. the Commissioner'*[1477] in conformity to the case of Nagaraja, it was ordered the cock fight is artificial man made and not intentional. Moreover torture, injury, hot and trauma of the game

[1473] PETA, Grey Hound Racing, Jun 24,2020, https://www.peta.org/issues/animals-in-entertainment/cruel-sports/greyhound-racing/
[1474] TNN,High Court Issues notice to Punjab on greyhound racing rules , Times Of India, Feb 21st, 2018.
[1475] Shalaka Shinde, *Dog racing emerges as new Maharashtra craze, activists cry foul*, Hindustan Times, Mar 02,2020.
[1476] Joanna Slater, *India's illegal 'Super Bowl' of cockfighting, where the roosters were razors,* The Washington Post, February 5,2019.
[1477] ***S Kannan v. the Commissioner'*** W.P.(MD)No. 8040 OF 2014.,

or not synonyms with fun, celebration, enjoyment of festivities the court also found a clear violation of section 11(1) of PCA 1960, since it contravenes section 11(1)(m), of PCA that prohibits the inciting of an animal to fight with another animal for providing entertainment. Andhra Pradesh High court also banned it in the case of *'Narahari Jagdish Kumar v. The State of Andhra Pradesh'*[1478] the subsequent banning of cockfighting was upheld by Supreme Court. Despite such a ban the game is being conducted in Andhra Pradesh and Tamilnadu.

4. AMENDMENTS TO PCA

following mass Marina protest in Chennai amendments were done to Prevention of Cruelty to Animals Act, the amendments were in such a way as to give Jallikattu a blanket immunity from the purview of PCA. The section 3 of PCA which talks about the duties of a person having charge of animals that it shall be the duty of such person to ensure the prevention of infliction of unnecessary pain was Renumbered as subsection 1 and subsection 2 was inserted in such a way that the conduct of Jallikattu subject to such rules and regulation as may be specified by the government shall be permitted. The whole of Section 11 is exempted for Jallikattu as Jallikattu was added to Sub-Section 3 of Section 11 as Clause (f). Now the primary question arises is when Jallikattu is conducted if the rules and regulations as specified by the states are infringed, under which section will the Convict be booked? The only section that provided for penalisation was Section 11 and section 26 (offences relating to the exhibition and training of performing animals). What constitutes the conduct of Jallikattu? Will the immunity extend to individual participant who infringes the rules of PCA. Infringements for the violation of provisions of PCA maybe of two tiers(i.e) violation by the organising side and the violation by the participation side. Section 11 deals with the violation from both sides among the violations as mentioned in 'Animal Welfare Board v. Nagaraja 'case the non maintenance of bull collection yard, video capturing not being made, the inner side of the yard Shielded from public view, allowing participants without registration and non maintenance of roofing are violations on the organising side and through the rules of Tamilnadu prevention of cruelty to animals conduct of Jallikattu rules 2017 these issues are addressed. But all such rules if violated cannot have any banning or penalizing effect since the amendments gives a blanket immunity for the conduct of Jallikattu. In other hands, the violations mentioned in the case, on the part of participants is much higher for the sport to have been banned. The ear cutting for the purpose

[1478] ***'Narahari Jagdish Kumar v. The State of Andhra Pradesh'*** W.P.(PIL) No.320 of 2014 AP, dec on 26th Nov, 2016.

of better hearing from all sides, biting and twisting of tails resulting its amputation, poking of bulls with sticks and knife, doping, applying irritant solutions to agitate them, pulling the ropes fanatically to cause blooding, not allowing the bulls to go for drinking water to prevent it from losing place in the line leaving bulls uncared all issues, on the participant side are not addressed in the rules. So the law is silent about such violations, though the Supreme Court held the conduct of such events without such infringements not possible. As soon as the Tamilnadu legislature passes bill, similar bills were also passed by Karnataka state government to exempt kambala racing[1479] and in Maharashtra to exempt Maharashtra bullock cart race[1480].But later the Bombay High Court again stayed the sport in Maharashtra.[1481] Now the constitutionality of the proposed amendments is under the judicial review before the Supreme Court. In 2019 and 20 the people for Ethical Treatment of animals submitted investigation reports confirming the cruelties such as tamers toppling bull to fall in the ground, a participant hanging in the neck of the bull, rough yanking of nose ropes, repeated attempts to poke bulls, the spectators trying to tame the Bull outside making illegal parallel Jallikattu, Many tamers taming a sole bull.[1482] Will all such activities exempt through these amendments in the name of culture and tradition is one of the million dollar questions around the amendments.

5. CONCLUSION;

India has got multi dimensional animal laws, and emerging sports laws, but the animal sports law is still a utopian cake. Most of the law in India that deals with animal sports have serious debate issues with animal sports. The role played by judiciary to find the necessity of animal sports laws consistent with animal rights is very indispensable. When the parliament reflects the interest of people for the conduction of traditional animal sports, the judiciary has taken the responsibility of constitutional responses to animal rights. It is up with the judiciary to find what colours do the amateur butcher reflect in the constitutional spectrum before PCA.

[1479] PTI, *Bill passed to allow kambala in Karnataka,* Economic Times, Feb 13,2017
[1480] PTI, *Maharashtra passes legislation to resume bullock cart race*, Economic Times, Apr,06, 2017.
[1481] Vijay Singh, *HC keeps bullock cart racing in Maharashtra banned.* Times Of India, Oct 12, 2017
[1482] TNN, *Jallikattu continues to claim lives of humans and bulls in Tamil Nadu, PETA report filed in Supreme Court says*, Jun 19, 2020 .

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ABORTION- THE DILEMMA OF RIGHT TO LIFE OF UNBORN OR THE WOMEN'S RIGHT?

- **SRISHTI GARG**

ABSTRACT

The feeling of being a mother and the emotions attached to it are adorable and cannot be measured. However, what if the same sentiment becomes more of a burden than a blessing? What if the child's birth is being forced upon the women? What if the women want to abort the child due to the abnormalities in the fetus? In addition to this, there may be several other reasons due to which the pregnant lady might think of abortion (rape cases, financial instability, family pressure, etc.).

Moreover, India being one of the most populous countries in the world, the number of unintended pregnancies is also the highest. Even after all these problems, abortion is not allowed in cases where the pregnancy was revealed at a later stage or abnormalities in fetus were discovered only after 20-24 weeks of the pregnancy.

However, certain people were even against the decriminalization of abortion. One can say that even the most influential people of the world believe that abortion is a crime and a non-forgivable sin, as it involves killing a human being.

It seems to me as clear as daylight that abortion would be a crime." **—** Mahatma Gandhi Ji gave this statement in **All Men are Brothers: Autobiographical Reflections**.

But, change is to come with the time.

There is no doubt that abortion is considered morally wrong, as the process involves taking of life, and it often hurts people. But, at the same time, the mother has to carry the child in her womb; she is the one who will take care of the child. Therefore, the decision should be left upon the parents.

LEGAL PROVISIONS FOR ABORTION AND THEIR BACKGROUND

Before 1971, abortion was criminalized in India under section-312 of the Indian Penal Code, 1860.[1483] It was described as intentionally 'causing miscarriage'. It was a punishable offense.

[1483] https://www.firstpost.com/india/abortion-law-in-24-week-pregnancy-case-supreme-court-failed-to-address-womans-right-to-her-body-2916174.html

However, to improve the scenario, the present act was implemented, i.e., Medical Termination of Pregnancy Act, 1971. This act provides a legal framework for the termination of pregnancy for up to 20 weeks of gestation.

The act was implemented with its defects as even today; the women hold no right on her body. The life of her fetus is to be decided by the courts and medical practitioners, and she is not allowed to have any say. There is no doubt that women are allowed to terminate their pregnancy at times and again, by the court, if certain severe anomalies are discovered in the child or in rape cases. But the court has never paid attention to the fulcrum, as to the right of women on her own body, right to personal liberty is being overweighed by the right to life of an unborn child.

In a recent case, a similar question was raised, but the supreme court failed to address the same as an essential right.[1484]

SOME IMPORTANT STATISTICS-

According to a journal published in the Lancet global health, it was estimated 15.6 million abortions took place in India in 2015, which ultimately created an abortion rate of 47.0 per thousand women aged 15-49 years[1485].

Moreover, it was also found that an estimation of 3.4 million facility based abortions was done in 2015 and it was nearly 5 times that were reported by the Ministry of health and Family Welfare (Health and Family Welfare statistics of India ,2015).[1486]

Moreover, WHO has defined safety of abortions in three stages- safe, less safe and least safe.[1487] which is kept in mind while abortion is done.

In addition to this, the office of High commissioner for Human Rights stated that The right to health in all its forms and at all levels contains several interrelated and essential elements. These elements are availability, accessibility, acceptability and quality.[1488] These elements should be strictly taken care of, in order to maintain the health of the Nation.

An Important Fact

[1484] WRIT PETITION (CIVIL) NO. 81 OF 2017
9 Mrs. X and ors. V. Union of India and ors.)
[1485] https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(17)30453-9/fulltext
[1486] ibid
[1487] https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)31794-4/fulltext
[1488] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 12.

The closest relation of a child is to her mother. However, it is even mentioned in our Vedas and Shastra's that "putra kaput hooey par Mata na hooey kumata". It means that it is possible for a son to do ill to his mother but mother can never be bad mother.

She will always think of the welfare of her child and will always take decisions in the best interest of the child. Thereby, she should be the one to take the decision whether the child should be born or not.

The constitution of India provides Right to life with dignity, freedom of speech and expression- Are these rights meant only for books or literature and for the sole purpose of fake publicity?

It has been rightly quoted by **Margaret Sanger that-**

"No woman can call herself free who does not control her own body."

One needs to understand what is more important, the life a women or the life of an unborn child. The law failed to maintain a balance between the right to life of an unborn child and the right of the woman as after all she is the one who will carry the child in her womb and afterwards be the one to take care of the child and to raise the child. Thereby, she must be the one to take the decision whether the child should be aborted or not[1489].

This has always been a controversial issue as it involves taking life.

Thereby, third-trimester abortion should be declared as a legal right[1490], and the decision should be left upon the mother as well as the recommendation of the doctor.

As everyone is well aware of the fact that there are two sides of a coins, and that there are both pros and cons for everything. Therefore, one needs to know both things before evaluating any act or law.

That's why, before condemning the rule made by the government, one needs to understand the **purpose behind it.**

No matter what laws are formed, what progress the society has made. The condition of women in India is not even near the range line. The cases of rape, molestation eve-teasing, kidnapping extortion have not been reduced and above all the cases of burning the women alive have not come to a halt.

This provision was formed to restrict sex- selective abortion along with a strong opinion to support the **fetal rights**, as like human beings they also possess the complete rights of a human

[1489] http://ili.ac.in/pdf/p10_bhavish.pdf
[1490] https://www.ijlrd.com/wp-content/uploads/2019/03/Abortion-Ayushi-Goyal-1.pdf

being, as after 23-24 weeks of pregnancy, the child is capable of surviving outside the womb of the mother. Thereby, just because the parents, at later stage of pregnancy feels that the child should be aborted cannot be allowed termination of pregnancy in such an easy manner without any cross checks. Because, if this is allowed, this would mean murder of the child.

As there is no doubt, that parents want to abort the child because of certain adversities whether those be of any kind. But at the same time, everyone is also aware of the fact that the child will be born impaired and but the child will not be incapable of doing anything. Therefore, before taking such a decision which is now not only concerned with the parents but now involves the civil society, the parents of the child require the permission of the court before termination of pregnancy in the third-trimester.

But above all, this provision is now creating difficulties in obtaining and providing safe abortion and post abortion care.[1491] Moreover, very few facilities and services are provided to women up to the legal limit.

The reports also say that the abortions which are considered to be least safe increases when the abortion laws becomes more restrictive[1492]

Human Rights bodies have provided clear guidance on the need to decriminalize abortion. Ensuring access to these services in accordance with human rights standards is part of State obligations to eliminate discrimination against women and to ensure women's right to health as well as other fundamental human rights..[1493]

At times and again, decisions to terminate pregnancy have been made in the favor of the pregnant lady, but before that the women have to face the trouble to file a petition before the court and she is not given the permission to take the decision to terminate her pregnancy by herself.

Even, In the case of Suchita Srivastava and Anr. vs. Chandigarh Administration [1494][(2009) 9 SCC 1], where a bench of three Judges held "a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution".

Here, in this case woman's right to make reproductive choice was given huge importance and was recognized publically.

[1491] https://www.guttmacher.org/report/abortion-unintended-pregnancy-six-states-india
[1492] https://www.guttmacher.org/report/abortion-worldwide-2017
[1493] https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf
[1494] [(2009) 9 SCC 1]

However, even after such judgments, the parents are required to take permission of the court in case of termination of pregnancy at a later stage. The court states that the right of bodily integrity calls for a permission to allow her to terminate her pregnancy.

CASE ANALYSIS-

Niketa Mehta case-

However, as a matter of fact. Women who are educated, independent might be fully aware of their rights and their duties as a mother. Moreover, when such women decide to have abortion there is quite a possibility that they have thought before taking the decision of terminating their pregnancy. The lady might be fully aware of the consequences and there may be a rational behind the same decision. Similarly, a well-educated lady approached the court for the termination of her pregnancy.

But, the court denied the petitioner permission to terminate her pregnancy as the gestation period has increased beyond 20 weeks, as she was 24 weeks pregnant. The victim approached the court because the fetus was discovered to have complete congenital heart blockage from the day of the child's birth.[1495]

Unfortunately, the women suffered miscarriage in the 27th week of her pregnancy.

This case was given huge publicity nationwide. Moreover, the incident showcased a direct reflection of the defects in this particular law

Mrs. X and Ors. vs Union Of India And Ors.[1496]

In this case, the petitioner was about 22 years old. The pregnancy was about 24 weeks; her fetus was diagnosed with bilateral renal agenesis. However, the petitioner was granted the permission to terminate her pregnancy. There were many other cases where the fetus suffered from severe abnormalities and the mother was allowed to terminate her pregnancy, so as to save the child from struggle of survival.

In this case, the petitioner also challenged the constitutional validity of section 3(2)(b) of the Medical Termination of Pregnancy (MTP) Act 1971 as well as seeking directions to reconsider the 20-week limit, the petition also seeks a declaration concerning the expression 'save the life of the pregnant woman' in Section 5 of the MTP Act. The petitioners want to include 'the protection of the mental and physical health of the pregnant woman', and situations where

[1495] https://timesofindia.indiatimes.com/city/mumbai/Mumbai-abortion-case-Niketa-Mehta-suffers-miscarriage/articleshow/3363293.cms
[1496] WRIT PETITION (CIVIL) NO. 81 OF 2017

serious abnormalities in the preborn baby are detected after the twentieth week of pregnancy.[1497]

TEEN PREGNANCY

A 11-year-old girl brutally raped by her uncle, gang rapes, sexual assault of young girls who are not even aware of the term sex and were unaware of what good touch or bad touch is, and are not even aware of the consequences of the actions done by their relatives, the fact which is unanimous is that what will happen to life of that child? What will be the future of the child? What will be the impact on the mental as well as physical health of the child?

In addition to all the above stated problems, due to young age, pregnancies are discovered only at a later stage and the family is in constant fear of suffering shame from the society.

All these situations indicate, that there is an immediate need of several separate provisions as to decline the misery to an extent.

However, to a great relief, in several cases, it has been held by the Hon'ble supreme court that the right of bodily integrity calls for a permission to allow her to terminate her pregnancy.[1498]

Thereby, emphasis must not be on the right to abortion but on the right to privacy and reproductive control.

– Ruth Bader Ginsburg.

An article published on The Times of India on 5 July, 2020[1499] stated that Bombay High Court permitted a married woman to terminate her 28- week pregnancy, as the child was diagnosed to have several anomalies.

The decision laid down in this case is exemplary, as it paid attention towards the rights of the women as the article also stated, that if the child is born alive and the parents are not willing to take care of the child. Then, the state will take the full responsibility of the child.

BENEFITS

A direct **No** to pre-natal sex determination tests – in cases where the family gets to know about the sex of the child at a later stage. The families may force the mother to abort the girl child

[1497] https://adfinternational.org/legal/mrs-x-mrs-y-v-union-of-india-and-another/
[1498] [(2009) 9 SCC 1],
[1499] https://timesofindia.indiatimes.com/city/mumbai/bombay-hc-nod-to-terminate-28-week-pregnancy-with-foetal-anomalies/articleshow/76801867.cms?from=mdr

and if the rules are not strict regarding the same. Then, in most of the cases, the mother will be made to abort the girl child.

DRAWBACKS

1. Illegal and Unsafe abortions will increase.
2. Rape victims- In cases, where women are raped and they become pregnant. In those cases, the families as well as the victim are already suffering from a lot of trouble and they are even feared from the society. In most of the cases, where the victim is a small girl, the pregnancy is recognized at a later stage and thereby taking permission from the court can disturb the life of the victim to a greater extent.
3. Funds to raise an abnormal child- If a woman is diagnosed, and the examination discovers that the child will be born with severe abnormalities. If the parents are willing to abort the child, then no permission should be taken by the court. As even if the child is born, the child will suffer misery. Moreover, no doubt, the world is harsh for such people, and the Government will not provide funds for raising such a child. Therefore, parents should be the ones to make the call.
4. Mental health- one of the significant elements of a healthy body is mental health. However, what if we allow the mental health of a person to suffer abruptly. Sooner or later, that person would be fighting to lead a healthy life. Therefore, mental health is an indispensable element and should be considered a valid ground for the termination of the pregnancy.

Why do all these factors are ignored?
why do the women require the permission of the court to terminate her pregnancy?

SOLUTIONS

1. Amendment in the medical Termination of pregnancy act, 1971-

The medical termination of pregnancy (amendment) bill,2020 should be considered and an amendment should be made in the act. The bill prescribes that the abortion limit be raised until 24 weeks, in exceptional cases involving vulnerable women, including survivors of rape, victims of incest, and other vulnerable women (like differently-abled women, Minors).[1500]

2. Highly experienced medical practitioners should be allowed to terminate the pregnancy, in several new cases without making them criminally.

[1500] https://pib.gov.in/PressReleseDetail.aspx?PRID=1600916

CONCLUSION

However, medical practitioners must adopt proper health and safety measures for termination of pregnancy at a later stage by medical surgeons in registered clinics and hospitals. Moreover, women should have a right over their bodies and along with the right to enjoy personal liberty. The changes in societal norms after the implementation of the Medical Termination of Pregnancy Act requires an enormous amount of changes in it.

Isn't the medical termination of pregnancy act direct threat to the reproductive rights of the women? She must be the one to decide whether she wants to continue the pregnancy or terminate her pregnancy.

It is the family of a child who takes care of all the financial costs and has to go through the burden of care, which had not been their responsibility if termination of pregnancy was their right. Moreover, no parent would want their child to get disabled or suffer a life of misery if the parents are aware that the child will be born with severe abnormalities. They are fully aware of the difficulties a child might have to face if the child is born.[1501] At the same time, this process requires intentionally taking away life, which is a murder otherwise. Also, no doubt that the existing provisions of the act, impose direct and substantial restrictions on the female foeticide.

Moreover, in most cases, the court has ruled in favor of the petitioner, allowing her to terminate her pregnancy.

Therefore, the debate has become more of ethical controversy, giving it the shape of a stereotypical debate.

[1501] https://ijme.in/articles/the-niketa-mehta-case-does-the-right-to-abortion-threaten-disability-rights/?galley=html

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FORCE MAJEURE IN THE TIME OF COVID-19

- **JYOTIKA & NANDITA MISHRA**

INTRODUCTION

Covid-19 was declared a pandemic by the World Health Organization on 11th March 2020. The onset of Covid-19 has proved to be not just a fatal humanitarian crisis but has also caused disruptions in commercial and business transactions globally. The work closures and restrictions on movement of persons and goods on account of nation-wide lockdown has raised uncertainty with respect to performance of contracts. The non-fulfilment of contractual obligations caused due to disruptions in supply chains, production and further cash flow problems for businesses, except in cases of "essential services" has brought to fore the rights and remedies arising out of the contract that parties have entered into.

FORCE MAJEURE AND VIS MAJOR

Force Majeure is a French Term which means "Superior Force". The Black's Law Dictionary[1502] defines it as "an event or effect that can neither be anticipated nor controlled and includes both acts of nature (e.g. Floods and hurricanes and acts of people like riots, strikes and wars)".[1503]

According to Chitty on Contracts[1504], " Force Majeure clause is normally used to describe a contractual term by which one or both of the parties is excused from performance of contract, in whole or in part, or is entitled to suspend performance or to claim and extension of time for performance, upon the happening of a specified event or events, beyond his control".[1505]

Vis Major is a Latin term meaning "Act of God" and is defined as "overwhelming, unpreventable event caused by forces of nature, such as earthquake, flood or tornado.[1506]

The Apex Court in *Dharanrajamal Gobindram V. Shamji Kalidas and Co.*[1507] while upholding the decision taken in *Lebeaupin V. Crispin*[1508] lays downs the distinction between "Force Majeure" and "Vis Major" and states that "the expression "Force Majeure" is of much wider

[1502] Black's Law Dictionary (11th Edition, 2019).
[1503] Id.
[1504] Chitty on Contracts, Volume 1, (31st Edition), Sweet & Maxwell.
[1505] Id.
[1506] Black's Law Dictionary (11th Edition, 2019).
[1507] AIR 1961 SC 1285.
[1508] Lebeaupin V. Crispin, 782 F.2d 314, 319 (2d Cir. 1985).

import and not merely the French version of the Latin expression "Vis Major". Disagreements and difficulties pertaining to what events "Force Majeure" could legitimately encompass within its wide imports. The judges seem to have made a consensus for inclusion of events like strikes and breakdown of machinery within its wide ambit. The inclusion of the above mentioned is indicative of the wider import of "force Majeure" as the same is not considered legitimate enough reasons within the contours of "Vis Major". Consequently, this also lays emphasis on the fact that where emphasis is made to "force Majeure", the intention is to save the performing party from the consequences of anything which he has no control over"[1509]

FORCE MAJEURE CLAUSE IN CONTRACTS

Force Majeure clause has been defined in Black's Law Dictionary as "A contractual provision allocating the risk if performance becomes impossible or impractical, especially as a result of an event or effect that the parties could not have anticipated or controlled"[1510]

Force majeure incidents usually include an act of God or natural disasters, conflict or conflict situations, labour unrest or strikes, epidemics etc. A force majeure provision helps to shield the executing group from the repercussions of something it has no power over.Force Majeure is an exception to what would otherwise amount to a contract breach. Whether one can avoid a particular contractual obligation is a factual analysis. The courts would examine whether the impact of COVID-19 epidemic in a particular case has prevented the party from fulfilling its contractual obligation. Indian courts have generally acknowledged and enforced this concept where relevant

The contracts negotiated between the parties, more than often lays down a broad laundry list events which constitute "force majeure" within the meaning of the instant contract, in addition to "Act of God" and includes the likes of circumstances beyond the control of the parties like, acts of terrorism, war, strike, embargos, unavailability of material, political events, labour disputes, act of government, pandemics, plagues, etc. The same list, alternatively, may also contain a list of exclusions to *force majeure.* In *Navrom V. Callatis Ship Management*[1511] "force majeure clause has been explained to not be construed in a restrictive manner by staying limited to the ordinary meaning of the events mentioned in the clause." The intention behind inclusion of the same was to relieve parties from fulfilling contractual obligations which have become impractical or rendered unachievable due to unfurling of natural events in such a manner that

[1509] Dharanrajamal Gobindram V. Shamji Kalidas and Co., AIR 1961 SC 1285.
[1510] Black's Law Dictionary (11th Edition, 2019).
[1511] Navrom V. Callatis Ship Management, SA (1998) 2 Llyods Rep 416 420.

the possible execution of the contract is beyond their control. Such natural events can also be furthered or fuelled by non-natural forces such as consequent strikes, lockouts, change of law, act of war, etc., which emanate from the former.

In the event of non-performance of contractual obligation, if such a list includes the event which has prevented the party from the performance of contract, the party is thereby relieved from performance. But the wisely minted force majeure clauses, in addition to specifically mentioned events, contain catch-all phrases. This heavily worded phrase would be similar in language to "any event/cause outside the reasonable control of parties" or "including but not limited to". Such phrases, however, fall in the category of *ejusdem generis.* Orissa High Court while interpreting the scope of such generic language in *Md. Serajuddin V. State of Orissa*[1512] has stated that "phrases such as "any other happening" must be given Ejusdem Generis construction and shall encompass events and happenings which are of similar construct and nature enumerated in the negotiated contract."[1513] But in the likelihood of absence of a specific word like "epidemic" or "pandemic" in the contract, if the list is inclusive of phrases like "act of government, owning to the restrictions imposed on movement and nation-wide lockdown, Covid-19 pandemic can still be argued to be squarely falling within the ambit of such a phrase.[1514]

COVID-19 as ACT OF GOD

Indian courts have not specifically ruled on whether an epidemic or pandemic will be covered within the ambit of 'Act of God'. However, in the case of *The Divisional Controller, KSRTC V. Madhava Shetty*,[1515] the apex court propounded that the expression 'Act of God' is an operation of natural forces coming into play without human intervention. But, the catch here as well is the fact that had the parties had a reasonable opportunity of anticipating the happening of such an event, occurrence of every such "unexpected happening", even if without human intervention, cannot excuse them from their liability. Judgments have also been pronounced on similar lines by Kerela High Court and Madras High Court in *R.R.N. Ramalinga Nadar V. V. Narayana Reddiar*[1516]and *P.K. Kalasami Nadar V. Ponnuswami Mudaliar*[1517]respectively.

[1512] AIR 1969 Ori 152. (Clause : any other happening which the lessee could not reasonably prevent or control).
[1513] TGV Projects & Investments Pvt. Ltd. V. National Highways Authority of India,2019 (173) DRJ 717 (Clause : an event or circumstances of nature analogous to the other events or circumstances); Also see Simplex Concrete Piles (India) Ltd. V. Union of India (2010) ILR 2 Delhi 699 (Clause : any other causes beyond the control of the Charterer).
[1514] Md. Serajuddin V. State of Orissa, AIR 1969 Ori 152.
[1515] The Divisional Controller, KSRTC V. Madhava Shetty, 2003 7 SCC 197.
[1516] R.R.N. Ramalinga Nadar V. V. Narayana Reddiar AIR, 1971 Ker 197.
[1517] P.K. Kalasami Nadar V. Ponnuswami Mudaliar, AIR 1962 Mad 44.

Courts in America and England however, have a different stance with respect to this. In both the jurisdictions, the 'Act of God' includes a pandemic or epidemic. In *Lakeman V. Pollard*[1518]a labourer employed at a mill left his job on account of a cholera epidemic. A suit was brought by the employer against the labourer claiming compensation from the labourer on account of loss of working hours arguing that this act would amount to breach of work contract. The Supreme Court of Maine held that the cholera outbreak was well within the contours of 'Act of God' and consequently the labourer stood discharged of fulfilling his obligation under the instant work contract. Similarly, in *Coombs V. Nolan*[1519], District court for Southern District of New York held that the defendant could not brought under the ambit of breach of work contract because of the delay in unloading cargo from a ship because of the prevailing horse flu. Such flu on account of being covered under the Act of God consequently reprieved the defendant from fulfilling his contractual obligation.

The Supreme Court of North Dakota in *Sandry V. Brooklyn School District*[1520], while hearing an appeal filed by transport workers/ bus drivers held that due to the shutting down of schools owing to influenza outbreak, the school administration was not in breach of the transport contract for the instant period in the ground that the contract had become impossible to be performed.

INDIAN JURISPRUDENCE AND STATUTORY PROVISIONS

Force majeure is often a combination which includes Doctrine of Frustration of contract, although both are hugely different from each other. The Indian Jurisprudence has not made remarkable progress in terms of developing the jurisprudence on Force Majeure. The same doesnot find itself a specific place within the Indian statues. However, a brief perusal of the Indian Contact Act, 1872, bring us to sec 32 and sec 56 which postulates the enforceability of Contingent contracts[1521] and evincing the doctrine of frustration[1522] respectively

Sec 32 of the The Indian Contract Act, 1872[1523] reads as "Contingent Contract to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void."

[1518] Lakeman V. Pollard, 43 Me 463 (1857).
[1519] Coombs V. Nolan, 6 F Cas. 468.
[1520] Sandry V. Brooklyn School District, 182 NW 689.
[1521] The Indian Contract Act, Section 32, (1872).
[1522] The Indian Contract Act, Section 56, (1872).
[1523] The Indian Contract Act, Section 32, (1872).

Sec 56, on the other hand, deals with Agreements to do Impossible Acts. The same function on two distinct levels of "initial impossibility" and a "subsequent possibility" to act upon the terms of the contract. It renders all agreements to do impossible acts void and further contemplates a situation wherein an act which was earlier considered lawful has been rendered unlawful or impossible to perform, by reason of some event.[1524]

DOCTRINE OF FRUSTRATION

The Apex Court while dwelling upon the modern approach to the Doctrine of Frustration in *Satyabrata Ghose V. Mugneeram Bangur and Company and Ors.*[1525] has stated that "the first part laid down in sec 56 is the same as in the case of English Law which speaks of an act which has become inherently impossible to be performed by its very nature and hence consequently cannot be asked to be performed. The second part enunciates the discharging of performance of contract in case of supervening impossibility or illegality of act. The usage of the word "impossible" cannot be understood only in the physical or literal sense of impossibility. The same envisages that even if the act might not have become literally impossible but it may have been rendered impossible with respect to the object and purpose which the parties had in view. If any untoward happening completely upsets the cornerstones on which the basis of the contract was laid and the parties entered into agreement, it would not be considered unbecoming on the part of promisor to find the promise to have become impossible to execute.[1526] The court in the instant case while further making distinction between the applicability of Sec 32 and Sec 56 of The Indian Contract Act, 1872, lays down that, if either impliedly or expressly, the contract itself contains a clause for discharge of contract in certain circumstances, the dissolution of contract would take place under sec 32 of the act. Whereas if the frustration of contract is taking place otherwise, sec 56 shall come into play.[1527] Further, in cases where the parties have stipulated that the contract would stand despite the arising of such a situation, the contract would be absolutely outside the purview of Sec 56 of The Indian Contract Act. Hence, the rule of positive law doesnot leave the determination of the applicability of sec 56 at the helm of intention of the parties.

In *M/s Alopi Parshad & Sons Ltd V. Union of India*[1528], the apex court has laid down that "parties to a contract often find themselves in murky waters while carrying their contractual

[1524] The Indian Contract Act, Section 56, (1872).
[1525] Satyabrata Ghose V. Mugneeram Bangur and Company and Ors., 1954 SCR 310.
[1526] Id.
[1527] The Indian Contract Act, Section 56, (1872).
[1528] M/s Alopi Parshad & Sons Ltd V. Union of India, 1960 (2) SCR 793.

obligations. The turn of events might as well be not at all anticipated by the parties for eg, wholly abnormal rise or fall in prices of raw materials or the likes of sudden enactments on the part of government turning the situation hostile. However, this alone cannot be used as a defence from fulfilling their promise. If there is enough reasonable ground to support the evidence that the parties to the contract never agreed for performance of the contract in a fundamentally different situation which might have arisen due to natural or non-natural forces coming into play, then such contract acts a reprieve for the parties from fulfilment of such obligations.[1529] It is pertinent to not that the contract becoming onerous to one of the parties is not a good enough ground for rendering the same impossible to be acted upon.

Further in *Naihati Jute Mills Ltd Vs Hyaliram Jagannath* [1530], the apex court while upholding the decision of *Satyabrata Ghose V. Mugneeram Bangur and Company and Ors* concluded that" alteration in the circumstances in which the executable contract was entered into does not render the contract frustrated. It has to be seen through the prism of general business understanding and courts cannot absolve parties from performance of contractual obligations on account of the same becoming onerous to one of the parties"[1531]

Further in the instructive English case of *Tsakirgolu & Co. Ltd V. Noblee Thorl GmbH*[1532] the court propounds that the Doctrine of Frustration shall be construed narrowly. In the instant case the parties had entered into an executable contract of sale of groundnut. The shipping of the same was in ordinary circumstances only carried out through the Suez Canal. Despite the closure of the Suez Canal in the instant case, the court did not render the contract frustrated. It emphasized on the alternative route which was way costlier than what was agreed between the parties. The expenditure incurred would have been double the previous price and the alternative distance through Cape of Good Hope, for the freight to be shipped from Hamburg to Port Sudan, would have been thrice of what would be covered through the ordinary route. The House of Lords propounded that despite of it having become onerous for the party to perform on account of closure of Suez Canal, it did not stand fundamentally altered and hence did not render the contract impossible to be discharged.[1533]

[1529] M/s Alopi Parshad & Sons Ltd V. Union of India, 1960 (2) SCR 793.
[1530] Naihati Jute Mills Ltd Vs Hyaliram Jagannath, 1968 (1) SCR 821.
[1531] Id.
[1532] 1961 (2) All ER 179. (cited in Energy Watch V. Central Electricity Regulatory Commission & Ors.), Also see the decision of *Coastal* Andhra Power Limited V. Andhra Pradesh Central Power Distribution Company Limited. FAO (OS) No.- 272 of 2012.
[1533] Tsakirgolu & Co. Ltd V. Noblee Thorl GmbH, 1961 (2) All ER 179.

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The Supreme Court in the recent decision of *Energy Watchdog V. Central Electricity Regulatory Commission & Ors.,*[1534] upheld the decision taken in the landmark case of *Satyabrata Ghose V. Mugneeram Bangur & Co.* laying emphasis on the fact that onerous obligations donot render contracts void unless there is fundamental alteration to the circumstances. Justice Rohinton Fali Nariman summarized the entire jurisprudence on the subject stating further that the following aspects necessarily need to be taken into consideration.

Outline of force majeure - The general concept means that events or conditions beyond the reasonable control of one party should not cause them to be held liable under the terms if that event or condition prevents the performance of the obligations of the contract. Some contracts list examples of force majeure events that automatically meet the standard. Others list events that must still meet the definition of force majeure. One may also rely on generic clauses usually included in force majeure clauses, such that the COVID-19 is an 'Act of God'.

Force majeure provisions vary widely-The language used in most contracts varies widely and it is therefore important to carefully review those clauses.

Duty to exercise reasonable diligence and mitigation? - When a contract duty to 'mitigate' is enforced, then the sense of 'fair diligence' is relevant. It is a subjective standard and will be interpreted case by case. It must also be analyzed if there is any obligation to use 'best efforts' to mitigate the effects of an event of force majeure.

Will the event be foreseeable - Most contracts specify that it must be unforeseeable or not fairly foreseeable for an incident to count as Force-Majeure.

Could the deal be cancelled or put on hold? - Some contracts provide for it to be put on hold until the event of force majeure is resolved. Some contracts provide for time limitations after which either party may terminate the agreement with a written notice to the other party. Others demand that the contract remain in place until the case of force majeure is resolved.

Burden of proof- The party which relies on the event of force majeure usually has the burden of proof and these clauses are strictly interpreted by the courts.

Hence, the applicability of Doctrine of Frustration shall change on a case to case basis. The multi-factorial approach shall take into consideration factors such as the terms of the contract, its object and purpose, knowledge of the parties, ambitions and expectations.

Ideally, a Force Majeure case notification shall provide clear descriptions of the Force Majeure case, its consequences on the requesting relief group and the necessary remedial measures. This is generally seen in the Energy Sector, according to the industry norms, the affected party must

[1534] Energy Watchdog V. Central Electricity Regulatory Commission & Ors., (2017) 14 SCC 80.

ISSN: 2581-6349

provide the other Party with daily (and not less than monthly) reports on the progress of certain remedial measures and any other details as the other Party may reasonably request on the Force Majeure Incident. It is expected that further notice of cessation of Force Majeure event and cessation of the impact of Force Majeure on performance obligations will be issued in time.

For clarification, a sample provision reproducing *The Force Majeure clause in Manual for Procurement of Works 2019 Ministry of Finance Department of Expenditure* is as follows:

'Conditions beyond the control of any party such as war, violence, actions of a public enemy, civil commotion, vandalism, severe loss or fire damage, fires, epidemics, attacks, lockouts or acts of God fall under the legal definition of Force Majeure. Problems in the achievement of contractual terms under the influence of FM conditions shall be tolerated by the other party without any right to termination or damage, provided that the affected party notifies the other party within 30 (thirty) days of the date of occurrence of any such event. Activities under the contract shall resume as soon as possible after any occurrence is terminated or ceased to exist. However, if such an event persists for a period of more than 120 days, either party may terminate the contract by giving notice to the other Party at its choice.'

State government notifications came in the run up to the lockdown to advise for employees in the IT / BT sectors, for work from home and all malls, cinema halls, night clubs to stay closed. Those advisories became the order of the days ahead to combat this unprecedented circumstance sooner than many expected. On this canvas the contractual contracts of different hues are looming where parties are testing the escape route of the Force Majeure Clause (FMC). Most of the business community is now reading between the lines of their contracts, understanding their contractual performance obligations vis-à - vis their efforts to mitigateloss. A legal force majeure protection protects the party / parties from lawsuits to resolve the situation by halting results or requesting time extension or looking at new renegotiation routes. Nevertheless, the party must explicitly relate the Force Majeure case to the failure of success if it wants to terminate the contract on the basis of dissatisfaction, resulting in a contract being frustrated. In the current case, as much as a company may like to reduce its losses, when for the most part it could be a red wash of its balance sheets, it is a established reality that FMC cannot be used for one's own gain to wriggle out contractual obligations. Economic catastrophe, adverse market circumstances etc. may not be necessary to invoke FMC and it must be read in support of the contract terms and any general notifications / clarifications.

In an exemplary example of the modern times, the Ministry of Finance (Division of Procurement Policy Division) by office Memorandum Number 18/4/2020 PPD of

19.2.2020[1535] examined supply chain disruption due to the spread of Corona Virus in China or any other country to be covered by Force Majeure Clause. MNRNE / Grid Solar Power Division Ministry by a similar office Memo No 283/18/2020 GRID SOLAR[1536] has declared time extension on the scheduled commissioning date of RE projects, considering disruption of supply chains due to the spread of Corona Virus in China and any other country, as an event of Force Majeure.

Today there's a rush across industry verticals to exercise or defend the grip of the FM clause. During this crisis the facts of every case must justify the enforceability of contract performance. However, for the parties to the contract to invoke or seek the defence of Force Majeure, it is necessary that they remain within their contours and be mindful of all the nuances. What essentially needs to be kept in mind that it should not be used as a means to seek reprieve from one's contractual obligation.

For a contract that includes a force majeure clause, it can be examined whether the contract's wording will explain whether Covid-19 would consequently invoke force majeure clause. Whereas in a Contract that does not incorporate a Force Majeure Clause, a party seeking a departure or reprieve from fulfilling their end of contractual duty under the Doctrine of Frustration must show that COVID-19 made the fulfilment of its duty impossible and that the outbreak and its effects were beyond the parties' fair foresight and skill at the time of the contract. Where conflict exists as to the meaning of the provision, the rules of contractual interpretation shall extend to the courts.

Unless an event falls clearly within the scope of the Force Majeure clause, courts may not consider such an event as a force majeure triggering consequence. Merely invoking the Force Majeure clause will not, therefore, in itself guarantee an escape from a contractual obligation and the same will depend on the nature of the obligations of the party and the specific terms of the contract. The duty lies with the party who wishes to invoke the force majeure clause in order to determine the existence of certain circumstances that lead to force majeure.

In the days ahead we may see a variety of rulings on Force Majeure and the Doctrine of Anger, possibly paving the way for further development of the principle as multiple contracts will be put to the litmus test.

[1535] The Ministry of Finance (Division of Procurement Policy Division) office Memorandum Number 18/4/2020 PPD of 19.2.2020; available at https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.
[1536] MNRNE / Grid Solar Power Division Ministry office Memo No 283/18/2020 GRID SOLAR; available at https://mnre.gov.in/img/documents/uploads/file_f-1584701308078.pdf.

GLOBAL TREATMENT OF PANDEMIC AS FORCE MAJEURE EVENT

In certain common law jurisdictions such as England and Singapore, there is no recorded caselaw specifically on the application of Force Majeure clauses in the form of epidemics or pandemics, given such previous events-such as outbreak of SARS and Ebola. Some of the key reasons for this is that most long-term foreign contracts contain arbitration clauses which are confidential in nature, and most arbitral awards are not issued, even those concerning force majeure matters.[1537] That being said, the party depending on these provisions may not be provided with much comfort from the minimal data available, unless the contracts are designed to cover situations such as pandemics or epidemics under the respective Force Majeure clauses. For instance, the *Illinois Supreme Court in Phelps v. School District No. 109*, Wayne County, at the time of the outbreak of Spanish Flu (in 1918), in 1921, held that an epidemic was not an act of God that would cause the school district to escape paying teachers who were eager, willing , and able to teach but were prevented from doing so by closing schools. In contrast, the *North Dakota Supreme Court in Williams County's Sandry v. Brooklyn School District No. 78*[1538] held that a public school was excused from paying a driver for its services during school closure by assessing that the pandemic was a God's Act and that non-payment would be excluded.

In 2015, during the Ebola outbreak that eventually killed more than 11,000 people, when the Moroccan government sought to rely on the Force Majeure clause to postpone the African Nations Cup, its plea was rejected by the African Football Confederation (CAF), on the grounds that it would still be possible for the country to host the soccer tournament, albeit with more difficulty. At the end, the CAF held Morocco responsible, suspended from the next two African Nations Cups and fined $1 million.[1539]

Similarly, as mentioned above, in a dispute regulated by the Convention on the International Sale of Goods (CISG) before an arbitral tribunal formed under CIETAC, where a party was unable to execute a contract citing the outbreak of the SARS epidemic, a plea of force majeure was dismissed on the basis of the finding that the outbreak of SARS occurred two months until the contract was signed and that the obstacle was foreseeable by the parties.[1540]

[1537] Hubert Konarski, Force Majeure and Hardship Clauses in International Contractual Practice, 2003 Int'l Bus. L. J. 405, 425 (2003) at 405 cited in Polkinghorne Michael & Rosenberg Charles, Expecting the Unexpected: The Force Majeure Clause, 16(1) BUS. L. INT'L (2015).

[1538] Sandry v. Brooklyn Sch. Dist. No. 78 of Williams Cty., 182 N.W. 689, 690-91 (N.D. 1921).

[1539] The Guardian. 2020. Morocco Banned And Fined $1M Over Africa Cup Of Nations Withdrawal. Available at: https://www.theguardian.com/football/2015/feb/06/morocco-banned-and-fined-africa-cup-of-nations [Accessed 17 May 2020].

[1540] L-Lysine case. Available at: http://cisgw3.law.pace.edu/cases/050305c1.html [Accessed 18 May 2020].

In China, the Chinese International Trade Promotion Council (CCPIT), a quasi-governmental entity, issued 5,637 Force Majeure certificates to exclude Chinese companies from their contract agreements.[1541] While not officially specified, it can be assumed that 'Force Majeure Certificates' are certificates given by trade councils or chambers of various countries to recognize a specific case as a Force Majeure occurrence. Likewise, the Russian Federation's Chamber of Commerce and Industry (CCI), a non-governmental non-profit organisation, granted Force Majeure certificates to Russian organizations, marking Covid-19 as a Major Force event.[1542] In our opinion, while those certificates can certainly qualify Covid-19 domestically as a Force Majeure event, the jury is still out there to determine the validity, enforceability and evidence value of such certificates in international contracts.

CONCLUSION

Force Majeure and the doctrine of contract dissatisfaction were consistently considered extraordinary protections in situations of complete impossibility. Although the standard of evidence remains high, the Courts can more actively evaluate the practicalities of the case. However, it is best left for the parties to draft proper Force Majeure clauses to include events that preclude them from contract performance. Therefore, an increase in the number of commercial contracts that incorporate Force Majeure clauses is very likely to cover specific situations such as lockdowns, epidemics and pandemics imposed by the government, apart from traditional events such as God's Act, natural calamities, etc.

Going through global treatment of contract non-performance during past outbreaks-such as Ebola, SARS, etc., we feel the threshold for successfully establishing protection of contract dissatisfaction is very high, with no straight jacket solution. Although more disputes regarding pleas of contract dissatisfaction and the use of Force Majeure clauses in contract law are likely to eventually increase, it would be an interesting development in India's contract law sector – considering epidemics like the Covid-19 in this modern world are rare.

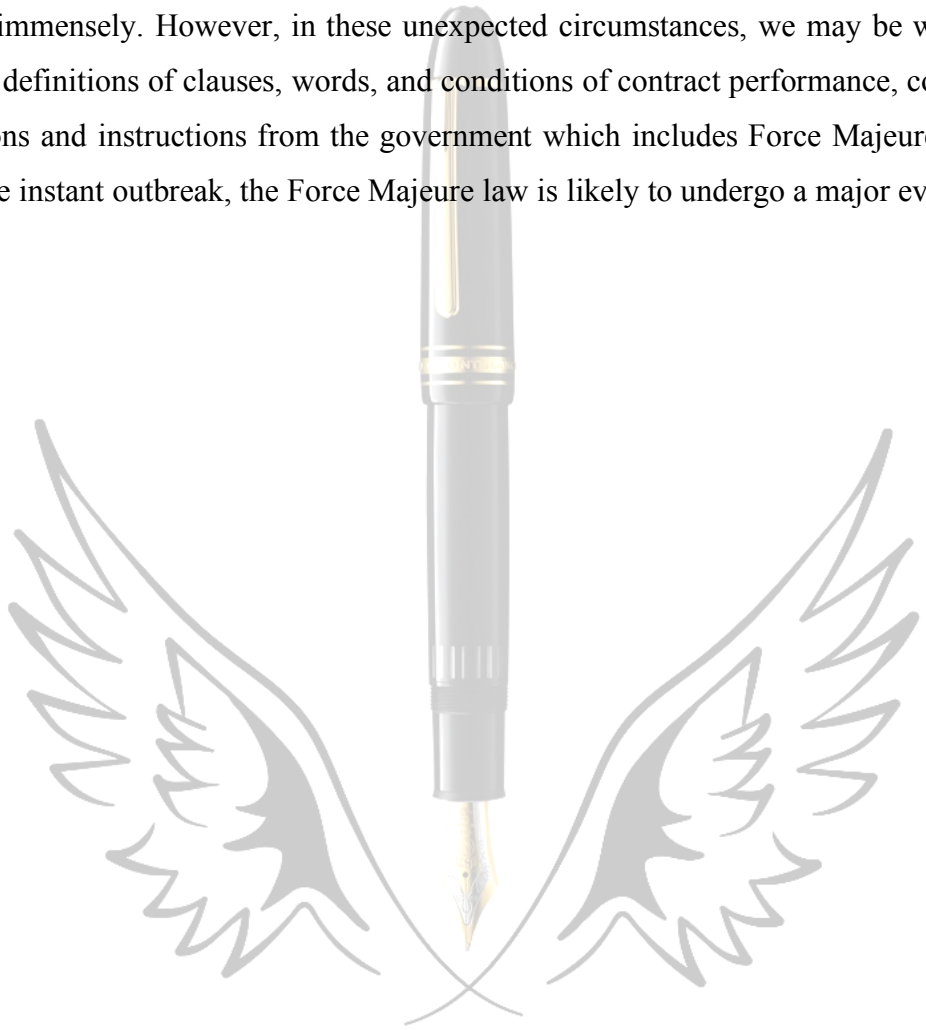
It is also important to notice many constructive measures taken by the Governments - such as the issuance of Force Majeure Certificates by China and Russia, and interdepartmental recommenders circulars in India to consider the Covid-19 pandemic in government contracts

[1541] U.S. 2020. China Force Majeure Certificate Issuance Pass 5,600 Amid Virus Outbreak - Trade Body.Available at: https://www.reuters.com/article/health-coronavirus-china-forcemajeure/china-force-majeure-certificate-issuance-pass-5600-amid-virus-outbreak-trade-body-idUSL4N2B43CK [Accessed 17 April 2020].

[1542] Pannebakker, E., 2020. 'Force Majeure Certificates' Issued By The Russian Chamber Of Commerce And Industry. Conflict of Laws. Available at: https://conflictoflaws.net/2020/force-majeure-certificates-by-the-russian-chamber-of-commerce-and-industry/ [Accessed 17 April 2020].

under the category of 'natural calamity.' These steps are further going to instil trust in demanding times like these and to protect the interests of the parties.

It stands undisputed that the pandemic and the present lock-down situation would affect contracts immensely. However, in these unexpected circumstances, we may be witnessing a variety of definitions of clauses, words, and conditions of contract performance, coupled with notifications and instructions from the government which includes Force Majeure clause. In light of the instant outbreak, the Force Majeure law is likely to undergo a major evolution.



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RELEVANCY OF PRE AND POST CONTRACTUAL DEALINGS: MULTI-JURIDICAL ANALYSIS

- **SONU MEHTHA AND ADITYA SARANGARAJAN**

ABSTRACT:

The cardinal jurisprudence of contract law is that there exists an element of *consensus ad idem* which means 'meeting of minds.' The relevance of this is starkly seen only when there arises a dispute between the contracting parties. It is of sheer convenience for the disputing party to take any sort of ambiguity, prevalent in the contractual provisions, to their advantage. Thus, the authority adjudicating the dispute ought to apply its mind while looking into the parties' conduct to understand what they actually intended by such a provision. This conduct can be over the course of a long duration right from the first interaction between the parties till the tile of arising of dispute. Thus, for the sake of better understanding, this has been divided into pre contractual and post contractual conduct.

In the course of this paper, the authors intend to discuss exactly this conduct and its impact on contractual obligations. Firstly, we would be dealing with the pre-contractual conduct by invoking the doctrine of Course of Dealing. Under this, we will separately analyze the jurisprudential value in various jurisdictions. Secondly, we would talk about the post-contractual dispute by referring to the doctrine of Course of Performance. In this regard, reliance has been placed on Art. 29 of CISG. Lastly, the doctrine of estoppel by Conduct is deliberated upon to finally conclude on the relevance of such conduct of parties.

Keywords: Course of dealing, course of performance, estoppel by conduct, consensus, Art.29 CISG.

INTRODUCTION:

While dealing with contracts, intention and conduct of the parties prove to be crucial to the execution of the contract. Intention is more often than not substantiated by conduct. Therefore, conduct of the parties play an important role to determine the terms as well as the validity and termination of contracts. Conduct of parties at two separate timelines can be of significance: pre and post contractual period. In this regard, the Doctrine of Course of Dealing is pivotal but, it has not attained its lucid form to be applicable in an effective manner. Contractual intention before the formation of a contract and after is significant as it might have a considerable effect on the outcome of the contract as a whole. Course of Dealing is referred to as a sequence of

conduct between the parties, previous to an agreement. The conduct of the parties may affect the terms of an agreement even after the formation of an agreement by means of bilateral modification or implied consent or Estoppels. A sequence of conduct that affects the agreement post creation of an agreement can be termed as Course of Performance.[1543]

Pre-Contractual Conduct: Course of Dealing:

United States- Jurisprudence:

Course of Dealing is defined in the Uniform Commercial Code in the United States of America as a sequence of conduct between the parties, previous to an agreement.[1544] This concept has proven to aid the courts in circumstances wherein disagreement on the meaning of terms of agreement was observed. Furthermore, courts in the USA have constantly turned to course of dealing between parties in case the terms of agreement were ambiguous.[1545] Thereby, under the jurisprudence of Court in the USA, Course of Dealing is employed as a well-accepted and applicable concept while determining intention of the parties prior to the creation of the agreement.

Position in India:

Indian statutes do not per se have a definition on course of dealing. Oftentimes, courts have looked into conduct of parties prior to signing of an agreement, to gain some clarity on interpretation of clauses put together. Courts in India have in the past determined that a course of dealing helps establishing a business connection over the past.[1546] The Hon'ble Apex Court in *Gedela Satchidananda Murthy (D) by Lrs. v. Dy. Commnr., Endowments Deptt., A.P. and Ors*.[1547] relied on a principle formulated by Lord Denning MR in *Amalgamated Investment & Property Co Ltd v. Texas-Commerce International Bank Ltd.*[1548] and decided that:

"If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it -- on the faith of which each of them -- to the knowledge of the other -- acts and conducts their mutual affairs -- they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular

[1543] § 1-303(a), *Uniform Commercial Code*, 1954.
[1544] § 1-303(b), *Uniform Commercial Code*, 1954.
[1545] *Pepcol Mfg. v. Denver Union Corp* 687 P.2d 1310,1314 (Colo. 1984).
[1546] *CIT, Punjab v. R D Agarwal* 1965 AIR 1526.
[1547] *Gedela Satchidananda Murthy (D) by Lrs. Vs. Dy. Commnr., Endowments Deptt., A.P. and Ors.*AIR 2007 SC 1917.
[1548] *Amalgamated Investment & Property Co Ltd v. Texas-Commerce International Bank Ltd.* [1982] 1 QB 84, 121.

interpretation is correct or not -- or whether they were mistaken or not -- or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."

Such courses of dealing have also been construed as forming the basis of carrying out business activities even without an express formal agreement in place, purely based on the conduct of the parties.[1549]

In this regard, a relevant principle was laid down by the Supreme Court in *Mohamad Ishaq v. Mohamad Iqbal*[1550]: *"There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, it follows that the distinction between express and implied contracts has every little importance, even if it can be said to exist at all."*

Although the concept of course of dealing is not codified in India, Courts have through a catena of decisions as discussed adopted the functioning of this doctrine while determining the validity of contracts and its terms.

United Kingdom Jurisprudence:

Lord Reid explains Course of Dealing as follows: If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said "of course not."[1551]

This paves way to an understanding that the course of compliance should be continuous over a period of time. A similar stance was elaborated in *SIAT v. Tradax*[1552] wherein the Court held that the term of a prior course of dealing will only be contractual if the parties' answer would have been a definite "Yes".

[1549] *UOI v. UAE Exchange Centre* Civil Appeal No. 9775/2011.
[1550] *Mohamad Ishaq v. Mohamad Iqbal* AIR 1978 SC 798.
[1551] *McCutcheon v. David Macbrayne Ltd* [1964] 1 W.L.R. 125 (HL).
[1552] *SIAT v. Tradax* [1978] 2 Lloyd's LR 470.

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The incorporation of terms by a prior course of dealing is a question of fact and degree. It will depend, amongst other things, on the number of previous contracts, how recent they are, and the similarity in terms of subject matter and the manner in which they were concluded.[1553] However, it is not necessary for the parties to the prior course of dealing to be exactly identical to the parties to the contract under consideration. In *SIAT v. Tradax*[1554], Donaldson J stated:

"Does it matter that previously the buyers either dealt with a different Tradax company or in a different commodity and not on CIF terms? The Board of Appeal thought not and I can see no reason to disagree. It is noteworthy that the broker's telex never identified the Tradax company concerned. This was left to the sellers' agents. I have no doubt that it was immaterial to the buyers. They were dealing with the Tradax organization and which member of the clan was the seller really did not matter."

At any given instance, Courts do not dwell into creation of contracts for or on behalf of the parties. The principles governing the limitation of interpretation and implications of Course of Dealings were examined by Lord Hoffmann in the Privy Council case of *Attorney General of Belize v. Belize Telecom*[1555] stating as follows:

"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves.

In some cases, however, the instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

This ascertains that Course of Dealing and its principles rely on the past conduct and relationship between the parties to establish and clarify ambiguity if any in the contract.

Extensive course of dealings for over a period of time along with additional support does facilitate the Court to believe that an implied contract has been concluded. As in the case of *Pachter v. Bernard Hodes Group, Inc.*, the Court concluded that "the evidence of the parties' extensive course of dealings for more than 11 years and the written monthly compensation

[1553] *Capes (Hatherden) Ltd v Western Arable Services Ltd* [2010] Lloyd's LR 477 at [35] per HHJ Havelock-Allan QC.
[1554] Supra 10.
[1555] *Attorney General of Belize v. Belize Telecom* [2009] 1 WLR 1988.

statements issued provided ample support for the conclusion that there was an implied contract.[1556]

Post- Contractual Conduct: Course of Performance:

The course of performance doctrine allows a contract to be modified by the post-contractual conduct of the parties. The desirability of the doctrine, however, has been a source of intense theoretical debate and controversy among legal scholars. The central theoretical argument that proponents of the doctrine present is that its application reflects the actual intention of the parties. A modification of a contract by course of performance normally incorporates several noteworthy implications: *First*, the modification may terminate certain rights afforded under the original agreement. *Second*, the modification can add new duties, by either expanding existing duties or imposing new duties on the parties. This doctrine is employed through different concepts and names across different legal systems of the world. Rule of Parol Evidence under Article 29, CISG, Estoppel by conduct are few specific concepts that fall under the umbrella of Course of Performance.

Article 29, CISG:

Article 29 of the Convention on International Sale of Goods [CISG] allows contracts to be modified or terminated by the "mere agreement" of the parties. This provision reinforces the principle that no particular form is required for either modification or termination. According to Article 29(1), the mere consent of the parties is sufficient to effect any variation of the contract. The provision does, and is intended to abolish the Doctrine of "consideration" of the common law as far as the Convention applies.[1557]

This Article is particularly pertinent and exclusive because it is essential to merchants who do business in a fast-pace environment and have no time write down every single alteration of their business agreements. The law they apply needs to be flexible, a helping hand not a burden that slows them down and thereby, Article 29 of the CISG is one such law that helps businesses that take place on faster pace and is just another form of Doctrine of Course of Performance.

Contract modification in the CISG is analyzed through the Doctrine of Parol Evidence rule that is contained under Article 29 of the Convention. In *Gold Kist, Inc. v Pillow*[1558], there were two

[1556] *Pachter v. Bernard Hodes Group, Inc.*, 10 NY3d 609 (2008), at 618.

[1557] Secretariat Commentary to (then) article 27 ("overcoming the common law rule that "consideration" is required") Commentary on the draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, reproduced in United Nations Conference on Contracts for the International Sale of Goods: Official Records, at p. 28, paras. 2-3.

[1558] *Gold Kist, Inc. v Pillow* (582 S.W.2d 77; 1979 Tenn. App. LEXIS 307).

ISSN: 2581-6349

agreements between the parties: first one was written and the second one was oral. Court allowed admission of evidence proving the subsequent, oral agreement even though appellant argued that this would be contrary to parol evidence rule. So in essence it is not allowed to use witness statements to prove the original, written agreement but if subsequent oral modifications have been made then witnesses can be called to testify about them.

Further on, extrinsic evidence like actions and conduct is used to prove that there was no intention to continue with the written agreement between the parties that was earlier agreed upon to be binding. This rule was set out in a landmark case *Pendleton Grain Growers v. Pedro*.[1559]

The agreement of both parties is all that is required in order to modify or terminate their contract as per the CISG.[1560] No form requirements must be met[1561] unless the reservation concerning form applies (Arts. 11, 12, 96 of CISG)[1562] or unless the parties have agreed otherwise. Just as intent is critical in determining the existence or scope of a contract under Article 11 of the CISG, intent is also important in examining the validity of a modification.

A U.S. court in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.* found that one party's unilateral attempt to modify an agreement failed where there was no indication that the other party accepted or agreed to the new terms.[1563] The parties had orally agreed to the essential terms of the contract, but a forum selection clause which was not part of the original agreement, was included in subsequent invoices. According to the court, it would be illogical to make the forum selection clause contained in the invoices part of the contract.[1564] The court stated that "nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Article 29." The court took into account the various circumstances recommended in Article 8(3) to determine the parties' intent, but concluded that there was no evidence or conduct that indicated the party had agreed to the modifications added to the invoice.

Court has also held that each agreement between the parties superseded the previous agreement.[1565] This agreement can be implied by mere conduct of the parties that will satisfy

[1559] *Pendleton Grain Growers v. Pedro* (271 Ore. 24; 530 P.2d 85; 1975Ore. LEXIS 478).
[1560] CLOUT case No. 176 AUSTRIA *Oberster Gerichtshof* [Supreme Court] 6 February 1996.
[1561] CLOUT case No. 413 UNITED STATES *Calzaturificio Claudia v. Olivieri Footwear* Federal District Court [New York] 6 April 1998.
[1562] BELGIUM *Rechtbank* [District Court] Hasselt 2 May 1995.
[1563] *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003).
[1564] *Id* at 531.
[1565] *Valero Mktg. & Supply Co. v. Greeni Oy,* 242 Fed.Appx. 840, 844-45 (3d Cir. 2007).

the elements of Course of Performance. Article 29 of the CISG lays down a set of implications that are found in the Doctrine of Course of Performance.

Estoppel by Conduct:

Courts around the world have touched on the concept of course of performance, which is simply put a concept in relation to the conduct of parties post signing of contracts including post expiry. Estoppel by conduct is one distinct facet under Course of Performance which is accepted and followed in various jurisprudences like India, UK and Australia. The Doctrine of Estoppel by conduct applies where one by words or conduct willfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at that time.[1566]

There are three requirements for Estoppel by conduct to be applicable:

A. The stopple must concern an existing state of facts. There is no common law stopple founded on a statement of future intention.
B. The second requirement of an Estoppel by' conduct is that it should be unambiguous.
C. Finally, an Estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law.

Estoppel by conduct is a principle which does not allow a party to say something contrary to his conduct. A person would be entitled to say anything unless he has assured the other party that he would not say something against the party. Such a scenario by dealt in the case of *Indian Oil Corporation v. Secretary Gujarat Petroleum*[1567] wherein the Court held that if one party has gone against their own conduct, then, the conduct exhibited by that party would stare in his own eyes and anything said contrary to the earlier conduct would be in the teeth of the earlier compromise.

Similarly, the English Court in *Pickard v. Sears*[1568] evolved three basic elements of the Doctrine of Estoppel to wit: *Firstly*, where a man makes a fraudulent misrepresentation and another man acts upon it to its true detriment. *Secondly*, another may be where a man makes a false statement negligently though without fraud and another person acts upon it. And *thirdly* there may be circumstances under which, where a misrepresentation is made without fraud and without negligence and will yet be considered as Estoppel by conduct.

[1566] *Superintendent of Taxes v. Onkarmal* Nathmal Trust, [*1975*] Supp. SCR 365.
[1567] *Indian Oil Corporation v. Secretary Gujarat Petroleum*, (2008) IILLJ 21 Guj.
[1568] *Pickard v. Sears* 1837 6 Ad. & El. 469, *Seton Laing Co. v. Lafone* 1887 19 Q.B.D. 68.

In this context, reference may be made to the decisions of the High Court of Australia in the case of *Craine v. Colonial Mutual Fire Insurance Co. Ltd*.[1569] and in *Grundt v. The Great Boulder Pty. Gold Mines Ltd.*[1570] which stated that:

"Estoppels by conduct, or, as they are still sometimes called, Estoppels by matter in pais, were anciently acts of notoriety not less solemn and formal than the execution of a deed, such as livery of seisin, entry, acceptance of an estate and the like, and whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed.[1571] *The doctrine has, however, in modern times, been extended so as to embrace practically any act or statement by a party which it would be unconscionable to permit him to deny."*

An issue of an Estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status.[1572] However, even in cases where in the conduct is negligent or consists wholly of omission, the party owes a duty to the person misled.[1573] Estoppel by conduct does not of itself constitute an independent cause of action.[1574]

The entire basis of this doctrine has been well put in a judgment of the Australian High Court reported in *The Commonwealth of Australia v. Verwayen*[1575], by Deane, J. in the following words:

An Estoppel of conduct will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of Estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.[1576] Therefore, the Doctrine of Estoppel by conduct will operate when without a contract, one person by his words or actions, represents to another the existence of certain facts or makes a promise to him, on which the other person acts and alters his position.[1577]

[1569] *Craine v. Colonial Mutual Fire Insurance Co. Ltd*. 1920 28 C.L.R. 305.
[1570] *Grundt v. The Great Boulder Pty. Gold Mines Ltd.* 1938 59 C.L.R. 641.
[1571] *Lyon v.Teed* (1844) 13 M & W. 285.
[1572] *Tata Iron And Steel* Co. Ltd. *v.* The *Union Of India 2000* (3) BLJR 2075.
[1573] *Mercantile Bank v. Central Bank* 1938 AC 287, *National Westminster Bank v. Barclays Bank* 1975 Q.B. 654.
[1574] *Nila Construction Company v.* Sanghi *Industries* Ltd., 2006 (1) ALD 486.
[1575] *The Commonwealth of Australia v. Verwayen* 170 C.L.R. 394.
[1576] *Manuelsons Hotels* (P) Ltd. *v. State of Kerala*, (*2016*) 6 SCC 766.
[1577] *Punjab National Bank vs Fortune Investors & Traders Ltd*.APO No.143 of 2015 CS No.202 of 2011.

Different forms of "conduct giving rise to an Estoppels" have been referred to in *Thompson v. Palmer*[1578] which may be summarised as "Estoppel by convention", "Estoppel by exercise of rights", "Estoppel by acquiescence in another's mistake", "Estoppel by negligence" and "Estoppel by representation". The kind of Estoppel is not material. The effect is. A mere rising of an expectation would suffice[1579] and a bare minimum of conduct is normally sufficient for enforcement of rights of the misled party under this doctrine.[1580]

CONCLUSION

This Article examines the frequency with which Course of Dealing and Course of Performance affect commercial contracts and allows attempts to demonstrate the application of the doctrines by various courts. Although not codified in all common law nations including India, both these doctrines are inevitable while understanding the intention of the parties and execution of agreements between them especially in cases of long-term business relationships. Ultimately, it is clear that the courts are allowed to look into not only pre-contractual dealings but also post-contractual nature of dealings, for a smooth interpretation of the agreement.

[1578] *Palmer v. Thompson*, 403 U.S. 217 (1971).
[1579] *Ramsden* 1866 LR I HL 129.
[1580] *Kanishka Aggarwal v. University Of Delhi*, AIR *1992* Delhi 105.

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ADOPTION IN INDIA – LEGAL PERSPECTIVE

- **S. SANKAR GANESH & S. MUTHU PRABA**

ABSTRACT

"What makes you a man is not the ability to make a child, it's the courage to raise one."

Barack Obama

The wordings of the past president of United States of America emphasizes the importance of an adoption. Adoption is the commitment of the parent who were not able to get their biological child or who were willing to raise one child. More emphasis is given on legal adoption because it is irrevocable and extended security is given to the adopted child. Many people adopt a child based on humanity and give parental care and support to them. In India, there is a demarcated legal procedure for adoption which confers the legitimate rights of adoptive child and adoptive parents. An adopted child gets the new life, its an opening of new world. India is a country known for its rich cultural diversity. In India, the adoption practice is in existence from olden days, the codified law structured the procedures.

KEYWORDS: Adoption in India, CARA, Effects of Adoption, Legal Perspective of Adoption in India

1. INTRODUCTION

India is a country known for its rich cultural diversity. Customs are one of the sources of law along with precedent and legislation. People in our country are governed by their own personal laws which are based on their custom and holy books. Hindu, Muslim, Christian and Parsi are the prevalent personal laws with proper legislation in India. Laws related to marriage, divorce, inheritance, adoption, and guardianship are governed by their concerned personal laws. Children are the pillars of the future and our constitution guarantees special protection to them. Adoption was once an area of taboo because of the conventional society. People who could not have their own child or those who voluntarily supports any child left alone in the world opt for adoption.

Adoption in the olden days were for succession and for the maintenance of their or for maintaining their status. Adoption is a process by which a person assumes parenting for a child, by doing so, permanently transfers all rights and responsibilities, along with filiations, from the biological parent or parents. Both in-country and inter-country adoptions are regulated by the Central Adoption Regulation Agency (CARA).[1581] There are certain norms and conditions for a person to adopt a child and for a child being adopted. More emphasis is given on legal adoption because it is irrevocable and extended security is given to the adopted child. The judiciary time and again had given a fair treatment regarding the laws of adoption in India. The rights of the adopted child must be protected in all aspects thus ensuring proper care and security. In this article, the legal aspects involved in the process of adoption are discussed in detail thus giving proper insight regarding adoption.

2. MEANING AND OBJECTIVES

Adoption is a legal process by which a child taken by a married couple or single parent with all responsibilities who agree to raise the child as their own. It is a legally approved way of formulating parent-child relationship between unassociated ones. This has given child to childless parents and second life for abandoned child with proper parental care. This concept has reference in almost all religion and mythologies. Recently, the perception of adoption has been changed from providing child to childless to providing home to homeless. Many people adopt a child based on humanity and give parental care and support to them.

The main objectives behind the concept of adoption are:

- ✓ To rescue the helpless, abandoned and orphan child and provide parental care
- ✓ To have old-age care form the adopted child
- ✓ To secure the assets
- ✓ To preserve family reputation
- ✓ Legal protection to the adopted child compared to surrogacy[1582]
- ✓ To provide consolation and relief to childless person

[1581] Autonomous and statutory body under Ministry of Women and Child Development, setup in 1990.
[1582] There is no proper legislation in India to regulate surrogacy. The Surrogacy Regulation Bill (2020) has been approved by the Cabinet on February 26, 2020.

ISSN: 2581-6349

- ✓ To secure performance of one's funeral rites and to preserve the continuance of one's lineage[1583]

3. PROCEDURE FOR ADOPTION IN INDIA

Adopting a child is not a complicated process. Indian Government and Judiciary has made it amazingly simple. Parents must register themselves in the adoption organization or agency and submit the relevant documents required. This is the basic step for adopting a child. Then the following procedure must be followed:

- ✓ Home enquiry and counseling of parents will be done
- ✓ Medical reports, physical examination reports and other relevant information of the child being adopted will be shared and the couple spend time with the child
- ✓ Proper acceptance should be given by the adoptive parents by filing a petition in the court of appropriate jurisdiction
- ✓ Pre-adoption foster care can be given to understand the habits of the child
- ✓ Court should settle the adoption case within 2 months from the date of submitting the application and after the decree is passed, adoption is valid and binding
- ✓ Periodical post adoption follow should be made by the agency
- ✓ Cancellation of adoption decree can be made only by the court in case of any fraud in the proceedings.

4. LEGISLATIVE PROVISIONS

To make it legitimate and for legal processing, India has laid down acts and regulations for adopting a child. In India, there is a demarcated legal procedure for adoption which confers the legitimate rights of adoptive child and adoptive parents. The main objective of these legislations is to transfer all the legal obligations of the biological parents over the adoptive child to the adoptive parents and protect their rights. Adoption in India is regulated by three main legislations:

a) Hindu Adoption and Maintenance Act, 1956 (Hindus, Buddhists, Sikhs or Jains)

[1583] Inder Singh v. Kartar Singh, AIR 1966 Punjab 258

b) Guardian and Wards Act, 1890 (Foreign citizens, NRIs,[1584] Indians who are Muslims, Christians, or Jews)
c) Juvenile Justice (Care and Protection of Children) Act, 2015 (provisions dealing with adoption by non-Hindu parents)

4.1 HINDU ADOPTION AND MAINTENANCE ACT, 1956

Child trafficking is one of the serious issues which should be given attention and controlled. Abandoned, orphan or surrendered children became victims of human trafficking and sexual violence. In some cases, they are protected by the adoption agencies thus giving a second chance for their life.

Hindu law legalizes adoption made by Hindus, Buddhists, Sikhs or Jains under this act. Adoption is a part of the customs and burden of proving the validity of adoption depends on the person who claims it under this act. For instance, adopted daughter of the deceased failed to prove the validity of her adoption and hence the probate of the will cannot be challenged.[1585]

Though customs have an influence over this legislation, a valid adoption is made when actual giving and taking had taken place and not when the religious ceremony is performed like *Datta Homam*.[1586]

The key features of this act are (Chapter- II: Section 5 to 17):

- ✓ Married couples or single adult (man or woman-even widow and divorced[1587]) can adopt
- ✓ Married male can adopt with the consent of his wife[1588] (Section 7)
- ✓ Married woman can adopt with the consent of her husband (Section 8)
- ✓ A child of opposite sex has to be adopted if a biological child already exists in the family

[1584] There is no specific legislation governing adoption by foreigners and NRIs. Hence it is governed by Guidelines Governing Adoption of Children inter(2015).
[1585] Binapani Samanta vs. Sambhu Mondal & Ors on 22 December, 2009
[1586] Guradas v. Rasaranjan, AIR 2006 SC 3275
[1587] Adoption by female was not permissible prior to this act
[1588] Consent of wife is mandatory for proving adoption-Ghisalal vs. Dhapubai (2011) 2 SCC 298

- ✓ A single man adopting a girl should be at least 21 years older than the child
- ✓ A single woman adopting a boy should be at least 21 years older than the child
- ✓ The same child may not be adopted simultaneously by two or more parents (Section 11)
- ✓ Adoption made under this act is irrevocable (Section 15)
- ✓ In case a male has two or more wives, consent of all the wives for adoption is mandatory and the senior most will be the legal adoptive mother of the child (Section 14).

Prior to the amendment of the parent act, the wife cannot adopt even with the consent of the husband. In 2010 amendment, married woman has been given the right to adopt with the consent of her husband but this is not likely to change the fate of married female who are placed in the position of disabled, deserted or divorced-like lady[1589].

The Court held that on adoption by a widow, the adopted son becomes the son of the deceased adoptive father and the position under the old Hindu law as regards ties in the adoptive family is not changed.[1590] The consent of the father is equally important when the mother wants to give or take a child in adoption unless he suffers from the statutory disabilities mentioned under sections 8 and 9 of the act.

The persons who are capable of being adopted are mentioned in Section 10 of this act:

a) He or she is a Hindu
b) He or she has not already been adopted
c) He or she has not been married, unless the custom permits
d) He or she has not completed the age of fifteen years, unless the custom permits.

The adopted child has all the rights of claiming adoptive parents' property as that of the biological heir. They lose all their rights in their biological family, including the right to claim any share in the estate of the biological father or relations, or any stake in the coparcenary property. An adopted child cannot claim share in the property of their adoptive parents if the parent was a disqualified heir to their parents' property.

[1589] Brijendra Singh vs. The State of MP
[1590] Ankush Narayan v. Janabai, AIR 1966 Bom 174

ISSN: 2581-6349

The law states that, "No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or save as provided in this Act, on any other ground whatsoever," but remarried widows, heirs of a convert who have not retained the original religion at the time of succession, criminals, half-blood are some conditions wherein the adoptive parent who themselves cannot inherit will not be in a position to devolve their property on to another. The biological parents can give their property to their child being adopted by another as a gift or through a will.

4.2 GUARDIANS AND WARDS ACT, 1890

This act gave clear definition of the guardianship of children. Parents are the real and natural guardian of children. After the death of the parents, grandparents or other members of the family becomes the guardian of the children but they are not considered as the natural parents of the child. Adoption by non-Hindus was regulated by this act prior to the enactment of Juvenile Justice (Care and Protection) Act of 2000.

Duties, Rights and Liabilities of Guardians

- ✓ Fiduciary relation of guardian to ward (Section 20): This is for the protection of will and other instruments of the child, but the guardian cannot make profit out of them.

- ✓ Capacity of minors to act as guardians (Section21): A minor is incompetent to act as a guardian of children, but he could be parents of his children.

- ✓ Remuneration of guardian (Section 22): The guardian appointed by the court shall be entitled for allowances for his care and execution of his duties.

- ✓ Control of Collector as Guardian (Section 23): The court appoints the Collector for care and protection of children if the guardian is minor. The collector relates to the minor and paid by the government.

- ✓ Other salient features of this act are:

ISSN: 2581-6349

a) Guardianship can be revoked by the court or by the guardian (Sec.39 & 40)
b) Both the spouses can legally be guardians
c) Single people can adopt without any restriction in age difference

- ✓ On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until further appointment is made by the court (Sec.41)

4.3. JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2000

This act and its amendment in 2006 are significant effort of the legislature towards recognition of adoption of orphan, abandoned and surrendered children by people irrespective of their religious status. The main objective of this act is to provide care and protection to children who conflict with the law.

The amendment made in 2006 expanded the provisions:

- ✓ Person can adopt irrespective of marital status (Sec.41 (6)(a))
- ✓ Person can adopt a child of same sex irrespective of the number of living biological sons or daughters (Sec.41 (6)(b))
- ✓ Childless couples can adopt (Sec.41 (6)(c))
- ✓ The passage of orders for adoption made under this act is given by the Juvenile Justice boards constituted in various districts.

4.4 CARA

Central Adoption Resource Authority (CARA) is a statutory body of Ministry of Women & Child Development, Government of India. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by the Indian Government in 2003. This nodal body primarily deals with adoption of

orphan, abandoned and surrendered children through its associated/recognised adoption agencies.

Functions

- ✓ Section 64 to 73 of Juvenile Justice (Care and Protection of Children), 2015 deals with reporting of adoption and authority of various agencies set up to regulate the process of adoption has been given. Under Section 68 CARA has been mandated to perform the following functions:
- ✓ To promote in-country adoptions and to facilitate inter-state adoptions in co-ordination with state agencies.
- ✓ To regulate and monitor inter-country adoptions.
- ✓ To frame regulations on adoption and related matters from time to time as necessary.
- ✓ To carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption.
- ✓ Other functions as provided under Regulation 37 of the Adoption Regulations, 2017

Objectives

The main objective is to ensure best interest of children; citizen-centric approach enabling prospective adoptive parents (PAPs) to take informed decision; online registration, referral (based on seniority), reservation & matching system and eliminating offline matching for transparency. The new Child Adoption Resource Information & Guidance System (CARINGS) has leveraged technology for bringing greater transparency in the adoption process and minimize delays in the adoption process through e-governance.

Vision

Children without parental care, orphan, abandoned and surrendered children should be given loving and caring family. Its mission is to expand adoption services to every nook and corner

ISSN: 2581-6349

of the country, make efforts for expeditious rehabilitation of the children through adoption, ensure standardization in the functioning of adoption agencies, promote ethical practices in adoption and facilitate parents desiring to adopt.

CARA Guidelines for Adoption

CARA gives the guidelines for adoption in India. Annual reports regarding the functions of regulatory bodies and agencies would be published in the official website through which the functioning of this nodal body can be clearly analysed. Database providing the detailed information of Adoption data (Consolidated) during last three years, State and Gender-wise Adoption Data (In-country & Inter-country) and Country and Gender-wise Adoption Data (Inter-country Adoption of Indian Children) can be accessed.[1591]

The adoption guidelines and authorities for adoption in India are:

a) Photograph of the family for adopting the child

b) Pan card, birth certificate and residence proof of the adoptive parents

c) Proof of income of the family

d) Medical certificate from a medical practitioner

e) Marriage certificate or divorce decree based on the marital status of the adoptive parents

f) Parents should be declared legal and they can file a suit against the adoption agency for the rejection of adoption if done inappropriately.

g) The appeal referred to in sub-regulation 14 shall be disposed of within 15 days and the decision of the authority in this regard shall be binding.

1591 http://cara.nic.in/PDF/annual/Annual%20Report%20of%20CARA%20for%202018-2019(English).pdf

ISSN: 2581-6349

h) Integrated Child Protection Scheme (ICPS) launched in 2009, is one of the governmental schemes regulated and facilitated by CARA in partnership with the State Governments/ UT Administrations. This has strengthened prevention of child rights violation. CARA also framed *Model Guidelines for Foster Care, 2016* to protect the well-being of children who are deprived of family care or who are at risk of being so.

Role and Charter[1592]

I. Specialised Adoption Agency (SAA)
II. Authorised Foreign Adoption Agency (AFAA)
III. State Government and State Adoption Resource Agency (SARA)
IV. District Child Protection Unit
V. Child Welfare Committee
VI. Birth Certificate Issuing Authority
VII. Central Adoption Resource Authority
VIII. Regional Passport Officer
IX. Foreigner Regional Registration Office
X. Indian Diplomatic Missions in Inter-Country Adoptions

5. ADOPTION LAW IN DIFFERENT RELIGION

India is a secular country and has its preamble of the constitution its secular nature. This secularism is practised in India from the olden days. Though several invasions and ruling over India was not able to dethrone this secular nature. The law for every religion in practise was in existence even before English ruled us, but the coding of such law and provisions were done during their rule.

5.1 Hindu Law

Only law in India which confers equal rights to adopted child as that of a biological child. Under the old Hindu law, only male can adopt a child and many restrictions were imposed based on caste and gotra. Females were not given the right of adoption and wife's consent for

1592 http://cara.nic.in/

adoption is immaterial. During time, gender neutrality has been conferred by amending the provisions of the Hindu Adoption and Maintenance Act, 1956.

5.2 Muslim Law

Muslim law does not recognise adoption[1593] and is completely different from Hindu Law. This law recognises adoption (kafala in Islam) as 'Acknowledgement of Paternity', the principle that establishes legitimacy of the child. There is a clear distinction between guardianship and custody. Father is the dominant person and mother is not recognised as the natural guardian even after death of the father. Guardian/ward role is played rather than parental role. It is unlawful to attribute one's adopted child as oneself, as if there is a biological relation between them. Islamic law would emphasis on providing relative care for the child, rather than giving in adoption. This is because Islam seeks to safeguard biological lineage and not to confuse them.

There are certain rules surrounding the concept of adoption:

- ✓ An adopted child retains his or her own biological family name (surname) and does not change his or her name to match that of the adoptive family.
- ✓ An adopted child inherits from his or her biological parents, not automatically from the adoptive parents.
- ✓ If the child is provided with property/wealth from the biological family, adoptive parents are commanded to take care and not affiliate that property/wealth with their own. They serve merely as trustees.

In ***Shabnam Hashmi vs. Union of India***[1594]*,* the Supreme Court declared that the right to adopt the child by a person as per the provisions of Juvenile Justice Act would prevail over all personal laws and religious codes in the country. Three judges bench consisting of erstwhile

[1593] Muhammad Allahdad Khan And Anr. vs Muhammad Ismail Khan And Ors., (1886) ILR 8 All 234
[1594] (2014) 4 SCC 1

Chief Justice P. Sathasivam and Justice Ranjan Gogoi and Shiv Kirti Singh maintained that personal laws would govern any person who chooses to submit him until such time that the vision of a Uniform Civil Code is achieved.

5.3 Christian Law and Parsi Law

The personal laws of Christianity and Parsi do not recognise the concept of Adoption. They are governed by Guardians and Wards Act, 1890. The general law relating to guardians and wards is contained in this act. The SC and National Commission for Women emphasised the need for uniform code to govern adoption.

In ***Philips Alfred Malvin vs. V.J Gonsalves***[1595], the court held that despite any absence of any law or alleged existence of any custom enabling Christians to adopt a child, the court legally recognised the validity of an adoption. Christians can take a child under the GWA, 1890 only under foster care. Once a child under foster care becomes major, he is free to break away all his ties with the foster parents. However, such child does not have legal right of inheritance. They can also adopt under Juvenile Justice Act read with the Guidelines and Rules issued by various State Governments.

In Parsi who are governed by the Parsi Marriage and Divorce Act, 1936 and Part-III of the Indian Succession Act, 1925 has no provision for adoption. ***Palak*** is the customary form of adoption amongst the Parsi. According to their law, widow can adopt on the 4th day of her husband's death, simply to perform certain rituals. The adopted child does not have the right to property.

6. UNIFORM CODE FOR ADOPTION

The Supreme Court time and again advocated in favour of Uniform Civil Code to curb the disparities prevailing among the personal laws.[1596] Incorporation of uniform code in adoption laws will not violate fundamental rights enshrined in our constitution. India being one of the

[1595] AIR 1999 Kerala 187
[1596] Mohd Ahmed Khan vs Shah Bano Begum, 1985 (1) SCALE 767 = 1985 (3) SCR 844 = 1985 (2) SCC 556 = AIR 1985 SC 945; Sarla Mudgal vs. Union of India, AIR 1995 SC 1531

ISSN: 2581-6349

signatories of CRC (Convention on the Rights of a Child)[1597] should bring uniformity in adoption laws so that the rights of the adoptive children can be enhanced and protected. Adoption is one of the salient features of Hinduism and hence The Hindu Adoption and Maintenance Act, 1956 statutorily recognises adoption.

This legislation underwent constructive changes and the law has been properly regulated. It is absurd that the Muslim and Christian Laws do not have proper legislation for adoption which mandates the enactment of a common law for adoption. There are vast differences among the personal laws of adoption. To improve the social life of women in India who are treated differently based on their personal laws, uniform civil code should be enacted thus rendering equal rights for men and women in the present gender biased society.

7. JUDICIARY RESPONSE

Judiciary has played a vital role in constructing and interpreting the existing the legislation by providing various insights in its judgements. Advertising about the adoption violates the right to privacy enshrined in our constitution and is prohibited under Section 74 of Juvenile Justice Act. Some important cases and judicial pronouncements related to adoption are:

In ***Lakshmi Pandey vs. Union of India[1598],*** the Supreme Court formulated the normative and procedural safeguards to be followed in giving an Indian child in adoption to foreign parents.

In ***Shrimati Asoka Mukherjee vs. Gandhi Das and Anr.[1599],*** it was held that in absence of evidence of giving and taking ceremony adoption, the person has no right, title and interest in respect of suit premises in respect of suit premises as a tenant as his claim that he was adopted son was not proved.

In ***Darshana Gupta vs. None and Ors[1600],*** it has been held that when the child to be adopted is orphaned, abandoned or surrendered or a child in need of care and protection as defined in Juvenile Justice Act, the bar imposed under Section 11 (i) and (ii) of Hindu Adoption and

[1597] International agreement on childhood and most widely ratified human rights treaty
[1598] (1987) 1 SCC 66
[1599] (2002) 3 CAL LT 307 (HC)
[1600] AIR 2015 Raj 105

Maintenance Act does not bar the Hindu having biological child from adopting the child of same gender.

In ***Karam Singh & Ors vs. Jagir Singh & Ors.,***[1601] Section 16- Presumption of validity under Hindu Adoption and Maintenance Act, 1956, it has been held that an adoption deed comes into effect the moment it is signed or thumb marked by the natural parent and the adopting parent. The only consequence of non-registration or a defective registration is that the presumption of truth, raised under Section 16 of the Act shall not arise and the adoption deed must be proved like any other ordinary fact or document.

8. WAY FORWARD

"To adopt a child is a great work of love. When it is done, much is given, but much is also received. It is a true exchange of gifts." — **Pope John Paul II**

As said by Shri Pope John Paul II, it is an exchange of gifts. The adoption opens the hope for the child, the adopted child with lot of expectations and lot of hopes enters the new family. Even sometimes the child does know about the parent and hence the child does not even know about love and affection of parent, in that case, this adoption opens the wings of that child to fly with a lot of love.

India introduced so many acts to prevent child trafficking and to encourage the system of adoption. But it requires the same wavelength between the child to be adopted and the parent who wish to adopt. The child mindset should go with the mindset of adopted parent. The child has to be made ready for getting adopted and all the things / issues in getting adopted.
The psychological issues must be resolved. Otherwise, it will make the parent to return the adopted child to the centres from which they adopt. Seemingly there was an increase in return of adopted child during the recent years because of this psychological issue.

The procedures for adoption and the issues involved in adopting a child seems to be complex and that must be made simplified, which will encourage more child to get adopted. Basically, Indians are philanthropist in nature and their philanthropy mind should be capitalised.

[1601] 2015 (3) RCR (Civil) 45 (P&H)

ISSN: 2581-6349

Still we are seeing child in streets begging for food and for their livelihood. Despite several acts and adoption principles, but the child is still in streets, The Government should come out with legal framework to curtail these kinds of insignificances.

Also, the child labour is a worrying factor. India has framed several acts to overcome this issue, but the child labour is still in existence and it leads to mental agonies, literacy insufficient, psychological factors to those children. So, the Government must come with stringent measures to eradicate this child labour. The adoption of orphan child rather protects them from child labour and other harassments.

The discrimination in child gender is also the worrying factor in the adoption. Though Government can frame the laws to overcome this issue, but the mindset of the people has to change. There is no difference between a girl and boy. It's the biological difference and this difference is nature oriented and nothing to do with their mental or physical issues. If this is set right, then the girl child in the streets or childcare centres or suppressive in the homes will come out with colours and make this world wonderful.

9. CONCLUSION

Adoption of the child is the biggest developmental process which is properly facilitated and regulated by the Government of India. Though it is a good way to control the population of the country, many people started adopting children to give them a better life in spite of having biological children. The prevailing ambiguities among the personal laws of various religions must be addressed appropriately so that it would pave the way for the incorporation of the uniform code for adoption.

Rights of the adoptive child must be protected, and they should be given parental care and affection by the adoptive family. The procedural aspect of the adoption laws in India should be revised to curb the delay in the process of adoption. Reserved judgements and delayed pronouncement of Adoption order should be regulated accordingly. The irrevocable aspect of adoption is the best part which ensures the protection of rights of the adoptive child. The adoptive child could not renounce the adoption thus safeguarding the rights of the adoptive parents also.

The law has further made express prohibition against the payment of money or other reward in consideration of adoption. Inter-country adoption process should also be regulated to limit the deferral. Thus, providing good life for a child in need of care and protection should be promoted by maintain the rights of the adoptive children.

Adoption in this process, there will be much emotional instances and situations throughout the life of child and parent. With the sayings of Richard Bach, “The bond that links your true family is not one of blood, but of respect and joy in each other’s life”, The life changes by means of adoption both to the child and the parent.

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CONSTITUTIONAL PERSPECTIVE ON ABORTION IN INDIA

- **ARTI CHAUHAN & GAURAV KUMAR ARYA**

ABSTRACT

There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process…The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned."[1602]

-Betty Friedan

Abortion is a phenomenon that has been deliberated upon since times immemorial and continues to be a topic of contention even today. Abortion is multi faceted because it involves the culmination of many aspects such as religion, ethics, medicine and law. In India, abortion was legalized in 1971. This paper aims to the constitutional study on abortion. This paper is on woman's autonomy over her body, which should not even be debatable, remains theoretical in lieu of a practical right. A woman's right to sexual and reproductive autonomy is a basic human right as well as a right recognized under Article 21 the Indian Constitution. Women and their right to determine their sexuality, fertility and reproduction are considerations that have seldom, if ever, been taken into account in the formation of policies related to abortion. This paper covers the area like a women right over abortion, a human right over abortion , and a fetus rights over abortion.

INTRODUCTION

Abortion, as a practice, is ancient as well as universal. It has taken different forms throughout history. Women have resorted to various means for aborting their pregnancies in different times: self-help practices, clandestine professional practice or alternative medicine.

Abortion is one of the most controversial ethical issues because it concerns the taking of a human life. When it comes to those who favor abortion, they point to the argument that abortion represents a woman's "right to choose" whether to continue her pregnancy or terminate it.

[1602] Betty Friedan, *Abortion: A Woman's Civil Right*, 39 (reprinted in Linda Greenhouse and Reva B. Siegel, 1st edn 1999).

Through the broad sweep of history, women have practised various forms of birth control and abortion. These practices have generated intense debates since abortion is not merely a medico-technical issue but "the fulcrum of a much broader ideological struggle in which the very meanings of the family, the state, motherhood and young women's sexuality are contested".[1603]

MEANING OF ABORTION

Lawmakers have faced difficulties in trying to define abortion, given its contentious nature. This ambiguity in itself has been a concern in the medical community. Often, due to the controversy attached to the term, medical community uses 'termination of pregnancy' to refer to it. The Oxford dictionary[1604] defines Abortion as the expulsion or removal from the womb of a developing embryo or foetus, in the period before it is capable of independent survival, occurring as a result either of natural causes (spontaneous abortion) or of a deliberate act (induced abortion); or the early or premature termination of pregnancy with loss of the foetus. Abortion or miscarriage means the spontaneous or induced termination of pregnancy before the foetus is independently viable, which is usually taken as occurring after the 28th week of conception. Children born a few days before the 28th week are known to have survived with modern care. Medically, abortion means the expulsion of the ovum within the first three months of pregnancy; miscarriage, the expulsion of the foetus from 4th to 7th month; and premature delivery, the delivery of a baby after 7 months of pregnancy and before full term. Legally, miscarriage, abortion and premature labour are now accepted as synonymous terms, indicating any termination of pregnancy at any state before confinement.[1605]

The Indian legislation on abortion, the Medical Termination of Pregnancy (MTP) Act, 1971, does not define the term 'abortion' or 'termination of pregnancy'. This creates a problem in the interpretation of the provisions of the act. There is a strong need for a uniform definition, at least in India, so that there is not so much arbitrariness around the topic and it is easier for people to interpret and also for medical practitioners to follow

ABORTION- A DILEMMA OF RIGHTS

[1603] Patchesky Rosalind Pollack, *Abortion and Women's Choice: The State, Sexuality and Reproductive Freedom,* 39 (Northeastern University Press, 1991).

[1604] "abortion, n." Oxford English Dictionary (Third ed.) Oxford University Press.

[1605] K. Mathiharan & Amrit K. Patnaik (eds.), *Modi's Medical Jurisprudence & Toxicology* 1013 (Lexis Nexis Butterworth, New Delhi, 23rd ed., 2006).

The two contrasting subjects of access to abortion as a reproductive and a sexual right, a human right, a right to health, and fundamentally, a woman's right on one hand and the embryo's right to life on the other is the core of this moral and legal issue at the outset.

A HUMAN RIGHT

Globally, both in terms of human rights and concern for women's health, reproductive right is the greatest need of the human society. The first international consensus document to recognize reproductive rights as human rights was the 1994 International Conference on Population and Development's (ICPD) Programme of Action held in Cairo.[1606] It called on State governments to fortify their obligations towards women's well-being and health. However, since there was nothing in it for the reformation of State laws and policies, a year later, the1995 Fourth World, UN Conference on Women, held in Beijing, Platform for Action called for review of national laws which contained punitive measures against women who undergo illegal abortion. Since then, the United Nations, through a series of comments, recommendations and observations, has laid down directions for states to develop their systems of treatment of abortions in a manner which does not violate a woman's imperative right of reproduction.

Over the last twenty years, international human rights norms have progressed to identify the denial of safe abortion services as a violation of human rights, significantly influencing the judicial and legislative development on the matter around the globe. Abortion has, on one hand, grown as a fundamental human right and, on the other, is allowing the transformative jurisprudential approach to recognition of women's reproductive autonomy. This progressive approach has played an important role in recognizing abortion as a constitutional guarantee and in advancing law and policy. Reproductive right is linked to a woman's other human rights including her social rights, right to health, to equality and non-discrimination, to privacy, etc. The legal acknowledgment of abortion rights is a small step towards allowing women the access to abortion care and the even more crucial and difficult task of implementing the policies to guarantee reproductive rights to women is the actual goal.[1607]

A WOMEN RIGHT

[1606] Cook, Dickens and Fathalla, *Reproductive, Health and Human Rights: Integrating Medicine, Ethics and Law* 148 (Oxford University Press, New York, 2003).

[1607] Johanna B. Fine et al., The Role of International Human Rights Norms in the Liberalization of Abortion Laws
Globally, Health Hum. Rights, Vol. 19 (June 2, 2017).

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Women and their right to determine their sexuality, fertility and reproduction are considerations that have seldom, if ever, been taken into account in the formation of policies related to abortion.[1608] Abortion is one of the most controversial ethical issues because it concerns the taking of a human life. Generally, if we look at traditional arguments for and against abortion, we find legal and religious arguments guiding each respectively. When it comes to those who favor abortion, they point to the argument that abortion represents a woman's "right to choose" whether to continue her pregnancy or terminate it. Antiabortionists, generally make a religious argument as the spearhead of their collective opposition to abortion.

There is a strong perception that a woman uses abortion as a means to terminate unwanted pregnancy for selfish reasons. Where in actuality, it shall be perceived only as a medical procedure for preserving the health of a woman. The former perception pitches a woman against the foetus in the eyes of an outsider. And so, the rights of a foetus that is not even born yet are generally preferred over the rights of a living person who is aware of them.

The right to access to safe abortion extends to so many of women's rights- to health, to free reproductive choice, to privacy, to bodily autonomy, to personal liberty, and to life. The right to life is one of the most fundamental in India. It has been recognised under Article 21 of the Indian Constitution and is available to all persons, including women. The umbrella of right to life and personal liberty has been extended over time to cover even the remotest of connotations by the Indian judiciary. The right to abortion also falls under it as it is a fragment of the right to privacy linked to the right to personal liberty that emanates from the right of life.[1609] The dilemma lies in deciding whether an unborn child should be given the status of a person or not- to whom the right to life extends.

A FOETUS RIGHT

Before advocating for right to life of fetus, it is important to prove that fetus has legal personality. To be a legal person is to be the subject of rights and duties. It is generally considered that only human beings can have rights and are necessarily the natural persons. The confusion with regard to legal personality of unborn child persists because of the doubt that whether unborn child can be considered as an alive human being or only a piece of property of mother who have the right to abort it according to her own wish.

[1608] Amar Jesani and Aditi Iyer, "Women and Abortion" , Economic and Political Weekly, November 1993.
[1609] Roe v. Wade, 410 U.S. 113 (1973).

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The legal understanding of the concept of 'person' or 'personality' revolves around possession of rights and capacity to discharge legal duties. Hence, natural persons, that is, human beings are the prime claimants of legal personality. The concept of legal personality of unborn child has been puzzling and uncertain since inception; hence, the case-law regarding the same has also been inconsistent.

Internationally, the sanctity of life of a person is recognized, however the recognition of a foetus as a person is still doubtful. The State's interest to save a prospective life is understandable, however, when it comes to a choice between the two, the life and rights of a living being should be considered over the life and rights of a prospective one.

ABORTION AND THE CONSTITUTION OF India

While establishing the democratic setup, our Constitution framers were vigilant and inculcated the sprit that people must be protected against misuse of power by the government and its officials. They, therefore, provided for the fundamental rights in part-III of the Constitution. The article 21 of Indian constitution provide right to life which includes within its ambit the right to privacy. Right to life and personal liberty is the most sacrosanct, precious, inalienable and fundamental of all the fundamental rights of citizens. This guarantee imposes a restraint on the government and it is part of the cultural and social consciousness of the community in India. In this context, every woman owe an individual right, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. The women have reproductive features and have right to decide about her sexual health and shape her reproductive choices. To ensure availability of human rights to women and to advance the development, the international community acknowledged reproductive rights of the woman. In order to follow the international mandate, governments from all over the world have recognized and accredited reproductive rights to women to an unprecedented heights. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus it can be reiterated that all over the World each and every woman has an unconditional right to have control over her own body.

AWARENESS

An increase in awareness and a dispel in misconceptions about abortions amongst providers and policymakers, backed by political will, advocacy and action at the central and state level are required. It sure will be a slow change, but it is achievable.

CONCLUSION

Before concluding and drawing an inference, it would be relevant to understand the basic aim behind rights regards to the abortion. One can deduce that the foremost objective is to provide all women with quality abortion care, which is sensitive to their needs by increasing aspects such as easy accessibility and affordability to safe abortion services. This may be done by mobilising human, financial and material resources for provision of care and safety in abortion procedure and increasing the number of trained persons and equipped abortion centers. In addition to this by efficiency is increased and ambit is broadened by integrating abortion services into primary and community health centers, increasing investment in public amenities, broaden the base of abortion providers by training paramedics to do first trimester abortions, simplifying registration procedures, link policy with up-to-date technology, addressing the need for appropriate post-abortion care etc.

As a woman, the first right that one has is of a human being. The age-old customs and beliefs of procreation being a duty has taken a backseat and given a new approach to life. The fertility of a woman is hers and hers only and she has the sole right over it. It is her right to reproduce or choose not to. This is all we need to understand. We need to grasp the concept of autonomy, bodily or otherwise and let people make decisions about their health. The subject of abortion is deeply tangled with that of gender equality and gendered roles everywhere. Being a developing country, India is still fighting the gender equality battle, and the stigma of abortion is only one of the many linked to it.

India needs to do away with the customary and religious practices that stand in the way of a woman's basic rights, if she is facing problems at their hands. The Indian judiciary has a specific part to play in recognition of this problem and in taking the next step. The judicial involvement at the primary stage in deciding whether to allow abortions on a case to case basis makes the provision all the more difficult to get access to and in some cases, increases the difficulty of the women in question by delaying the termination. But in the implementation and correction of laws, in the review of policies, in recognizing the lacunae and in ensuring that women are provided their basic rights, the judiciary is the only hope, as it has been in the recent decade.

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DEVELOPMENT OF AVIATION LAW IN NATIONAL AND GLOBAL DOMAIN

- SIDRAH JAMI

INTRODUCTION

In 1912, the first flight between London to Karachi flight passing through Delhi and Karachi with the help of the cooperation of the Indian State Air Service and UK-based Imperial Airways initiated a beginning and expansion of Indian Civil Aviation Industry. The first airline which was established in India was Tata Airlines by JRD Tata. During the time of independence, the cargoes and the passengers were carried by nine esteemed carrier companies. In 1948, a joint venture of Tata Airlines and a fleet of three Lockheed Constellation Aircraft called **Air India International Ltd** was started by the Government of India. Air India International Ltd had its first maiden between Mumbai and London on June 8, 1948. After independence in 1953, nine companies were nationalised by the Indian Government and the Air Corporation Act 1953 was implemented. The domestic flights were facilitated and monitored by The Indian Airline Corporation whereas the international flights were overseen by the Air India International. The feeder services were provided between two small cities by Vayudoot which was the third government-claimed airline company. The Open Sky Policy focussed on permitting air tax operators to operate flights from any airport on both sanction and non-sanction basis which was adopted by the government in April 1990. In 1994, **Vaayudoot** became a part of Indian Airline Corporation. Later Air Corporations Transfer and Undertakings and Repeal Act of 1994 was introduced and replaced by Air Corporation Act 1953 which was repealed. This act focused on giving permission to own and provide air transport services by the private operators. It also focused on the concept of **Foreign Direct Investment**. According to it, 49% of FDI was permitted and the restriction placed on the equity stake of Non-Residential Indians (NRI) was raised to 100%. The act signified that no foreign airline company will be allowed to hold any equity in local airlines. The Indian aviation industry is one of the fastest-growing industries in the world.

INTERNATIONAL ORGANISATIONS AND CONVENTIONS

In 1947, the **International Civil Aviation Organization (ICAO)** along with the application of the Chicago Convention on International Civil Aviation was established. The **Chicago**

Convention came into power with the goal of establishing a lawful system for the improvement of the common aviation industry, post World War II. It depicted the constitutive arrangements of the ICAO. On 7th December 1944 the **International Air Service Transit Agreement** was signed in Chicago and later was enforced on 30 January 1945. This agreement gave allowance for the common use of air spaces by different countries. It accommodated the utilisation of airspace by one nation in return for the consent for the equivalent over the airspace of another.

The Five Freedom Agreement managed the mutual exchange of traffic rights. This agreement consisted of five freedom which had to be followed by every nation that signed it. It included freedoms like:

1. To fly across any territory without landing
2. To take on the passengers, mail, and cargo, destined for the territory of another agreeing nation and to put down passengers, mail and cargo coming from any such territory.
3. To put down passengers, mail, and cargo is taken on in the territory of the country whose nationality the aircraft possesses
4. To take on passengers, mail, and cargo destined for the territory of the country whose nationality the aircraft possesses
5. To land for non-traffic purposes

The initial two freedoms attack and evacuate the political obstructions, keeping the skies open to free air travel. The remaining freedom empowers business benefits for the advancement of financial ventures in air. The ICAO was set up to lay down the standards, rules, methods, and procedures for the global air route and to encourage and cultivate the advancement of air transport across worldwide limits. The Chicago Convention's arrangements are coordinated to states giving rules for the formulation of public international law. The convention was based on the concept of mutual respect of air space between the nations which have signed the agreement.

Kupeli & Ors Vs Kibris Turk Have Yollari Sirketi (t/a Cyprus Turkish Airlines) & Ors

This case was related to the sovereignty over the airspace. Under this, an appeal made against the judgement of the English Court on 28th July 2009 by Kibris, a Cyprus airline on 12th October 2010 was dismissed. The UK Secretary of State for Transport was considered correct in refusing Kibris's application to operate direct flights between Cyprus and the UK. It was held that direct flights between UK and Cyprus would infringe the sovereignty of the Republic of Cyprus.

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ANTI HIJACKING IN INTERNATIONAL DOMAIN

Hijacking was a serious issue in the aviation area. **The Convention for the Suppression of Unlawful Seizure of Aircraft** was signed on December 16th, 1970 and was adopted by the International Conference of Air Law at Hague. It was also known as the **Hague Hijacking Convention**. It was a multilateral treaty under which the member nations consented to forbid and penalise airplane capturing. The convention limited its ambit to situations in which the civilian aircraft takes off or lands from a country which is not registered under this convention. It also didn't apply to law enforcement or military aircraft. It sets out the rule **Aut Ut Deidre Aut Judicare** connoting that under this a state must arraign the hijacker of an airplane if no state demands their removal for the indictment of the equivalent. The depository of this convention in the USA and the Soviet Union, and in the present time, it hosts 185 parties, with 75 signatories and 10 ratifications.

The **Beijing Convention** was drafted on 10th September 2010. it had its guidelines like the Hague Convention. This convention focused the parties consented to condemn the use of the common airplane as weapons or as unlawful transporters of a natural, compound and atomic weapons or utilizing dangerous things to attack airplane. This convention has been ratified by 22 countries.

DOMESTIC LEGISLATIONS

Aviation industry plays an important role for the development of the country. The International of India (IAAI) and the National Airport Authority collaborated together and established Airport Authority of India in 1995. In 1912, Tata airlines starred their first airline services in India which were later renames as Air India in 1946. Indian Aviation Industry is one of the fastest growing industries in the world.

Article 246 read with **Schedule VII, List 1** of the Indian Constitution helped in the initiation of The Indian Aircraft Act of 1934. This article gives power to the Indian Parliament to make laws regarding civil aviation. This act contains provisions for widening the scope of notifications, civil orders and regulations given by subordinate legislation. The **Aircraft Rules of 1937** laid down guidelines relating to security guidelines, condition of flying, rules for enlistment and advertising of airplane which incorporates an investigation of

accidents, ground lights, the air-worthiness of aeronautical beacons, logbooks, false lights, investigation of incidents, radiotelegraph, inspection, requirements and other rules.

The **Aircraft Act 1934** gave explicit powers for manufacture, operation, possession, use, control, export and import of airplanes.

The **Directorate General of Civil Aviation** is responsible for enforcement for air-worthiness norms, air guidelines, air safety and for proper and systematic regulation of the transport services between various areas in India.

The **Airport Authority of India** has the responsibility of developing the infrastructure of the airports in India. **The Bureau of Civil Aviation Security** acts as a crucial agency for which looks after aviation security. The Indian Government under the Civil Aviation Policy 2016 proposed that the qualification necessary for the operation of the airline overseas is five years, with a condition requiring the distribution of 20 percent or 20 airplane of the total fleet, to the local area if the abroad operation were to be permitted.

ANTI HIJACKING IN NATIONAL DOMAIN

The Indian Legislature repealed the **Anti Hijacking Act of 1982** and implemented the Anti-Hijacking Act of 2016. This act was proposed with guidelines relating to the Hague Hijacking Convention and Beijing Convention. This act applies even if the offence is committed outside Indian territory, under conditions like firstly, if the offender is Indian, the offender is stateless but lives in India as an illegal migrant, the offence is committed against Indians or if the airplane is leased to any Indian or registered in India.

The new act includes the punishment of hoax calls and changing the "in service" definition. Under the old act Anti-Hijacking Act of 1982, an airplane was seen "in service" between the time when the doors were shut and the time when passengers go out of the plane. Whereas under the new act Anti-Hijacking Act of 2016 an airplane was seen "in service" from the start of the pre-flight preparation by ground staff or by the group for a particular flight until 24 hours after the landing of the airplane".

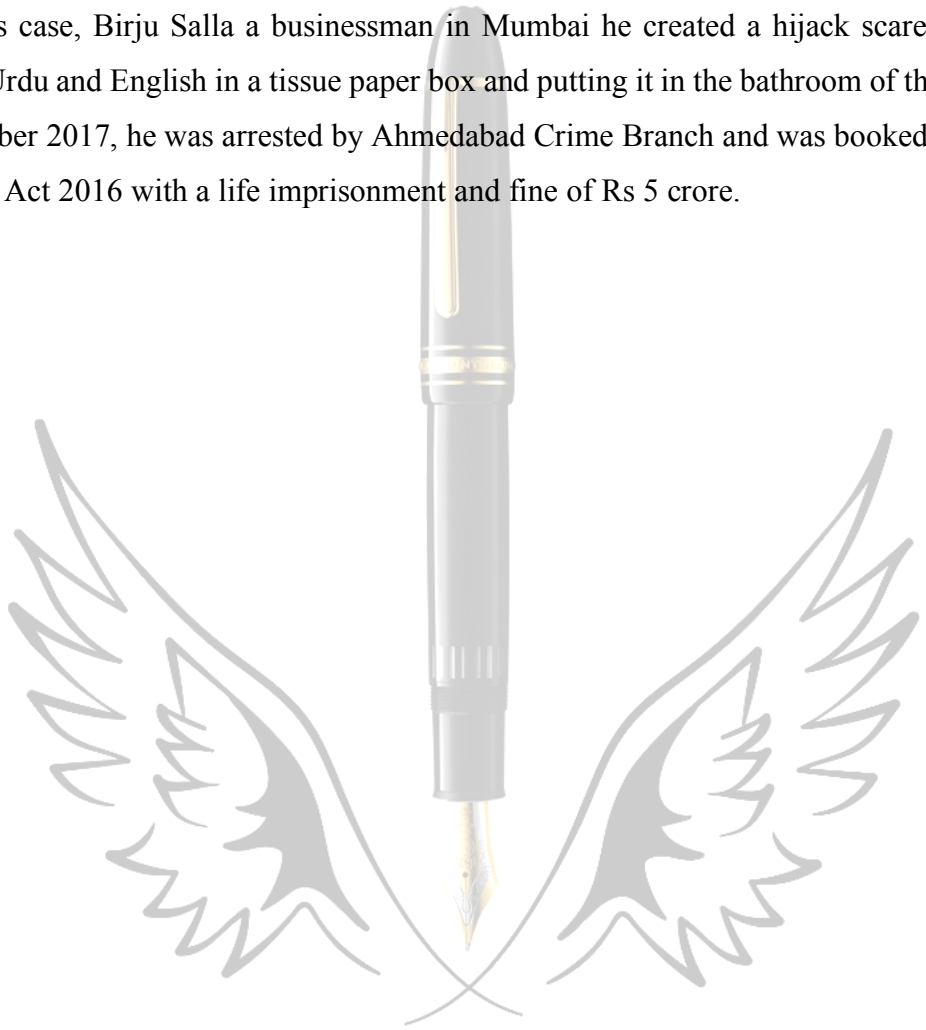
According to Section 3(1) of Anti-Hijacking Act of 1982, hijacking is defined as "Whoever unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, or by any technological means, commits the offence of hijacking".

Whereas under the new act Anti-Hijacking Act of 2016 the offence of hijacking will include influencing or guiding others in being an accomplice in the hijacking, preparation of hijacking a plane or even a canard that many appear to be veritable will be punished with up to life

imprisonment only if there are no losses or demise however, if there is death of any traveler or crew member then death penalty might be given.

Birju Kishorekumar Salla vs State of Gujarat

Under this case, Birju Salla a businessman in Mumbai he created a hijack scare by writing threat in Urdu and English in a tissue paper box and putting it in the bathroom of the plane. On 30th October 2017, he was arrested by Ahmedabad Crime Branch and was booked under Anti Hijacking Act 2016 with a life imprisonment and fine of Rs 5 crore.



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DRUG LAWS IN INDIA – POLICIES AND PAPER

- **DEYASINI DAS & AHIR MITRA**

ABSTRACT

The Ministry of Welfare and the Narcotics Control Bureau have often said words like "Say no to Drugs and yes to Life" and "Drug abuse is Life abuse". Universally every country has its own set of drug control laws and there has been sanction of three globally known conventions. This aspect of International law has been and will be in existence until it is completely eradicated or restrained. The objective is to prepare an overview of the principle laws and conventions applied in India.

INTRODUCTION

In 21st century, almost everyone is familiar with the word 'drug' but they are unaware of the true meaning of the word. According to medical science, the chemical substance that is prescribed by a medical practitioner to prevent or cure a disease is referred to as 'drug'. Whereas, the ordinary meaning suggests, it as a chemical substance related with some definite psychological and physical characteristics which eventually alters the normal functioning of a human body as its effect. The definition of drug extents when viewed from sociological or psychological factors. Consumption of drugs can become a regular practice for a human being in short time, later resulting into damaged brain cells and nervous system. Its even may lead to death in certain cases. These are the reasons, drugs are considered to be anti-social and illegal in several countries for the welfare of people.

Usage of drugs for experiencing pleasure is referred to as drug abuse. Drugs for this purpose are being consumed by over 190 million users around the globe, and, the numbers are increasing day by day among the young generation mostly people under the age of 30. Abuse of drugs like hashish, ganja, morphine, cocaine, heroine and LSD are extremely harmful for the brain. Apart from this abuse of drug includes injections as well, which can lead to transmission of diseases like HIV and Hepatitis. Drug abuse has become a warning concern for humanity.

Drug trafficking is another major topic, when elaborated it covers illicit trading, cultivation, distribution, manufacturing and sales globally. This is also barred under laws of several

countries. The global illicit drug market is constantly growing in dynamics and is being monitored and researched by UNODC.

In India, according to the UN reports, the top three states consuming drugs are Punjab, Manipur and Mizoram. India is considered to be one of the largest markets of drug. Punjab tops the chart as almost half of the cases registered under Narcotic Drugs and Psychotropic Substances Act are from there. States of West Bengal, Andhra Pradesh, Uttar Pradesh and Haryana has the maximum number of teenagers addicted to drug amounting to 80% of that population. 3.3% of 7% people commit suicide in India due to over influence of drug. As of 2020, the country might have way more censorious issues to deal with but the speedy rate of drug abuse is also something noteworthy. To limit and control drug usage India has its two major drug laws, namely Narcotic Drugs and Psychotropic Substances Act (1985) and the Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act (1985). The objective of these acts is to make drugs illegal and punish any person misusing it.

In order to educate common people with the side effects of drug and its injurious nature 26th June is observed as International Day against Drug Abuse and Illicit Trafficking by the UN General Assembly. The UN has organized several International meetings and conventions with its member countries in order to achieve a drug free society.

INDIAN LEGISLATIONS RELATED TO DRUG

India's broad legislative policy has been mentioned in the two following Acts :

- **Narcotic Drugs and Psychotropic Substance Act, 1985**

Narcotic Drugs and Psychotropic Substance Act, 1985 was introduced by the Government to prohibit any person who tries or conduct to produce, consume, cultivate, store, sell , purchase etc ant kinds of Narcotic Drugs or Psychotropic Substances. The main intention of the legislature to come out with a different act as because till then there was no separate law governing such issues in India. The came into form in 14th November, 1985, and it went under amends three times till date. This act is designed as per a treaty India underwent, such as the Single Convention on Narcotic Drugs, Convention on Psychotropic Substances and United Nations Convention Against Illicit in Narcotic Drugs and Psychotropic Substances. This Act was shaped to reinforce and change the different laws which will manage the different offenses identified with the drug activities in India. The act abolished all the dangerous drugs such as cannabis, charas, opium, codeine, heroin, coco, cocaine. The NDPS Act considers the different drug offenses as genuine in nature and punishment is not easy in nature. The scale for punishments and disciplines of drugs for the most part relies on the sort of offenses however

ISSN: 2581-6349

one of the standards for specific offenses is the number of drug seized. Section 2 of the NDPS Act gives us the different meaning of which a portion of the accompanying terms are portrayed, for example, Addict: An individual who is reliant on any opiate Narcotic Drug and psychotropic substances. Conveyance: It implies a transport of any portrayal at all and incorporates any airplane, vehicle, or vessel.

Central Government processing plants: these are the production lines possessed by the Central govt. or on the other hand, such processing plants that are held by any such organization in which the central govt. is a dominant part partner.

Offenses or acts identified with drugs are essentially coordinated toward gaining of benefits, the illicit medication merchants have a specific cost on which they sell the drugs and by that value, these venders can procure gigantic benefits. A few merchants are related to an association or we call them 'specialists' while the individuals who are not connected to any of the association which implies they sell drugs all alone are known as 'free dealers'.

Part V-An explicitly discusses the relinquishment of illicitly procured property. Be that as it may, before discussing the procedural part of holding onto the wrongfully gained property, as referenced prior that the amount of different sorts of medications seized has an imperative job in choosing the punishment and discipline for the equivalent. Part IV of the Act expresses the offenses and punishments.

In a decision given on account of Joginder Singh v. Territory of Himachal Pradesh by the Himachal Pradesh High Court, the Court cleared the charge as the authority couldn't follow Section 50 of the NDPS Act. The blamed for this situation was conveying a sack on his correct shoulder and when enquired by the police concerning what he was conveying taken care of, he attempted to flee from the spot however a short time later he was gotten by the police. The substance present taken care of was discovered to be charas of an all-out amount of 1.470 kgs. The indictment has neglected to demonstrate the blame of the denounced and the capable specialists didn't agree to Sec. 50 of the Act; consequently, the Court absolved the denounced. In State of Punjab v. Rakesh Kumar[1610], the accused was found under lock and key for 'manufactured drugs' as referenced in Section 21 and 22 of the Act, anyway the Punjab High Court for the situation expressed that the 'produced drugs' must be considered as a piece of Drugs and Cosmetics Act, 1940. The State distressed by the choice moved toward the Supreme Court and the Apex Court held that the choice given by the High Court was faulty, the Supreme

[1610] 2018.

Court likewise expressed that Drugs and Cosmetics Act, 1940 arrangements with the restorative or remedial utilization of drugs while in the current case, the accused was found under lock and key for drugs in a mass amount to which Section 80 of the NDPS Act will be material and put aside the request for the High Court and further arranged that the charged will be arrested.

- **155th law commission report**

  Drug misuse has been one of the scourges of the general public, it is a danger that undermines open life and prompts pulverization of the individual, families yet besides the general public. It would consistently be a significant need to address this issue and control this. It was felt that significantly after the correction of 1988 in the Narcotic Drugs and Psychotropic Substance Act, there were no ideal outcomes. Along these lines, the law commission thought of it as important to embrace a survey of Narcotic Drugs and Psychotropic Substance Act, 1985, bringing about the 155th report of law commission. This gave proposals to top off the provisos and to make the arrangement increasingly successful.

  With a perspective on the enormous worry of developing drugs maltreatment in various pieces of the nation the law commission planned for examining the accompanying angles, Examining the threat of drug misuse and drug dealing and its impact on the young people of India. Investigating the Directive Principles of State Policy cherished in the Constitution of India and the arrangements of International Conventions on Narcotic Drugs and Psychotropic Substances; Understanding the greatness of the issue of illegal dealing and utilization of opiate drugs and psychotropic substance just as the sicknesses in the NDPS Act;Looking at the important arrangements of the NDPS Act and their translation by the Courts and Recognizing the alterations required for progressively successful usage of the NDPS Act.

- **Amendments of NDPS Act**

1989

The NDPS Act experienced its first chance in the year 1989. Harsh disciplines were presented, similar to the obligatory least detainment of 10 years, a bar on suspension, limitation on bail, preliminary by an exceptional court, relinquishment of property, and required capital punishment at times of rehashed offense. After these alterations, individuals got even with a

modest quantity of medications needed to experience long detainments and exceptionally heavy fines, until and except if the individual could demonstrate that it was for his very own utilization.

2001

Because of the analysis looked by the 1989 revision on account of its unpredictable condemning strategies, the 2001 alteration was passed. As per the 2001 correction, the punitive arrangements were redesigned, and punishments were forced dependent on the amount of the medications. Three classes for the amount were made-small, business, and middle of the road. The edge was given through a Central Government warning in October 2001.

2014

The NDPS Act was again revised in the year 2014, and from May 2014, the alterations came into power. The fundamental highlights of the most recent changes are- Another class of fundamental opiate drugs was made which the Central Government can manage consistently all through the country. The target of the law was augmented with the advancement of opiate drugs and psychotropic substances for logical and clinical utilize yet besides denying illegal use. Counting the expressions "the executives" of medication reliance and "acknowledgment and endorsement" of treatment focuses, in this manner taking into account the foundation of legitimately restricting treatment gauges and proof-based clinical intercessions. Capital punishment was made optional for a rehashed offense.

- **The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988**

Illicit trafficking of drugs and such chemical substances gives rise to significant threat to the society. This does not only limit to the detoriating health and welfare of the people indulged in such activities but also reflects on the national economy. Drug dealing operations are detrimental to the economy of the country. To the control the rising issue, Parliament of India extended its drug laws. In the year 1988 Prevention of Illicit Traffic in NDPS Act came into force, for the full enforcement and implementation of NDPS Act.

The main objective behind this act is to detain certain cases in order to prevent trafficking. Trafficking exercise was being carried on by several people on a daily basis, multiple areas became highly vulnerable due to those organizations and it just increased in magnitude. Detention of these persons was the only way to prevent the population from such scandalous

organizations. Thus, the Parliament came up with another enactment restricting the flow of drugs.

INTERNATIONAL CONVENTIONS

- **Single Convention on Narcotic Drugs, 1961**

Through coordinated international action this convention was proposed to fight drug abuse. The convention can be divided into two forms that work together. The first part restricts the limit of possession of drug in areas of production, distribution and trade. Second part fights drug trafficking by putting off and discouraging the traffickers. To asses the state's implementation of the terms of this convention a 'statistical return system' was also created. This return would consist of information related to- consumption, production, export and import of drugs. The primary purpose of this convention was to control plant based substances like marijuana, opium, coca and its derivatives.

- **Convention on Psychotropic Substances, 1971**

To establish an international supervision on psychotropic substances this convention came into existence. This convention mainly is an expansion of the ambit of drug abuse and particularly deals with control of certain synthetic drugs, scrutinizing the therapeutic value and abuse potential. Since the Single Convention on Narcotic Drugs, 1961 was limited to plant based drugs this convention contends with psychoactive drugs namely, benzodiazepines, psychedelics, barbiturates and amphetamine stimulants.

- **UN Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988**

This convention is a set of measures to control illicit trafficking of drug. The detailed interpretation of the convention shows its provisions against laundering of money and digression predecessor substances. This treaty is considered to be one of the most important drug control treaties that are in force. In the developed world the demand for drugs like heroine and cocaine increased so much that the production was hiked as well as the trade movement soon making it a million dollar industry. In view of the sociological development this convention terminated trafficking of drugs.

- **SAARC Convention on Narcotics Drug and Psychotropic Substances, 1993**

The South Asian region is the chief foundation for trafficking of drugs and chemical substances. SAARC or the South Asian Association of Regional Corporation came up with a set of regulations in order to control drugs and substances in countries like India, Bangladesh, Maldives and Bhutan. The base of this convention is to standardize abuse of drug by means of

ISSN: 2581-6349

lowering addiction level to prevent the damage caused physically and mentally and to combat trafficking illegally.

POLICIES IN INDIA

India policy to take control over drug, which is been stated in The Directive Principle of State Policy that is Article 47 of The Constitution of India, which implies that it is the duty of the state to increase the nutrition level and amount, it shall also look into standard of living and encourage in improve the public. This also prohibits the consumption of drugs which likely to endanger the health of human and the drug's use for the medical purpose are exempted. To take control over dangerous drugs, it one of the fundamental duties of the state. India has multi-agency function in order take control over the dangerous drugs. The Governments' strategy has in this way been to advance their utilization for clinical and logical purposes while keeping their preoccupation from licit sources, and precluding illegal traffic and misuse. Not at all like the prior Opium Acts furthermore, the Dangerous Drugs Act which it supplanted, the NDPS Act has given the intensity of authorization to different focal and state law implementation organizations, therefore spreading the net of law authorization far and wide.

The NDPS Act It is likewise workable for the focal and State Governments to advise any new class of officials of any division to authorize. The NDPS Act partitions the forces and duty of guideline of licit exercises. Section 9 of the Act has recorded different exercises which the Central Government can, by rules, control while area 10 records different exercises which the State Governments can, by rules, direct. Along these lines, we have NDPS Rules of the Central Government and the State NDPS Rules surrounded by each State Government under a similar Act. These are upheld by the Central or on the other hand concerned State Government. Government business is isolated in the Central Government according to the Allotment of Business Rules. According to these Rules, the NDPS Act is regulated by the Ministry of Finance, Department of Revenue. Be that as it may, matters relating to Drug Demand Reduction are taken care of by the Ministry of Social Equity and Empowerment (MSJE). MSJE underpins different NGOs associated with Medication Demand Reduction. Service of Health, Government of India, which is liable for all medical problems, runs a few medications de-fixation focuses in the Government clinics the nation over. The Narcotics Control Bureau, under the Ministry of Home Affairs (MHA), arranges activities by different functionaries (Central and State) under the NDPS Act. The State Governments likewise have their own Health Departments and Social Welfare Departments every one of which has its own arrangement of exercises identifying with Drug Demand Reduction.

ISSN: 2581-6349

Some different associations, in spite of having no immediate job under the NDPS Act, are firmly associated with the issue of dealing and maltreatment of drugs. For instance, the staff of detainment facilities need to manage the issue of enslavement which is a lot higher among detainees than among the general populace. The National AIDS Control Organization (NACO) which is worried about AIDS needs to manage the issue of spread of HIV among infusing drug clients. There are likewise issues on which there has been no uniform approach in the nation. For example, infusing drug clients (IDUs) (addicts who infuse of smoking, grunting or orally devouring medications) frequently share needles and syringes. One HIV positive fanatic in the gathering spreads the contamination to the rest through such trade of needles and syringes. There are two schools of thought on the best way to manage infusing drug clients "hurt decrease" or “forbearance as it were". Damage decrease approach looks to convince addicts to misuse sedates securely by providing them clean needles and syringes (with the goal that they try not to share or utilize tainted ones), oral tablets of buprenorphine or methadone (so that as opposed to infusing heroin, they misuse buprenorphine or methadone orally), and so forth. Forbearance just methodology accepts that the main way to forestall medicate driven HIV is to totally swear off devouring medications. Nations, for example, USA, Russia and China follow the 'forbearance just' approach while nations in EU and Australia follow the 'hurt decrease' approach. The Service of Social Justice and Empowerment has so far been following the 'restraint just' strategy while the Ministry of Health and Family Welfare and the National AIDS Control Organization (NACO) have been advancing 'hurt decrease'. This strategy report looks for, bury alia, to address this sort of disparity in approach on related issues. This National Policy on NDPS has been set up in meeting with the concerned Ministries, associations and State Governments. It means to: (a) Spell out the arrangement of India towards opiate drugs and psychotropic substances; (b) Serve as a manual for different Ministries and associations in the Legislature of India and to the State Governments just as Global Organizations, NGOs, and so on.; and (c) Re-attest India's promise to battle the medication threat in a comprehensive way.

White Collar Crime in relation with Drugs

White collar crime or socio-economic offences that affects the public of society at large such as smuggling, illicit trafficking, sale of narcotic drugs and psychotropic substances etc. Drug business in a society is main carried out by the influential people of the society for the purpose of easy way of export and import of such substances. Moreover, all the drugs that are available in the market are not cost friendly, so for this reason every person can get hands over such kinds of drugs. In NDPS Act, selling, consumption, manufacturing, storing such kind of substance is an offence. White collar crime are non- conventional crimes that means there is

no exists of Mens Rea in the crime conducted. These kinds of crime don't affect one person in particular but it targets large person at large in a society. **Sutherland** offered a formal definition of white-collar crime as "a crime committed by a person of high social status and respectability in the course of his occupation".[1611] These types of crime are committed on behalf of the organisation. For managing the Monaco of drug abuse and illegal dealing in that because of geological area of India between "GOLDEN TRIANGLE" and "GOLDEN CRESCENT", the significant hotspots for unlawful opium and its subsidiaries, their business sectors being in western nations, the peril of India being a travel defeat is consistently there which has its own effect and impact locally especially on the adolescent in light of the fact that the flexibly for them gets simpler. Consequently, it is basic to take rigid measures by achieving appropriate alterations in the NDPS Act by making it increasingly powerful to battle this danger.

PENALTIES IN INDIA

According to the NDPS Act, drug offences are egregious and risky, and is considered to be cognizable and non - bailable so the punishments for them are very rigid. The aggregate of the fine and sentence differs in each case. The quantity of drugs play a vital role while the order of punishment is passed and it can be segregated into three divisions- less amount, more than less amount and commercial amount.

- **Punishment Against Quantity**

I. Small Quantity- For; Heroin (5g), Opium (25g), Morphine (5g), Ganja(1000g), Charas (100g), Coca leaf (100g), Cocaine (2g), Methadone (2g), Amphetamine (2g), THC (2g) and LSD (0.002g)

the punishment is 1 year of rigorous imprisonment maximum or fine up to Rs. 10000 or both.

II. Intermediate Quantity- For quantity which is more than small but less than large

the punishment may rise up to rigorous imprisonment for 10 years or a fine of almost 1 lac.

III. Large Quantity- For; Heroin (250g), Opium (2.5kg), Morphine (250g), Ganja(20kg), Charas (1kg), Coca leaf (2kg), Cocaine (100g), Methadone (50g), Amphetamine (50g), THC (50g) and LSD (0.1kg)

the punishment is rigorous imprisonment for at least 10 years to 20 years and fine of 1 lac to 2 lacs.

- **Punishment Against Offences**

[1611] https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0020.xml.

I. According to sections of Opium Act (18c), Cannabis (20) and Coca (16), cultivation without license, leads to a punishment of rigorous imprisonment up to 10 years and fine up to 1 lac.

II. According to section Opium Act (19) embezzlement by farmer with license notwithstanding the quantity will lead to rigorous imprisonment of 10 to 20 years and fine of 1 to 2 lacs.

III. According to sections prepared Opium (17), Opium (18), Cannabis (20), Psychotropic substances (22) and Manufacturing drug or preparation (21), any person involved in production, manufacturing, transportation, possession, sale or export/import will lead to punishment of rigorous imprisonment of 6 months or fine of Rs.10000 [small quantity], imprisonment up to 10 years and fine of 1 lac [intermediate] or imprisonment of 10 to 20 years and fine of 1 to 2 lacs [large].

IV. According to section 23 of NDPS Act, import/export or shipment will lead to a punishment of rigorous imprisonment of 6 months or fine of Rs.10000 [small quantity], imprisonment up to 10 years and fine of 1 lac [intermediate] or imprisonment of 10 to 20 years and fine of 1 to 2 lacs [large].

V. According to section 24 of NDPS Act, when drugs are imported from places outside India or supplied outside India for trading purposes, the punishment is rigorous imprisonment of 10 to 20 years and fine of 1 to 2 lacs notwithstanding the quantity.

VI. According to section 25 of NDPS Act, using of premises for the purpose of drug dealing the punishment is rigorous imprisonment of 10 to 20 years and fine of 1 to 2 lacs notwithstanding the quantity.

VII. According to section 25A of NDPS Act, any violation regarding controlled substance will lead to a punishment of rigorous imprisonment up to 10 years or fine of 1 to 2 lacs.

VIII. According to section 27A NDPS Act, financing trafficking and harboring will lead to a punishment of rigorous imprisonment up to 10 years or fine of 1 to 2 lacs.

IX. According to section 32 of NDPS, punishment for offences not specified is imprisonment up to 6 months or fine or both.

X. According to sections 27 and 64A od NDPS Act, the punishment for consumption is rigorous imprisonment for up to 1 year or fine of Rs.20000 or both [morphine, cocaine ,heroin] and 6 months or fine up to Rs.10000 or both [other drugs].

When drug addicts are participating for rehabilitation an immunity is provided through proceedings.

XI. According to sections 28 and 29 of NDPS Act, any person committing attempts, abetment and criminal conspiracy will be punished as per the offences.

XII. According to section 30 of NDPS Act, any person preparing to commit an offence will be punished half as per the offence.

XIII. According to sections 31 and 31A of NDPS Act, repeating of offence leads to a punishment of 1.5 times the penalties [maximum cases] and death penalty [some cases].

CONCLUSION

Concisely, drug is a toxicant that provides for short-term relaxation and comfort but also long-term defilement in life. The youth of India is trapped under the purview of drug abuse thus; they suffer a number of physical and mental diseases. Even internationally, this is an arguable issue, as it not only harms the lives of people but the trading of drugs plays an major role economically by means of illegal wealth. The Government of India has taken compact initiatives to spread the language of awareness among common people but it needs deeper interference.

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DEVADASI SYSTEM AND ITs CURRENT LEGAL SITUATION IN SOUTH INDIA

- **AKSHITA AGARWAL & SOHAIL SEN**

INTRODUCTION

Since the pre-historic days' women have been an indispensable piece of the Indian culture. Regardless of the Early Vedic Period where wars were battled between the families[1612], excluding the women thinking about their significance in the antiquated social orders. The procreating abilities of the women to carry forward the ancestry and to shield the particular traditions which were being regarded. The significance and regard given to the women can be comprehended from instances like interpretation and clarification of Rig Vedic hymns given by Lopamudra the spouse of Agatha Rishi, the minister under King Khela.

With the appearance of different gatherings on the Indian subcontinent, as Kushanas, Kashtrapas, Turks and Afghans, Mughals and the Europeans, a need emerged for the native individuals to secure their women. In light of which their developments were controlled and they were constrained inside the four dividers of the house which inevitably disintegrated their situation in the general public.

Women were not recognised in a considerate manner and were dealt as a commodity who is fit for conceiving an offspring and dealing with family needs. Manusmriti[1613] the earliest law text alludes that a family where a lady endures is bound to be destroyed, on the other way around a family where women are dealt benevolently will undoubtedly flourish.[1614] In another area of the content, it is referenced that women didn't perform *Upanayana*[1615] function suggesting that, female literacy was not of significance. The *Apastamba Dharmasutra*[1616] refers to the punishments[1617] that a husband would endure if he with no legitimisation relinquishes his significant other or wives.

[1612] Eng. Tr. Ralph T.H. Griffith, Rig Veda, Mandala 7, Hymn 18, 33, 83 (1896); Bharatas, Matsyas, Yadus and Purus.

[1613] The Manusmriti is an ancient legal text among the many Dharmashastras of Hinduism.

[1614]Manusmriti, Chapter 3, verse 55, (01st July 2020, 7:08 pm), https://archive.org/details/ManuSmriti_201601 /page/n3

[1615] Manusmriti, Chapter 2, verse 36, (01st July 2020, 7:15 pm), https://archive.org/details/ManuSmriti_201601 /page/n15. Upanayana was an elaborate ceremony, that included rituals involving the family, the child and the teacher.

[1616] Apastamba Dharma sutra is a Sanskrit text and one of the oldest Dharma-related texts of Hinduism that have survived into the modern age from the 1st-millennium BCE. It is one of three extant Dharmasutras texts from the Taittiriya school of Krishna Yajurveda.

[1617] Apastamba Dharma sutra, Prasna 1, Patala 10, Khanda 28, 19, (01st July 2020, 7:30 pm), https://archive .org/ details/apastamba__dharma_grihya_sutras . He who shall abandon his wife shall put on an ass's skin, with

With the attack of Mughals in medieval India, the situation of women crumbled with the intrusion of the Turks, Afghans, and Mughals. Parda System which was a typical practice among the Turks, Afghans and the Mughals which was later accepted by the Hindus. Other than Parda System, child marriage was additionally embraced to protect the girl child. Polygamy was predominant amongst the Hindu high class and the Turks, Afghans and the Mughals.

The Advent of the Europeans exacerbated the social status of women in India. By this point, the education pace of women witness massive downfall bringing forth new unacceptable social practices.[1618] Practices that debased the status of women in the general public, like child marriage, sati, female child murder, Devadasi et cetera.

The term Devadasi has been obtained from two Sanskrit terms, "*Deva and Dasi"* where Deva implies God and Dasi imply the female, when assembled it implies the female workers of God. It was first pervasive in *Tamilagam* (presently called Tamil Nadu) and later being adopted in the states of Maharashtra, Karnataka, Orissa et cetera. At first, Devadasis were youthful and unmarried women who were devoted to the Lord of a temple. They used to sing, move, clean the sanctuary and serve the Lord. Devadasis got significance and regard in the general public. *Shatapatha Brahmana*[1619] depicts the physical characteristics of a Devadasi and how she can be alluring to the Lord.[1620] A comparative reference has also been given in the *Chandogya Upanishad*.[1621] In the domain of strict ceremonies and practices of the above notice time frame, women (Devadasis) delighted a noteworthy job. Womb, where women carry a child, is all termed as *Garabhagriha,*[1622] the term was also utilized in a temple. Here the Lord is positioned inside a woman's womb depicting the significance given to women.

Puranas like the *Padma Purana*[1623] alludes to names of the temple Puri Jagannath, Konark temple having Natamandapas[1624]. The Devadasis who were committed to these temples were given musical instruments for temple services. Padma Purana states the purchase of Devadasis

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the hair turned outside, and beg in seven houses, saying, 'Give alms to him who abandons his wife.' That shall be livelihood for six months.

[1618] [1618] Max Roser and Esteban Ortiz-Ospina, Historical Perspective, Literacy (01st July 2020, 7:50 PM), https://ourworldindata.org/literacy.

[1619] Vol. 12, The Sataptha Brahmana, p.63, (F.Max Muller ed., eng.tr. Julius Eggeling, 1882).

[1620] Id.

[1621] M L Varadpande, Religion and Theatre, p.46, (1983).

[1622] The innermost sanctum of a Hindu temple where resides the murti (idol or icon) of the primary deity of the temple. Literally the word means "womb chamber", from the Sanskrit words *garbha* for womb and *griha* for house.

[1623] The Padma Purana is one of the eighteen major Puranas, a genre of texts in Dharmic religions.

[1624] Benudhar Patra, Devadasi System in Orissa: A Case study of the Jagannatha Temple of Puri, Bhandarkar Oriental Research Institute, p.162, 1st July, 2020, 13:28 pm.

to devote them to the Sun temples. Another Purana, Bhavishya Purana[1625] comments that to accomplish *SuryaLoka*[1626] one must donate many women as Devadasis to the Sun Temples. One of the section from Kautilya's Arthashastra,[1627] Sutradhyaksha Prakarana alludes to the retirement of devadasis from the temple administrations after which they procure their income through spinning wheel. Kalidasa's Meghadutta also mentions the appearance and performance of the temple's young ladies at the hour of devotion in Mahakal temples of Ujjain. "In one of the stanzas, he is referring to the excellence of the women which was being addressed by one of the spectators. Who further depicts their pieces of jewellery made of lustrous pearls which continue shimmering and contrast her hand movements with waves and her black eyes to the bunch of honey bees."[1628]

6th century AD denoted the period when the Devadasi System was viewed as holy and when they were exceptionally regarded. The presentation of the Devadasis was considered so holy and devout that their appreciators would roll on that ground to purify themselves off any sins. The collapse of Devadasis started in Odisha when they started to dance in the imperial courts on exceptional events like during Ramachandra Deva.[1629] Additionally, we have substantive pieces of evidence confirming that in or around this period itself something very similar occurred all through India.[1630]

TRAVELOGUES: THE HISTORICAL EVIDENCE

Numerous travelogue's give a distinctive record of Devadasi System, post 6th century CE. Starting with *Xuan Zang* (Hsuan-Tsang) who visited India during c. 602-664. He alludes to females dancing in the temple throughout the night, during which lights continued to burn and incenses and blossoms were constantly being offered to the temple.[1631] *Al Biruni,* the Father of Indology mentions about the dancing young ladies of Kabul. The King of Kabul made the

[1625] The Bhavishya Purana is one of the eighteen major works in the Purana genre of Hinduism, written in Sanskrit.
[1626] Dr. A. S. Altekar, The position of women in Hindu civilisation, p. 215 (1938).
[1627] Supra. 10, p.52.
[1628] Vol. 1, Kalidasa, Meghduta, p. 192 (Eng. Tr. Arthur W. Ryder).
[1629] Ramachandra (c. 1271-1311 CE), also known as Ramadeva, was a ruler of the Seuna (Yadava) dynasty of Deccan region in India. He seized the throne from his cousin Ammana, after staging a coup in the capital Devagiri.
[1630] Accounts of various travelers who visited India after the 14th century refer to the fact that, the previous sanctity of the Devadasis were lost and currently they have become nothing but woman with questionable character.
[1631] Vol.2, Hsuan Tsang, On Yuan Chwang's Travels in India, p. 254 (T. W. Rhys Davids and S. W. Bushell ed., Eng. Tr. Thomas Watters, 1905).

dancing young ladies as a fascination of the city and were utilized to increase monetary assets which were later used to reinforce the military.[1632]

Vijayanagar Empire, additionally, was not resistant to the Devadasi system. Several travel accounts allude to its essence like *Abd-ur-Razzaq Samarqandi* (1413-820). As mentioned under his travelogues the sovereign of Vijayanagar on the event of Mahanavi called his courtesans and heads from remote terrains for the function in the region. During this service, Abd-ur-Razzaq portrays the dancing young ladies and their exhibitions where he contrasts their cheeks with moon and faces with the spring. Further, he describes that when the women started to perform even the savviest individual in the crowd lost his detects.[1633]

Domingo Paes and Fernao Nuniz, travellers who visited Vijayanagar Empire, likewise mentions about the incidence of dancing young ladies in the pagodas which had an idol of Lord Ganesh.[1634] *Thomas Roe* (1581-1644), an ambassador of the British who visited Jahangir's court, describes an incidence when Rana of Udaipur ranges to Jahangir's court with presents and this specific event came to an end by the *Nautch girls*[1635].

Francois Bernier a French doctor who visits the court of Shah Jahan expounded widely on the New Year festivities. He also describes the fairs that were begun by Akbar. Numerous measures were taken during this period to improve the situation of women. Further his work alludes to seraglio singing and dancing for people who belonged to a progressively private and good class.[1636]

In the content *"Travels in India", Tavernier* (the author) mentions to *Baladines*.[1637] In one of the illustrations, he describes imminent armament specialists who spent most of their income on the Baladines.[1638] He further expounds another village which is three coss away from the village of Cambay where girls between the age of eleven and twelve were offered by their concubines in one of the pagoda of the village.[1639]

Having observed the records of the medieval period which mentions the dancing young ladies or the Devadasis let us comprehend the contemporary time frame and their viewpoint towards

[1632] Vol. 2, Abu Rayḥan Muḥammad ibn Aḥmad Al-Biruni, Alberuni's India: English edition, p.157 (Eng. Tr. Dr. Edward C. Sachau, 1910).
[1633] Vol. IV, Kamal-ud-Din Abd-ur-Razzaq ibn Ishaq Samarqandi, The History of India: as told by its own Historians, p.118 (Prof. John Dowson ed., Eng. Tr. Sir H.M. Elliot, 1872).
[1634] Domingos Paes and Fernao Nuniz, The Vijayanagar Empire chronicles of Paes and Nuniz, p. 241 (1991).
[1635] Vol. 1, Sir Thomas Roe, To the Court of Mogul, p.145 (William Foster ed.).
[1636] Francois Bernier, Travels in Mogul India, p.273 (Vincent A. Smith ed., second edition, Eng. tr. Archibald Constable, 1891).
[1637] Vol. 1, Jean Baptiste Tavernier, Travel in India, p. 289 (Eng. Tr. V. Ball, 1890). Meaning: Dancing girls.
[1638] Id., p. 288-89.
[1639] Supra 26, p.71.

the Devadasis. The period of nineteenth-century saw social revolts concerning the act of Devadasi. Towards the finish of the eighteenth century and the start of the nineteenth century, the idea of the devadasi framework started to change and was transformed into the act of temple prostitution which was not favoured by the literate Hindus.

REVOLUTIONARY MOVEMENTS

The social movement, in the 19th century, against the Devadasi system can be comprehensively partitioned under two heads, *the Revivalists and the Reformists*. The reformists who accepted the practise of Devadasi as an indecent one began two significant revolts, *Anti-Natch movements and Anti-Dedication movements*.[1640] Devadasi System which was predominant among the Hindus were the young ladies were hitched to the Lord and expected to serve them. These Anti-Devadasi movements were started to eliminate the Devadasi System. At long last in 1882[1641] congregations and meetings were arranged to stir popular view and to put forward an appeal to Viceroy and Governor General of Madras. But the Governor General of Madras was of the opinion that the position and the practise of dancing girls was not disgraceful to the Indian culture subsequently there is no reason to abolish it.

In spite of the decision taken by the Governor-General of Madras, the educated Hindus put in all the endeavours to make the Anti-Devadasi development a triumph. The reformists like Raja Ram Mohan Roy, Mahadev Govind Ranade played an indispensable role. By 1920's essential advances were taken to safeguard the land and the Properties joined to the Devadasis.

A significant job was played by the Anti-Brahmin reformists in this development which ultimately led to the Madras Act of 1929. In spite of the fact that the Devadasi System was not abolished yet it played a crucial job in the advancement of the Devadasis. Under this Act the properties of Devadasis were set free from taxes. Hence, from 1929 the Devadasis in the presidency of Madras started to be the proprietors of their own home and land.

While the reformists were attempting to dispense with the Devadasi System there was gathering of *Revivalists* who were attempting to save Sadir,[1642] a dance form performed by the Devadasis. This movement was bolstered by the theosophical society of India. One such part was Rukmini

[1640] Anil Chawala, Devadasis-Sinners or Sinned Against, p. 18, (2nd July 2020, 3:04 pm), www.samarthbharat.com.

[1641] Women Issues and Social Reform Movement, http://shodhganga.inflibnet.ac.in/bitstream/10603 /101744/9/09_chapter%202.pdf, p. 22, July 02 ,2020, 10:13 am.

[1642] Toward reform and rehabilitation of Devadasi, p.169, (2nd July 2020, 3:36 pm), http://shodhganga.Inflibnet.ac.in/bitstream /10603/94747 /12/12_chapter%206.pdf. 'Sadeer attam', the ancient name of Bharata Natyam, an Indian classical dance.

Arundale,[1643] a theosophist, upheld the revivalists for protecting that specific dance form; she was a follower of Annie Besant.[1644] The endeavours of the revivalists restored Sadir as Bharatanatyam, a significant dance of India.[1645]

LEGISLATIVE ACTIONS WITH RESPECT SOUTH INDIA

The first Indian Penal Code of 1860 did not mentioned to the Devadasi System. It was under the Amendment Act of 1924 that two section, that is, 372[1646] and 373[1647] were introduced. These considered the utilization of Devadasis for satisfaction of sexual wants to be unlawful and unethical. However, these two sections, did not meddle with the Devadasi System openly. This could be comprehended from one of the cases, *Public Prosecutor v. Maddila Mutyalu and Another*[1648]. In this case the accused were not sentenced because of absence of confirmations under Section 372 and 373 of the Indian Penal Code. The section describes prostitution as the total belonging and control of the minor's gotten by purchasing, recruiting, or by any case other expectation or information explicit in the section.

The *Bombay Devadasi Protection Act in the year 1934* was the principal administrative action that entirely managed Devadasis. As indicated by this Act the commitment of a young girls to serve the Lord is illicit despite the fact that the assent of such young lady is available.[1649] This Act additionally penalizes individuals included, other than the lady, to be devoted, performs, licenses, partakes in or abets, the performance of, any function mentioned in segment 5, will, on conviction, be culpable with detainment of either depiction for a term which may stretch out to one year, or with fine or with both.[1650]

[1643] Id., p. 169.
[1644] Supra 31, p. 169. She also became involved in politics in India, joining the Indian National Congress. When World War I broke out in 1914, she helped launch the Home Rule League to campaign for democracy in India, and dominion status within the British Empire. This led to her election as president of the India National Congress, in late 1917.
[1645] Id.
[1646] Selling minor for purposes of prostitution, etc.-Whoever sells, lets to hire, or otherwise disposes of any 2 [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
[1647] Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any 2 [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
[1648]Public Prosecutor v. Maddila Mutyalu and another (1918) 35 MLJ 157.
[1649] Bombay Devadasi Protection Act, 1934.
[1650] Id., Section 5, p.2

The word Devadasi as described by Section 2(a) means, any unmarried lady who is committed to any Hindu divinity, idol, object of love, temple or different religious institution. Moreover, the state government under section 4 of the Act empower Devadasis to get hitched and the child born after such marriage will be legitimately perceived.

As a result of the Act 1934, various different Acts were passed in different states of South India for security of Devadasis.[1651] Initially, the *Madras Devadasi (Prevention of dedication) Act 1947* was introduced in the state of Madras (now known as Tamil Nadu) but later was also enforced in the state of Karnataka. Later, the government of India also passed a statute known as the *Immoral Traffic (Prevention) Act of 1956* likewise played a significant job to control the practice of prostitution. Under section 3(1), the Act describe punishments for keeping a brothel[1652] or permitting another person to utilize the property as a house of ill-repute.

In the year 1990, a Public Interest Litigation was filed under Article 32, of the Indian constitution.[1653] Under this litigation the appealing party brought up specific issues on the indecent practices concerning women, shaky financial state of their guardians and sexual exploitation of young girls. In the present case it was observed by the court that the issue presented is not just a social issue but also a financial issue. It was further held that such an issue requires both legalistic and an excessive humanistic approach. The court guided the state government and the union territories to make new suitable laws and to take severe measures, under the current laws. The court likewise leads them to build up the *Advisory committees* comprising of government representatives and women from various government assistance divisions, for eliminating the practice of prostitutes and devadasis or jogins.[1654]

It was further in the case of *Public at Large vs. The State of Maharashtra*[1655] that the court of law guided the state to follow severe surveillance in the regions where sex labourers work and to safeguard the young girls who are working as sex labourers. It additionally guided the state to punish individuals who are involved in women trafficking. The court additionally guided the state to establish an Advisory Committee which would take care of new proposals in controlling women trafficking. Further it was instructed to the State Government to set up homes as rehabilitation centres for rescued women.[1656]

[1651] After the Bombay Devadasis Protection Act 1934 many new Acts were passed in different states of south India i.e. Madras Devadasi (Prevention of Dedication) Act of 1947, Karnataka Devadasi (Prohibition of Dedication) Act of 1982, Andhra Pradesh Devadasi (Prohibition of Dedication) Act of 1988.
[1652] The Immoral Traffic (Prevention) Act, (1956).
[1653] Vishal Jeet v. Union of India, MANU/SC/0277/1990.
[1654] Id.
[1655] Public at Large V. State of Maharashtra, 1997 (4) BomCR 171, 1997.
[1656] Id.

In the year 2005[1657] a new statute was introduced in the state of Maharashtra called the *Maharashtra Devadasi (Abolition of Dedication) Act.* The Act was introduced repealing the Bombay *Devadasi Protection Act of 1934*. Although, the statute was made inclusive of laws nullifying the practise of Devadasis, yet it failed to do so. It was in the year 2016 when a case was registered by Kerala based NGO, S.L. Foundation. The issue was focused to the defects in the regulating authority of different Southern states (Maharashtra, Andhra Pradesh, Karnataka and Tamil Nadu).

There were arguments recorded against the negligent behaviour displayed by the police officials and the State authorities with respect to the laws ensuring the safety of the Devadasis or jogin, prostitutes, sexual harassment and human trafficking. The court, for this situation, gave a warning note to all the previously mentioned states to safeguard the young girls from being constrained into prostitution and furthermore to shield them from sexual harassment and human dealing.[1658] This case furnishes us with the data with regards to proceeded with endurance of the Devadasi Practice in India.

STATISTICAL REPORTS PROVING THE EXISTENCE OF DEVADASI SYSTEM

The Joint Women's Program, Bangalore for National Commission for Women conducted a survey in the year 2010, with a goal to educate individuals about the presence of Devadasi practice in the modern society. Collectively about 375[1659] Devadasis were surveyed. As indicated by the table- *Over 63.6 percent of girls were constrained into the devadasi framework because of customs, while 38.4 percent revealed that their family had a background marked by Devadasis.*[1660]

There were numerous reasons published in the report, however, one of the fundamental reasons was the caste system in India which is still pervasive in the general public. As indicated by the report, larger part of these devadasis were from "three scheduled class society".[1661] Therefore,

[1657] Maharashtra devadasis (Abolition of Dedication) Act, (2006).
[1658] Krishnadas Rajagopal, Act against Devadasi system: SC tells states, THE HINDUS, (July 13, 2016) 8th July, 2020, 16:23 pm. Link- https://www.thehindu.com/news/national/act-against-devadasi-system-sc-tells-states/article8229560.ece
[1659] Supra. 29, p.30.
[1660] Shingal, Ankur, The Devadasi System, The Devadasi System: Temple Prostitution in India (10th July, 2020, 20:27 pm) https://cloudfront.escholarship.org/dist/prd/content/qt37z853br/qt37z853br.pdf.
[1661] supra. 29, p.30-31.

CASTES	Per cent of total devadasis of a village
Holers	85.88
Madars	12.94

we see that the practice of Devadasis much more of a social and caste based crime. Alongside the position framework, reasons like financial state of a family, the economic wellbeing of a girl or woman, inadequate information and absence of proper enforcements of Statutes passed by the government against the devadasi framework in India.

National Commission of Women, works for the advancement and empowerment of women. It has recently gathered information from all those states where the system of Devadasis is still prevalent.[1662] The information was put together in its report which indicates that in the territory of Maharashtra, *"A sum of 8,793 applications were collected and subsequent to leading an overview 6,314 were dismissed and 2,479 devadasis were proclaimed qualified for the recompense. At the time when the report was submitted only 1,432 devadasis were accepting this remittance."*[1663] It is obvious that in the province of Maharashtra alone, out of 8,793 applications just 1,432 Devadasis were accepting the stipend which is a major issue.

Numerous activities have been organised for the upliftment of Devadasis however none of it ends up being effective, in which case the state is to be blamed as they can't produce adequate lawful education. Lack of education among the women is another explanation and it additionally indicates the circumstance because of which it is still prevalent in the territory of Maharashtra.

CONCLUSION AND SUGGESTIONS

Different survey reports give us an idea about the presence of Devadasis system in many different states of India. There are some point of suggestions and reasons behind the failure of the Acts restricting and criminalizing the Devadasi System. All the current statutes restricting the frameworks of Devadasis are enacted by the State government. While imposing these laws the State authorities gets careless as they are not responsible to any more significant position authority. Since the Devadasi System is pervasive in different states of the nation it is the obligation of the Union government to uplift these women and to administer a law under which they can be made aware on the implementation of those laws.

Samgars	1.18
Total	100.00

[1662] Devadasis, p.294, July 01, 2020, 16:56 pm), http://shodhganga.inflibnet.ac.in/bitstream/10603/72215/14/14_chapter%208.pdf, p. Quoting the National Commission for Women, the authority says there are 2.5 lakh "Devadasi" girls who have been dedicated to Yellamma and Khandoba temples on Maharastra-Kamataka border.

[1663] Id., p.294. The statistical data collected by them through a survey, "Devadasi Maintenance Allowance".

The Union must introduce a Committee which coordinates with the State Government to keep a check on the application and execution of these laws. The primary role of these unique committees ought to be to gather information with respect to the laws and approaches been made by the state and were these arrangements fruitful against such heinous practices.

The Union and State government ought to likewise direct rehabilitation and vocational projects for Devadasis and prostitutes with the goal that they can be prepared to have a fair existence. Through these rehabilitations and professional projects, the women who were devadasis will get prepared and literate enough to earn and to live a decent life. Economic policies ought to be set up by the legislature for giving employment help to the Devadasis.

Taking into account the historical records which mentions about the Devadasi System throughout the Indian History, one can comprehend it as a framework that had roots in Ancient India. In spite of the fact that it started as a framework where women were committed to the temples for the administration of the Lord. In the end it changed its nature and transformed into temple prostitution. Initially it was a practise where young girls were sent into this system without wanting to, which shows that *Woman rights or Human rights* were encroached on an enormous scale. In the current world bunch of enactments are being passed to patch up the status of women in the general public by wiping out every single social discrimination against women.

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GLOBAL ADMINISTARTIVE LAW:- SEPARATION OF POWER AND GLOBAL ADMINISTRATIVE LAW

- **ASTHA GARG**

ABSTRACT

This Article examines the debates of the Founders over the separation of powers and global administrative law. After surveying the experience in the colonies and under the post-Revolutionary state constitutions, it analyzes the relevant issues at the Constitutional convention. Separation of powers is a principle set out by Montesquieu in the 17th century after observing the British System of the time. The doctrine of the separation of powers sets out that there are three distinct entities at the centre of the decision and law making process. Montesquieu believed that the best safeguard against tyranny was the separation of the Executive, Legislature and Judiciary. Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the of power and provide for checks and balances . This article also deal with global administrative law This GAL concept is based on the idea of understanding global governance as administration, which can be organised and shaped by principles of an administrative law character . Global Administrative Law is an academic project that attempts to describe the emergence of a regulatory space beyond the state and to prescribe solutions to the problems it diagnoses through certain normative principles like participation, transparency, reasoned decision-making, judicial review, accountability, proportionality, and legitimate expectation. This article argues that Global Administrative Law (GAL) approaches may strengthen analysis of operational issues such as emergency actions by IOs and the human rights implications of IO activities, structural issues such as the involvement of IOs in field missions and in public-private partnerships, and normative issues concerning the production and effects of non-treaty regulatory instrument by IOs

I. INTRODUCTION

In India, separation of functions is followed and not of powers and hence, the principle is not abided in its rigidity[1664].Strict separation of powers is not followed as it is followed in the U.S. According to article 16 of the French Declaration of the Rights of Man and of the citizen of

[1664]Allen Maliga , Separation of power in Tanzania , (march 15, 2019) ttps://www.academia.edu

1789, "A society where rights are not secured or the separation of powers established has no constitution at all"1665.The constitution makers have also meticulously defined the function of various organs of the state Montesquieu who for the first time formulated this doctrine systematically, scientifically and clearly in his book1666 'Esprit des Lois' (The Spirit of the Laws), published in the year 1748.These words state the Doctrine of Separation of Powers as given by Montesquieu, "There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing laws, that of executing public resolutions, and of trying the causes of individuals."1667.Thus to check this problem he felt that the solution would be to vest power in three distinct organs of the government, namely, the legislature, the executive and the judiciary. Legislatures review the functioning of the executive. Separation of powers doctrine is based on the notion that each branch of government has its own unique set of powers and that these powers are exclusive and not to be exercised by another branch of government.1668 Executive appoints the judges1669, judiciary exercises judicial review over legislative and executive actions. Judiciary has the power to void laws passed by the Parliament. Similarly, it can declare the unconstitutional executive actions as void1670.Separation of powers doctrine provides that the legislative power is the power to make, alter, and repeal laws and to make legislative policy while the executive power is the power to put the laws enacted by the legislature into effect.1671 Thus, through its law making ability, the legislature has significant power to affect the authority of the executive branch by providing the parameters within which the executive can operate. The legislature's power, however, is not unlimited.

II. MONSTEQUE THEORY OF SEPERATION OF POWER

. Charles de Montesquieu very talented and respected writer no one have ever suspected on his writing as he has not given the actual meaning of separation of power but he has contributed much in development of the separation of power as he is Long before the publication of *De l'Esprit des Loix* Montesquieu had become widely known and respected through the

[1665]Article 16 of the Declaration of the rights of Man and the citizen 1789, as reproduce in English translation in S.E Finer, V.Bogandor and B. Rudden, Comparing Constitution.
[1666] Prachishah , separation of power in India and USA , (march 15, 2019) http://www. legalservicesindia.com
[1667] All answer limited , 'India constitution And separation of power ' (law teacher . net , march 15 , 2019) http://www.lawteacher.net
[1668]State v. Ronek, 176 N.W. 2d 153, 155(1970)
[1669]Prachishah , separation of power in India and USA , (march 15, 2019) http://www. legalservicesindia.com
[1670] CK. Takwani , Lecture on Administrative Law (Lucknow eastern book company) , 4th edition , p32 , (march 15 , 2019)
[1671]In re C.S., 516 N.W.2d 851, 859 (Iowa 1994)

publication of the *Letterspersanes* and the *Considerations sur les causes de la grandeur des Romains.*1672who gave the importance to the Doctrine of Separation of power . As he took from the john Locke .the publication of his book took twenty year of preparation and once his book was published it was giving a result and many more edition has been added and he gave a new meaning to the political government. Montesquieu trying to show how law of each different state are connected with the principle form of government, climate , soil , nature etc. still not a fine solution have been found only a relation between a government and a law have been found . every state must be interested to know on which maxim his concept is based . *De l'Esprit des Loix*was hailed as the first systematic treatise on politics since Aristotle; not a desiccated, boring treatise for the expert alone, but rather as a work brilliant style of which made it an object of attention for all educated men.1673 Indeed, Voltaire caustically remarked that it was Montesquieu style alone which retrieved a work so full of error.1674 Modern idea of separation of power of eighteen century is on political science. The Baron laws; in a de Montesquieu The Spirit of the Laws (1748), which states that "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates … [or] if the power of judging be not separated from the legislative and executive powers.1675 In the first the people is possessed of the supreme power; in a monarchy a single person governs by fixed and established despotic government a single person directs everything by his own will and caprice.1676 In the monarchy, then, power is exercised in a controlled way, but it is not the separation of powers , but "the prince is the source of all power," and he clearly exercises both the legislative and executive powers within the fundamental constitution[23] to know the relation among separation of power and there agenise . if the executive and judiciary are on the same person or to the same magistrate there will be no liberty here is one more condition when there can be no liberty if the judiciary power is not separated from the judiciary and executive were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, Montesquieu was aware of the problem of ensuring that a system of government so nicely balanced should not result in

[1672].J.C . Vile's chapter 4 in constitutionalism and the separation of power (2nd ed.) (Indianapolis. Liberty fund 1998)

[1673]M.J.C . Vile's chapter 4 in constitutionalism and the separation of power (2nd ed.) (Indianapolis. Liberty fund 1998)

[1674]*L'ABC,* quoted by W. Struck—*Montesquieu alsPolitiker,* Berlin, 1933, p. 4

[1675]Encyclopaedia . com , separation of power

[1676]Ibid., II, 1.

complete deadlock, that the three bodies, King, Lords, and Commons, by being poised in opposition to each other should not produce merely a state of "repose or inaction."1677 The question of whether he saw the State as an organic unity in which the articulated parts formed a single unit exercising the sovereign power, or whether he destroyed the unity of sovereignty by dividing it up into parts which were to be distributed among quite distinct, autonomous bodies, related to each other in a mechanistic fashion only, is probably impossible to answer, because it is doubtful if he ever formulated the problem in either of these ways.1678

III. SEPARATION OF POWER: In INDIA , USA &Uk

THE INDIA PLAN

Separation of power is divided into three distinct activities of the government tough which the people need and will are expressed .these are legislature, executive and judiciary . Legislature frame the law , executive execute them and judiciary applies that laws on the people who breach the laws. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public.1679 When these three organ try to perform there own power chances of overlapping increase .so there are few question arises i. e, what are the relation among these three organ i.e., whether there should be a complete separation or there should be some collaboration ?

IV.CONSTITUTION PROVISON AND JUDICIAL VIEW:- INDIAN CASES

Indian constitution has not recognised the separation of power in an implied manner. There is no provision regarding separation of power in an absolute form but the function of three different organ has been sufficiently differented.By looking into the various provisions of the Constitution, it is evident that the Constitution intends that the powers of legislation shall be exercised exclusively by the legislature. 1680 Similarly, the judicial powers can be said to vest with the judicical.[26] Judiciary perform there function independently there must be no

[1677] Online library of liberty , Montesquieu theory of separation of power , https://oll.libertyfund.org/

[1678]Stark, op. cit., Ch. I, discusses this problem, arguing that Montesquieu had a semi-organic rather than a mechanistic concept of the State

[1679]MD. SAYEM PRODHAN, SEPARATION OF POWERS: A COMPARATIVE STUDY UNDER BANGLADESH, INDIA, UK AND USA CONSTITUTION, https://www.researchgate.net

[1680] Online was Act, 1912, In re, AIR 1951 SC 332 at pp. 346-47

interference of executive and legislative Also, the executive powers of the Union and the State are vested in the President and the Governor respectively.1681

Function of separation power laid down by the constitution in the following manner : -

Article 50 laid down that executive and judiciary should perform there power separately for the independency of judiciary .Article 122 and 212 provides validity of proceedings in Parliament. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity.1682 Article 53 state that the executive power of state and the union is in hand of president and governor and they enjoy the immunity of civil and criminal liability .1683Legislative beside framing the law perform as the power of judiciary in case impeachment of president , removal of judges .the executive is dependent on legislature and thus its perform some of its sub ordinate legislation . the legislature which perform the executive function can remove it and perform its function to for maintaining law and order . its clear that judge of SC and HC are appointed by president with the consult of chief justice of Indian and there removal are done on the basis of misconduct or two third of the total membership of the House is passed in each House of Parliament and Presented to the President.

In the case of K. Veer swami v/s Union of India,33 the impeachment notion was, however, defeated in Lok Sabha as it failed to get support of the 2/3 majority of the member present and voting. The congress party obtained from voting. The result was that there was 176 votes in favour of the impeachment but none against.1684

From the above mention proposition it is very clear that there is no clear cut separation of power in India.

UK

In UK the power of Government , court and the parliament are very close and in fact the executive and the legislature are seen as close union . which Walter Baghot viewed as the "efficient secret of the English constitution".1685

However the separation of power has arises a new question basically focus on implementation of European law the human right act 1998. Professor Vernon Bogdanor has predicted that "issues which, in the past, were decided by ministers accountable to Parliament will now come

[1681]Article 53(1), Constitution of India
[1682]See Pandit M S M Sharma v. Sri Krishna Sinha, AIR 1960 SC 1186
[1683]Aman chhibber , Separation of power : its scope and its changing equation
[1684]Sk Jahangir Ali, Asst. Prof., Balurghat Law College
[1685]Bagehot, *The English Constitution*, 1867, p. 67–68

to be decided by the courts".1686 As already mention in UK absolute separation of power is followed , present in UK – The king executive head is integrated and the other member is also a member of one or other group of parliament . in UK lord chancellor is at the same time member of the house of lord , member of judiciary and the member of government . so in UK clearly the parliamentary executive power is not followed i.e., the same person should not be allowed to the member of all the three organ.

UK constitution is define as a weak separation of power .

British law system is based on common law tradition are as follows:

Police or regulate on criminal report can't initiate them they can only investigate which prevent selective enforcement .

Prosecutor can't withhold the evidence against defence from attorney otherwise the result will dismissed and there is no advantage of relation with police . Defendant convicted can appeal, but only fresh and compelling evidence not available at trial can be introduced, restricting the power of the court of appeal to the process of law applied.1687

UNITED STATE OF AMERICA

In USA the separation of power is form the formation on which whole constitution is based . All the legislative power in hand of congress , executive power president of United state and the judiciary to supreme court . The united state is not having the power to raise question related political affairs so its clear that they don ' t have the exercise to perform the executive power . The Constitution of America has not given overriding power of judicial review to the Supreme Court. It is a queer fact of American Constitution history that the power of judicial review has been usurped by the court. However, American Constitutional developments have shown that in the face of the complexity of modern government, strict structural classification of the powers of the government is not possible. The president of the United States interferes with the exercise of powers by the Congress through the exercise of his veto power1688. He also exercises the law-making power in exercise of his treaty-maker power. The President also interferes with the functioning of his power to appoint the judges. In fact, the President Roosevelt did interfere with the functions of the Court when he threatened to pack the court in

[1686] Professor Vernon Bogdanor, '*Parliament and the Judiciary: The Problem of Accountability*', speech to the UK Public Administration Consortium, 9 February 2006. See more generally Vernon Bogdanor the New British Constitution 2009

[1687] https://en.wikipedia.org/wiki/Separation_of_powers

[1688] The Veto power of the president , https://library.cqpress.com

order to get the court's support for his New Deal legislation. Congress also interferes with the exercise of powers by the courts by passing procedural laws, creating special courts and by approving the appointment of judges. The judiciary interferes with the powers of the Congress and the President through the exercise of its powers of judicial review. It is correct to say that Supreme Court of the United States has made more amendments to the American constitution than the congress itself . Separation of power in united state have often been criticised .In particular, John Kingdom made this argument, separation of power is giving a unique structure to politics of united state. He attributes that large number of people in united state are interested in separation of power .

V. MODERN SEPARATION OF POWER COMES WITH THE CHECK AND BALANCES

Strictly speaking, the modern 'doctrine of separation of powers' proposes that the three functions of government, legislative (making the law), executive (enacting the law) and judicial (interpreting the law), be enacted by three autonomous and independent branches of government. Further, that no member of any one branch should be a member of any other. Early idealistic attempts to realize this doctrine appeared in the 18th Century, within some of the rising colonies of the Americas and the early French Republic,1689 but both failed to produce coherent systems of government.1690 Today, the Constitution of the USA is the only structure that tries to fully adhere to this doctrine.

Critics of the system point out both practical and conceptual difficulties in realizing such a separation. For instance, is it really possible to succinctly classify all the functions of modern government into these three areas? Additionally, providing a coherent structure of government whilst keeping such functional areas totally separate, can lead to unnecessary complications and gamesmanship, with a myriad of checks and counter-checks being imposed between the three branches.1691

For a smoothing running of democracy check and balance play a very crucial role in the country . check and balance ensure that no body or organ have so much power that they misuse the

[1689]See the 1789 Declaration of the Rights of Man and Citizen

[1690]Bryan Palmer, 1996-2005, *'Separation of Powers'*, Palmer's Oz Politics (Online), URL: http://www.ozpolitics.info/rules/sep.htm; Retrieved on 18-02-12 and Aristotle., *Politics - Book 5*, Written 350 B.C.E, Translated by Benjamin Jowett (Online), URL: http://classics.mit.edu/Aristotle/politics.5.five.html, Retrieved on 18.02.12

[1691]Spindler, G., 2000, *Separation of Powers: Doctrine and Practice*, in Legal Date (Online), http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/01; Retrieved on 18.02.12

legal system or If any country have frame new law it should be through a system of intense scrutiny for ex – It will help to ensure long and successful life of democracy .

The basic concept is that no one part of government should be able to make policy easily. This is a major founding principle of a modern democratic country - that no part of government should have the ability to wield uncontrolled power. The idea against the check and balance was to make it much harder for government to rule the people so that they must me in their control .

VI. UNDERSTANDING GLOBAL ADMINISTRATIVE LAW

Global institutions are about twenty years old, but they have developed rapidly. Indeed, globalization enhances the role of law and of legal systems, because globalization is achieved mainly through legalization1692. And yet, the definition of global administrative law is still viewed with its relations with international law and constitutional law. The definition of global administrative law is contested by the German school of Heidelberg, whose scholars, such as Armin von Bog dandy, believe that it is more appropriate to speak of the "exercise of international public authority"1693. EyalBenvenisti, on the other hand, finds it more appropriate to speak of the "law of global governance."1694One's understanding of global administrative law is difficult if asked for whether it is altogether a different law, or a part of International law, or an administration law as the name suggest. Scholars of the growing field of global administrative law (GAL) share the idea that it transcends international law, because it also includes national civil societies among its actors1695. However, international law experts tend to consider global administrative law as a part of their discipline. Whereas some believe it is not only global, because it includes many supranational regional or local agreements and authorities, it is not only administrative law, because it contains many private and constitutional law elements (although the administrative component prevails, because constitutions and private regulation). Global administrative law is not only a law, because it also includes many types of "soft law" and standards. It is now clear that global administrative law is not only global, not only administrative, and not only law. As for global administrative law's peculiarities, three in particular have been studied. Global regulatory regimes feature legislation (treaties, rules, policies, standards, soft law) without legislatures; dispute settlement

[1692]Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, The Emergence of Global Administrative Law, 68(3-4)
[1693]Sabino Cassese, Global Administrative law: The state of art, 13 IJCL, 636-655 (2015)
[1694]EyalBenvenisti, The Law of Global Governance (2d ed. 2014)
[1695]Sabino Cassese, Global Administrative law: The state of art, 13 IJCL, 465-468 (2015)

functions with only a limited number of courts (but a great number of quasi-judicial reviewing bodies); implementation without an executive branch through indirect rule, and by monitoring and controlling implementation and enforcement through national .

VI.1 PROBLEM ASSOCIATED WITH GLOBAL ADMINISTRATION

Global administrative law has focused especially on two problems1696: the reasons for the emergence of global administrative law, and its peculiarities: the "why do we focus on power" and the "how to functional approach to the question". However, in both respects, many questions remain unanswered. As for the reasons, one set of explanations is clear: global problems require global institutions. To organize Olympic Games and control doping; to fight global terrorism; to control epidemics, world trade, international finance, the Internet; to protect highly migratory species; or to reduce global warming, one cannot proceed at the national level—one must go global.

Global administrative law may be developed through five potential sites in which it might be spread1697: (i) inside formal international organizations, notably the United Nations Organization (UN), the Security Council, or the World Health Organization; (ii) in systems of distributed administration set in place under treaty regimes, notably the GATS and WTO, where autonomous dispute resolution machinery has also been established; (iii) by transnational networks of administrative actors engaged in agenda-setting and other joint (governmental) enterprises; (iv) by groups of private institutions or hybrid groupings, which possess delegated regulatory functions, such as the Commission on Food Safety Standards, responsible for the Codex Alimentarius; and finally (v), as self-regulatory schemes of apparently private bodies, such as the International Olympic Committee1698. Global administrative law is emerging as the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character1699. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of

[1696]Sabino Cassese, *Global Administrative law: The state of art*, 13 IJCL, 465-468 (2015)
[1697]Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15-62 (Summer 2005),
[1698]Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EJIL, 187-214 (2006)
[1699]Carol Harlow, Global Administrative Law: The Quest for Principles and Values, 17 EJIL, 187-214 (2006)

governance.1700 The sense that there is some unity of proper principles and practices across these issue areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes. Endeavouring to take account of these phenomena, one approach understands global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise1701 affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules.

Less research has been done on why global administrative law develops to address national problems—for example, on the global institutions established to enhance national democracy or the rule of law, to increase mutual accountability between nations, or to reduce the asymmetries between nations but possess capacity-based authority7 and are kept under control through surrogates. Despite these shortcomings, the literature on global administrative law is making a unique contribution to the progress of administrative law scholarship around the world. During its two centuries of life, administrative law has been largely parochial, because it was studied as a purely national intellectual effort, based solely on national rules. The scholarship on global administrative law adds a new layer and a common language, contributes to the emphasis of similarities against differences, and establishes some unitary features in a field that, since the decline of the natural law doctrine, has been conceived as only national.

A lot of the administration of global governance is highly decentralized and not very systematic. Some entities are given roles in global regulatory governance which they may not wish for or be particularly designed or prepared for1702. For instance, national courts may find themselves reviewing the acts of international, transnational and especially national bodies that are in effect administering decentralized global governance systems, and in some cases the national courts themselves form part not only of the review but of the practical administration of a global governance regime.1703 This is described as ‘global’ rather than ‘international’ to avoid implying that this is part of the recognized lexlata or indeed lexferenda, and instead to include informal institutional arrangements (many involving prominent roles for non-state

[1700] KAREN WENDT, RESPONSIBLE INVESTMENT BANKING, Samuel O. Idowu, (2d, 2015)
[1701]Kingsbury, Benedict and Schill, Stephan, *"Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law"* (2009).New York University Public Law and Legal Theory Working Papers. Paper 146
[1702]Kingsbury, *‘Weighing Global Regulatory Decisions in National Courts’*, ActaJuridica (2009)
[1703] Kingsbury, Kirsch and Stewart, *‘The Emergence of Global Administrative Law’*, 68:3–4 Law &ContempProbs (2005) 15

actors) and other normative practices and sources that are not encompassed within standard conceptions of 'international law'.

VIII. CONCLUSION

It is crucial to understand that the doctrine of separation of powers has come a long way from its theoretical inception. Today, the doctrine in its absolute form is only recognized in letter as it is entirely unfeasible and impractical for usage in the operational practices of a government. With the passage of time, States have evolved from being minimal and non-interventionist to being welfare oriented by playing the multifarious roles of protector, arbiter, controller and provider to the people.

All the above discussion it is clear that there is no strict separation of powers and it is difficult to establish that because all the organs of the government are inter related about their works, activities. Such as executive related to the legislature but we should maintain fairness regarding our works and officials are accountable to an authority. On the other hand separation of powers are also problematic because we have already seen that if every power are in one hand that absolute power also creates problem that time abuse of power occur. In this circumstances check and balances system is appropriate. While the doctrine of the separation of powers and its practice will not necessarily be the same thing, the purpose behind the doctrine can be seen to be embedded in democracies. In the Westminster system, as practiced in Australia, discussion of the doctrine is riddled with exceptions and variations. Certainly, in its classical form it exists here only partially at best. A tension between separation and concentration of powers will always exist, and the greatest danger will always lie with the executive are not judges or legislatures Theoretically separation may be intact, but practically we follow others countries policies such as fusion of powers, checks and balances or mixed separation of powers that will be more effective for the life of separation of power theory.

Strengthening the judiciary by separation of judiciary in 2007 Bangladesh entails a dynamic gamut of tasks and challenges that must be taken head on. There are no short cuts but strategies can be conceived to facilitate the reform process and overcome obstacles. Needless to say, the judiciary cannot do this alone. The other branches of government and the people in general must all support and cooperate to hasten the accomplishment of this long - cherished goal. It is important to inculcate this mind set in the members of the judiciary so that they can contribute without fear or favour in avoiding accusations of incompetence, corruption, or court mismanagement among judges.

In conclusion, government doesn't opts for strict separation of power because it is undesirable , concept can be seen in all the countries . For democratic nation separation of power is a part of constitution, whether its based on theoretical or practical usage, Doctrine of separation is necessary for better function of democracy. Whereas in the case of global administrative Globalization and the rise of global governance are transforming the structure of international law, though much of this transformation takes place beneath the surface of the international legal order and often goes unnoticed. The rules of global regulation and global administrative law flow to a considerable extent from sources not usually recognized as sources of international law. Transparency, participation and review are often based on principles derived largely from institutional practices or intra-institutional rules. Many relevant rules and practices are generated primarily in public-private or purely private structures of transnational regulation,

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AN ANALYSIS OF 115QA OF IT ACT: INCOME OF SHAREHOLDER OR COMPANY?

- **SOFIYA MHAISALE**

Section 115QA was introduced by the Finance Act, 2013, and this provision imposed a tax on buy back transactions done by a company. The liability to discharge this tax was on the domestic company buying back shares. According to the Memorandum of the Act, the purpose to introducing such a tax was to curb the practice of buy-backing the shares, which was done by the companies to avoid paying dividends the shareholders. When dividends were paid, the liability of dividend distribution tax was on companies. However, if the shares were bought back through the buy-back scheme, the liability of discharging the tax was on shareholders. Therefore, companies were increasingly participating in buy back transactions and were avoiding paying dividends.

By the introduction of Sec. 115QA, the liability to pay taxes in buy-back transactions was shifted on the company. The section is a complete code within itself, since it defines the term buy-back, defines the amount on which tax shall be imposed (distributed income) and also mentions the tax rate, specifically stating that the tax liability shall be on Domestic Companies. However, the issue arising in this section is that it does not specify on whose income the tax should be imposed. There can be two views to this.

1. ***Company's contention***

- Sec. 2(24) of the IT Act, 1961[1704] defines the term 'income". The term income simply means receipt or accrual of money or money's worth. Income-tax is tax on income in the hands of assessee.[1705] It cannot be a tax on anything else. In a buy back transaction, a company earns no income. Rather, It pays a consideration, and the shares received in the buy-back transaction are destroyed.
- Merely including any sum of money in definition of income or deeming any sum of money as income cannot be basis of imposition of tax.[1706] The question whether a particular receipt is income or not depends on the nature of the receipt and the true

[1704]The Income Tax Act, 1961, Section 2(24).
[1705]Southern Technologies v. JCIT 2010 2 SCC 548.
[1706]J.C. Chandiok v. Dy. CIT 1999 64 TTJ (Del)(SB) 1.

scope and effect of the relevant taxing provision.[1707] If a particular receipt is not constituting income, it cannot be brought to tax under the relevant section.[1708]

- The tax liability u/s 115QA of IT Act, 1961, if it can be imposed, can only be levied only on the income of a shareholder and not on the company, as the shareholder is the only party that can earn income in the said transaction
- As per Sec. 2(24) of the IT Act, 1961[1709], income should be real and not fictional. Income tax is a tax on the real income i.e. the profits arrived at, on commercial principles subject to the provisions of the IT Act, 1961.[1710]
- Tax on income can only be attracted if there is accrual of income or its receipt, subject matter of which is income.[1711] If income does not result at all, no tax can be imposed even though in book-keeping, an entry is made about a hypothetical income which does not materialise.[1712]

2. ***Revenue's contention***

The second view is that tax u/s 115QA is on the income of the company, and the liability is on the company as well.

- Although the company is not earning any income in the buy-back transaction, Sec. 115QA of the IT Act, 1961[1713] is a charging section which defines the person liable to pay tax. The liability to pay tax is on the domestic company who buy-back's shares from the shareholder and such tax liability is independent of the taxability of the shareholder on transfer of such shares offered in the buy-back.
- Sec. 115QA of the IT Act, 1961 is a deeming provision. It is a complete code in itself as it is both a charging and computation provision. While interpreting a deeming provision, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction.[1714] When a Statute provides that something shall be deemed to have been done, which in fact was not done, the Court must ascertain for what purpose and for whom the fiction was created.[1715]

[1707] Ashok Seth v. ACIT, 2014 SCC OnLine ITAT 11247.
[1708] Gopal Saran Narain Singh v. CIT 3 ITR 237, 242; Lavrids Knudsen Maskinfabrik (I) Ltd. v. Assistant Commissioner of Income-tax, (2001) 77 ITD 212 (Pune.).
[1709] The Income Tax Act, 1961, Section 2(24).
[1710] Poona Electric Supply Co. Ltd. v. Commissioner of Income tax Bombay, AIR 1966 SC 30.
[1711] UCO Bank v. CIT AIR 1999 SC 2082.
[1712] Commissioner of Income Tax v. ChamanlalMangaldas AIR 1960 SC 1336.
[1713] The Income Tax Act, 1961, Section 115QA.
[1714] Delhi Cloth and General Mills Company Limited v. State of Rajasthan AIR 1996 SC 2930
[1715] The Bengal immunity Co. Ltd. v. State of Bihar and Others AIR 1955 SC 661; Tenant v. Smith 1982 AC150, 154; DCC Holdings (UK) Ltd v. Revenue and Customs Commissioners (2010) UKSC 58.

- The liability to pay tax arises on a person whose income is subject to tax.[1716]If the legislature intended to impose tax liability on the shareholder, it would have specifically mentioned it in the Section. But since the Section specifically imposes liability on the company buying back the shares, the tax liability u/s 115QA of the IT Act, 1961 is solely on the Company.
- Sec. 5 of the IT Act, 1961[1717] of the IT Act provides that income may not have been accrued, arisen or been received, yet it may be brought to charge u/s 5of the IT Act, 1961 if it is deemed to have accrued, arisen or been received under the provisions of the Act.[1718] An assessee might be taxed on income, profits or gains which have accrued or arisen and the amount which is deemed to be his income by virtue of legal fiction.[1719]
- Under Sec. 115QA of the IT Act, 1961 the tax is imposed on company as additional tax on 'deemed distributed income' irrespective of source of the amount distributed in buy-back shares. The amount of deemed distributed income falls within the wide ambit of the term 'income'
- The Finance Minister in his speech on Finance Bill, 2013 stated that the purpose of introducing Sec. 115QA of the IT Act, 1961was because unlisted companies were resorting to buy-back schemes to avoid payment of taxes.[1720] It is asserted that the intention of the Legislature was to only impose tax on the Company and not the shareholder. Thus, by the Finance Act, 2013, Sec. 10(34A)of the IT Act, 1961was introduced in the IT Act, 1961 which specifically exempted the shareholders from paying tax on the income earned by the shareholder.

CONCLUSION

Therefore, there is no certainty on this point. The company can state that the tax is on the income of the shareholder so if the shareholder incurs losses in the buy-back transaction, there won't be any tax liability for the domestic company. However, the Revenue can state that tax is clearly on the company's income and must be collected from the company.

There is a need for a proper precedent on this matter, or there is a need for the Legislature to amend the provision and state on whose income the tax is actually imposed.

[1716]The Income Tax Act, 2013, Section 4.
[1717] The Income Tax Act, 1961, Section 5.
[1718]CIT v. Singaribai13 ITR 224, 232;Kanwalnen v. CIT 6 ITR 675.
[1719]Keshav Mills Ltd. v. CIT 23 ITR 230, 239.
[1720]Finance bill, 2013, Memorandum Explaining Provisions relating to Direct Taxes, https://www.incometaxindia.gov.in/pages/budget-and-bills/finance-bill.aspx accessed on 12th march, 2019

Conflict between DTAA and Section 115QA of IT Act, 1961- which prevails?

A Double Tax Avoidance Agreement is signed between two countries for lifting the burden of double taxation on taxpayers, and is applicable in a particular transaction to provide relief against double taxation when a tax is imposed on the income of the non-resident.[1721] The DTAA between India and several countries like Singapore and Mauritius provide for taxation of capital gains in Singapore. However, due to Sec. 115QA of the IT Act, 1961, the buy-back transactions gains would be taxed in India. This creates a conflict between both provisions

The words in the treaty are to be read in the natural or ordinary sense, and the court should in the interest of uniformity construe rules formulated by an international convention and not be constrained by technical rules of domestic laws.[1722] Since a treaty is not legislation, the literal rule of construction is not applicable.[1723] While interpreting, an interpretation should be sought which is most likely to be constructed in both contracting states.[1724] Article 13, Clause 4 of the DTAA agreement[1725] states that Gains from the alienation of shares other than those mentioned in paragraph 4 of Article 13 in a company which is a resident of a Contracting State may be taxed in that State. Therefore, Article 13(4) provides for taxation of Capital Gains in Singapore. The 2005 Protocol[1726] clearly granted only to Singapore and Mauritius the right to tax capital gains from transfer of shares of an Indian company. This meant that such capital gains would not be taxable in India, if the Singapore tax resident investor satisfied the conditions of a Limitation of Benefits (LOB) clause.[1727]

Sec. 90 of the IT Act, 1961[1728] empowers the Central Government to enter into any agreement with any country for granting relief from and avoidance of double taxation.[1729] Furthermore, in case of conflict between domestic law and DTAA, the provisions of the treaty will prevail, using the doctrine of *generalia specialibis non derogant*, which means that general words or

[1721] D.P MITTAL, INDIAN DOUBLE TAXATION AGREEMENTS & TAX LAWS 1.528 (Taxmann Allied Services (P.) Ltd, New Delhi, 5th ed., 2014).
[1722] James Buchanan & CO. Ltd. v. Babco Forwarding and Shipping Ltd. 1978 AC 141; Stag Line Corporation of India Ltd. v. Gamlen Chemical Co. Pvt. Ltd. (1980) 147 CLR 142; Theil v. FCT 89 ATC 4015.
[1723] Shri Krishna Sharma v. State of West Bengal AIR 1954 SC 591.
[1724] Canadian Pacific Ltd. v. The Queen [1906] A.C. 204.
[1725] Agreement Between The Government Of The Republic Of Singapore And The Government Of The Republic Of India For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income, Article 13, Clause 4.
[1726] Amendment Notification No. 185/2005 [F.NO. 500/139/2002-FTD]/SO 1022(E), DATED 18-7-2005.
[1727] DCIT v. DB International (Asia) Ltd, ITA no.992/./2015.
[1728] The Income Tax Act, 1961, Section 90.
[1729] The Income Tax Act, 1961, Section 90.

provisions do not derogate from special. The view favourable to assessee must be taken when there are two contrary views on the same issue.[1730]

If the nature of the income is such that it could be classified as falling under two heads, the matter could be resolved according to the well-established principles that a specific provision will override the general one and that the assessee/subject-matter is entitled to invoke the provisions most beneficial to him, be the provisions of the treaty or the statute.[1731] It is well settled that the expression when the term "may be taxed" is used in a treaty, there is an automatic exclusion of other State. [1732] Sec. 90 of the IT Act, 1961 also confirms this principle and grants tax treaties priority over domestic law.[1733]. The CBDT has also issued a circular which is mandatory to follow,[1734] stating that the AOs should give effect to the provisions of DTAA when there is a conflict between the domestic act and treaty.[1735]

[115QAof the IT Act, 1961 cannot over-ride DTAA

Although Sec. 115QA begins with a non-obstante clause, Non-obstante clauses are not always regarded as repealing clauses, nor as clauses which completely supersede any provision of law.[1736] Equitable construction may be resorted to when strict literal construction does not lead to the result intended.[1737] The court should endeavor to interpret the provisions in such a manner that they achieve the object of the provision[1738] and best harmonize with and effectuate the object of the legislation.[1739] Departure from the rule of literal interpretation is legitimate in cases where literal construction may result in depriving certain existing words of all meaning or to avoid any part of the statute from becoming meaningless or otiose.[1740] Therefore, when the literal interpretation would defeat the obvious intention of the legislation and produce a

[1730]D.P MITTAL, INDIAN DOUBLE TAXATION AGREEMENTS & TAX LAWS 1.528 (5th ed., Taxmann Allied Services (P.) Ltd, New Delhi 2014).
[1731]CIT v. ShahzadaNand and Sons (1966) 60 ITR 392; Union of India v. Indian Fisheries; Brown and Root Inc. v. CIT (1999) 237 ITR 156.
[1732]Apollo Hospital Enterprises Ltd. v. Deputy Commissioner of Income Tax 2013 158 TTJ (Coch.) 786.
[1733]Salomen v. Commissioner of Customs and Excise (1966) 3 WLR 1223; Woodlend Rubber Co. v. CIT, (1970) 3 WLR 10.
[1734]Navnit Lal C. Javeri v. KK Sen, AAC (1965) 56 ITR 198; Ellerman Lines Ltd. v. CIT1971 SC 82 ITR 91; Union of India v. Azadi BachaoAndolan (2003) 263 IR 706; CIT v. Davy Ashmore India Ltd, (1991) 190 ITR 626 (Cal).
[1735]Circular No. 333/1982.
[1736] State of Bihar v. Bihar Rajya MSESKK Mahasangh, (2005) 9 SCC 129.
[1737]KeshavjiRavji v. CIT 183 ITR 1 SC.
[1738]Syed Sadique v. CIT 239 ITR 269; Ansal Properties v. Appropriate Authority 236 ITR 793; CBDT v. Oberoi Hotels 231 ITR 148 SC; Assam Company v. State 248 ITR 567; Discount and Finance House v. SK Bharadwaj, CIT 259 ITR 295; CIT v. United Western 259 ITR 312.
[1739]CIT v. Gwalior Rayon 196 ITR 149 SC; CIT v. Laxmi Metal 236 ITR 130; CIT v. Hindustan Wire 254 ITR 299; CIT v. Chloride India 256 ITR 625.
[1740]ParshottamNagindas v. Adwalpalkar 218 ITR 392.

wholly unreasonable or manifestly unjust result, the court must follow the rule of reasonable construction or modify the language of the statute.[1741]

A literal or legalistic interpretation is avoided when the basic purpose of the treaty might be defeated or frustrated.[1742] The courts should usually adopt a liberal interpretation to give effect to the apparent intention of the contracting parties.[1743]

In the present case, there can be no literal interpretation of the non-obstante clause stating *"notwithstanding anything contained in any other provisions"*, since such an interpretation over-rides the provisions of Sec. 90(2) of the IT Act,1961. This would defeat the intention of the Legislature of allowing the parties choose as to whether they want to be governed by the IT Act or Double Taxation Avoidance Agreement between India and Singapore or Mauritius

As far as possible the act must be construed in such a way as to reconcile various provisions,[1744] and should adopt a harmonious construction that gives meaning to all parts of the Act.[1745] The entire statute should be read as a whole,[1746] and one provision must be construed with reference to other provisions.[1747]

Interpretation of a provision in a taxing statute rendered years back and accepted and acted upon should not be easily departed from except for compelling reasons.[1748] Every statute must be interpreted and applied to not be inconsistent with the comity of nations or with well-established rules of International Law.[1749]

The question of beneficial interpretation arises only when, in the opinion of the court, two views are reasonably possible.[1750] An interpretation to extend the benefit intended by the legislature should be preferred, instead of an interpretation to deny the benefit by resorting to technical interpretation.[1751]

[1741] Luke v. IR 54 ITR 692; CIT v. National Taj 121 ITR 535, 542; Varghese v. ITO 131 ITR 597, 606; CIT v. Golta 156 ITR 323, 339; Goodyear v. State of Haryana 188 ITR 402, 440; Balaji Tempo v. CIT 196 ITR 188, 194, 197; Padmasundra v. State of TN 255 ITR 70.

[1742] Gladden Estate v. R (1985) 85 DTC.

[1743] Factor v. Laubenheimer 290 US 276.

[1744] CIT v. Saran 14 ITR 152.

[1745] CIT v. Hindustan Bulk 259 ITR 449, 465; Shaw Wallace v. ACIT 238 ITR 13; Mohnot v. DCIT 215 ITR 275;CIT v. Anita Ghosh 202 ITR 991; CIT v. BRConsts 202 ITR 222; CIT v. Deoria 196 ITR 110; CIT v. Associated Finance 195 ITR 742; Belani v. CIT 195 ITR 639; Shantaben Patel v. CIT 249 ITR 682; Sattur'sSushrushalya v. State of Karnataka 198 ITR 480.

[1746] CIT v. Kelvinator 256 ITR 1 (FB).

[1747] CIT v. Parekh Brothers 253 ITR 43.

[1748] Camber of ITC v. CBDT 209 ITR 660.

[1749] D.P MITTAL, INDIAN DOUBLE TAXATION AGREEMENTS & TAX LAWS 1.528 (Taxmann Allied Services (P.) Ltd, 5th ed., New Delhi 2014).

[1750] ARVIND DATAR, KANGA & PALKHIVALA'S THE LAW AND PRACTICE OF INCOME TAX 1728 (10th ed. 2014).

[1751] CIT v. Palemar Krishna 342 ITR 366.

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Therefore, Sec. 115QA of the IT Act, 1961 cannot over-ride Sec. 90(2) of the IT Act, 1961.

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DAM CONSTRUCTION: POTENTIAL SOCIO-ECONOMIC AND ECOLOGICAL POLICIES TO MITIGATE THE IMPACT OF DESTRUCTIVE DEVELOPMENTAL PROJECTS

- TASHA BLUEWIN JOSEPH

ABSTRACT

This paper gives an overview of the socio-economic and ecological impact caused by the construction of dams. It discusses the botches in the decision making process which fail to include the groups which get directly affected by such projects. The paper also explores the various reactions to the initiation of such destructive developmental projects in countries with different political systems. Additionally, it investigates the socio-economic and ecological viability of dam construction projects and delves into the possible ways of accommodating the interests of the pro-dam and anti-dam groups, economically, socially and environmentally. The conclusion states that a balance needs to be struck between the economic goals of the State, interests of the corporates and protecting human rights and preserving the environment from further degradation. This would help to mitigate the destructive impact of developmental projects.

I. INTRODUCTION

There is a homogenization of the idea of economic development and growth all over the world. This economic integration is otherwise known as globalization, has led to the proliferation, growth, and influence of Multi-national Enterprises globally. The only aim of these corporate entities is to make a profit, regardless of the unsustainable means they adopt to achieve the same. The whole process of capitalization and globalization has privatized manufactured goods and attempts to do the same with our natural resources such as water, forests, and agriculture. The idea of big monuments such as developmental multipurpose dams[1752] theoretically, serve as welfare initiatives and seek to bring in socio-economic equality among the people in a country. Dam construction while being in line with a human-centric approach to development causes social, economic, and ecological impact which is perverse to the eco-centric approach perception of development. These projects cause irreversible economic losses, ecological damage, and disrupt social stability. It is proven and seen through experience that these projects

[1752] Roy, A, (2002), 'The Greater Common Good'. The Algebra of Infinite Justice, Penguin Books.

have failed to deliver the basic welfare needs and have instead caused more issues to address. The fight is to prevent the influence these Multi-National Enterprises (MNEs) have over economic policy and development projects in the nation-State and to bring in an inclusive and participatory[1753] process of making decisions that affect the indigenous population. There lie policies given by environmental economists to handle the external costs of development. However, what seems apparent is the growing need to strike a balance between the economic goals of the State, interests of the corporates and protecting human rights and preserving the environment from further degradation.

II. ***Impact of Big Dams***

Anthropocentric viewpoints may look at dam construction as marvels supporting human needs and important to human life. Reality however shows us that the construction of these big dams is in contrast to realising the true socio-economic needs of the people of living around these dams. These dams profess to increase and assure water supply for purposes of drinking, agriculture, and other domestic needs of the people. Further, it is promised to prevent the occurrence of floods in a region as well as guarantee the supply of water for irrigation of crops and harnessing it for electricity needs. The dams however fail to fulfil these needs and instead deplete supply of the regular supply of water and cause more issues associated with scarcity than prior to the construction of these dams. Today, we see more people being deprived of the right to access a basic need: water for drinking purposes and a stable supply of electricity. While these dams claim to prevent natural disasters and proclaim to mitigate losses related with floods and scarcity, we see the adverse effects of these structures in the manner in which they make the areas surrounding the dam to be environmentally unbalanced and prone to deluges, scarcity, deforestation, earthquakes[1754] (reservoir induced seismicity) and so on.[1755] They also cause mudslides and landslides.[1756] Further, dam construction leads to alterations and diversion that make it difficult for the surrounding ecosystem to adapt to.[1757] They put ecosystems under pressure beyond which organisms can adapt. They create imbalances which affect the

[1753] Patkar, M, (1995), 'The Struggle for Participation and Justice: A Historical Narrative'. In William Fisher (ed.), Toward Sustainable Development: Struggling Over India's Narmada River, M. Sharpe, Inc., London, pp.159-78.
[1754] Malini, H and Rao, NK. (2004) 'Coastal erosion and habitat loss along the Godavari delta front – a fallout of dam construction (?).' Current Science, Vol. 87, No. 9. pp. 1232-1236. Current Science Association. Retrieved from https://www.jstor.org/stable/24109438.
[1755] 'The Great Walls Damming Tibet'. Tibet Nature Environmental Conservation Network. (2018). Retrieved from http://tibetnature.net/en/great-walls-damming-tibet/.
[1756] 'The Great Walls Damming Tibet'. Tibet Nature Environmental Conservation Network. (2018). Retrieved from http://tibetnature.net/en/great-walls-damming-tibet/.
[1757] Li K, et al. (2013). 'Problems caused by the Three Gorges Dam construction in the Yangtze River basin: a review'. Environmental Reviews, Vol. 21, No. 3. pp. 127-135. Canadian Science Publishing. Retrieved from https://www.jstor.org/stable/10.2307/envirevi.21.3.127.

deposition of silt, habitat quality and also affect the salinity content in water. The long term consequences also include the imbalance in species web and altered and even dead rivers.[1758] They have had an adverse impact on the climate from an eco-centric point of view. They were likely to cause irreparable environmental damage. These dams further cause major displacement of tribals and locals living in the area surrounding the dam, posing a threat to their livelihoods and making them vulnerable economically.[1759] It also leads to social conflict between the proponents of these projects, the Government, the MNE and the affected groups of people. This social disruption acts as hurdles in the successful completion of these projects and leads to more battles won legally and informally to prevent violation of rights of people living in the surrounding areas. It is seen that the assured resettlement reforms were not likely to be implemented. Thus, it seems that the while the construction and operations of these monumental dams is based on anthropocentric views of development, it has inevitably caused more social tension than what existed in their absence.

Further we see that the claims backing such developmental projects is based on it being 'multi-purpose' in nature and its ability to solve all problems of water scarcity and lack of electrification in the areas. The very irony behind these projects lies in the claim of it being 'multi-purpose' while compromising on one or more of the purposes, once the project takes shape.

III. ***Consideration of Stakeholder's interests in these projects***

Over the years, we have seen an informal group of decision makers managing, leading and propounding for these projects. This group comprises leading MNEs of foreign nationality, their home government, global institutions and agencies and the appointed specialised experts who work towards the fruition of these projects. All of these actors have a common thread linking them to each other; their transnational activities.[1760] They mainly come from the Global North and initiate projects, in the name of development, in regions of the Global South. This is because in the Global North, such developmental projects failed and led to the spread of awareness on environmental harm and human rights violations.[1761] However, the corporates functioning in the Global North instead of ceasing their destructive operations, chose to expand their business in countries in the Global South. This is welcome in the Global South due to

[1758] Khagram, S. (2004). Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1759] Roy, A, (2002), 'The Greater Common Good', The Algebra of Infinite Justice, Penguin Books.
[1760] Khagram, S. (2004). Chapter 6 'Dams, Democracy, and Development in Transnational Perspective'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1761] Khagram, S. (2004). Chapter 6 'Dams, Democracy, and Development in Transnational Perspective'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.

pressing needs to join the race in developing their economies.[1762] As a result, around two-thirds of the big dams built in the 1980s were in the third world.[1763] In doing so, they collaborate with other supporters of their disguised projects for profit such as the national governments of the States in the Global South as well as other profit-hungry businesses and corporates, joining these projects, in hopes of lucrative earnings.

This joint collaboration, however, fails to include the participation of those most likely to be affected by these projects. They are seen as "oustees" in these projects. This affected group of people comprise the indigenous population and locals that are dependent on the concerned area for its natural resources. They are not consulted, informed in advance or heard in this entire process. Their participation is not seen necessary for successful execution of the projects.[1764] A comprehensive policy of resettlement and rehabilitation always remains unformulated. There is neither a stipulation for possible compensation to be awarded for the loss of lands and livelihoods. It is seen that these groups are usually not organized, mobilized, or even aware of their rights.[1765] A lot of these anti-dam movements fight for equal participation of affected peoples in the decision-making process and a need to address requisite rehabilitation and resettlement (R&R) concerns.

The dam building projects are also never backed by environmentally sound impact assessments done by experts, in good faith. There are no competent review bodies or reliable reports that are accessible to the public to prevent the completion of a project and prove the magnitude of destruction these projects generate. Thus, some other groups eventually become part of the cause to prevent the loss of livelihood to these affected people. These include political and social activists, grassroots groups, local NGOs, lawyers and International network of people and organizations that stand for human and environmental rights. The fight lies in claiming ownership over these naturally occurring resources and preventing the usurpation of the same by private corporations whose sole aim is to privatise them and have exclusive rights of sale and use over them. This led to a change in the politics surrounding an economy of development.[1766] These social movements made the transnational allied actors empowered to

[1762] Khagram, S. (2004). Chapter 1 'Transnational Struggles for Water and Power'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1763] *Ibid.*
[1764] Khagram, S. (2004). Chapter 3 'India's Narmada Projects'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1765] Khagram, S. (2004). Chapter 4 'The Transnational Campaign to Save India's Narmada River'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1766] McCullly, P, (1998). 'Silenced Rivers: The Ecology and Politics of Large Dams. Orient Longman. Hyderabad, p80.

contribute to, the global spread and international institutionalization of norms in areas such as the environment, indigenous peoples, and human rights.

IV. *Reactions to Dam Building in different political systems*

Democratic Regimes

Dam building promises to bring in socio-economic equality and alter the existing disparities between different sections of the society. It is this aspect that receives a major applaud and approval from all sections, in the hope of development reaching all nook and corners of a country. However, through experience, it was seen that these projects failed to deliver these promises and instead created deeper and wider fissures between the affluent and the economically vulnerable classes. It was used to fulfil the needs of the affluent and politically favoured groups for making profit in the disguise of bringing equality to the other sections of the society. It led to profit making of the private corporations that owned these resources such as Enron (electricity) in Maharashtra and S. Kumars, a textile company[1767], in the Sardar Sarovar Dam project while causing major harmful alterations to the economic and social stability of the people living around it and destroying the natural ecosystem of the concerned region. It is the demand of democracy societies to support the causes of socio-economic equality and when the same is promised and not fulfilled, the people being the main stakeholders in the system, have agency to demand for socio-economic justice. They fight for their guaranteed liberties, using non-violent organizing, bargaining and mobilizing. This fight for economic and social equality in democracies serve as catalysts for more people joining these social movements. The increasing scarcity and unequal distribution of resources and environmental and social dislocation and reallocations of resources, would thus, generate public mobilization and protest. These in turn would generate or exacerbate struggles between different sections of the society. Usually the governments in power acquiesce to the demands of these movement. They are less able to violently repress these actors through the use of violent means because of the role of countervailing institutions that increase the costs of doing so. The countervailing institutions consist of the courts, the press and opposing political parties which offer points of access and opportunities to alter development practices. This provides more room for manoeuvring for the grassroots' movements. The State would have to consider,

[1767] Roy, A. (2009) The Shape of the Beast. Penguin UK. Retrieved from https://books.google.co.in/books?id=iBi1g1yTzoC&pg=PA50&lpg=PA50&dq=textile+company+in+charge+of+Sardar+Sarovar+Dam&source=bl&ots=2CsgXxfCnc&sig=ACfU3U2JQ8AVLvpIgiNzmThKL37ho8gGZQ&hl=en&sa=X&ved=2ahUKEwiy_aynvbpAhUijOYKHRXADm8Q6AEwAHoECAgQAQ#v=onepage&q=textile%20company%20in%20charge%20of%20Sardar%20Sarovar%20Dam&f=false.

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respond and concede to the demands made by these groups as they are accountable to them and rely on them for political endurance.

Thus, for example, domestic nongovernmental organizations, grassroots groups, and social movements are greatly empowered to stop or reform big dam projects when state agencies on indigenous peoples or the environment are established. This is achievable in democratic countries due to domestic social mobilization and advocacy. This being successful domestically, increases the potential impact of globalizing norms and international regimes, once they have been adopted domestically. They then result into transnational action from below.[1768] Finally, governments in democracies are also likely to be more aware of transnational criticism of their sustainable development records and practices, particularly in the third world where foreign funding may suffer as a result.

For instance, the Narmada Bachao Andolan movement was essentially a grass roots movements of social, political activists, NGOs and lawyers to prevent the encroachment of livelihood and infringement of fundamental and human rights, by State approved dam building projects. This garnered mass support domestically, socially, legally and transnationally from other environmental and human rights advocacy groups. It compelled the Indian State to cease dam construction operations for a while until proper review and monitoring boards were set up and proper environmental assessment impact reports were prepared. India's democratic opportunity structure-in particular the ability of citizens to organize themselves, to form links to external actors, to have access to information to pressure and hold authorities accountable through various institutional mechanisms, and especially the courts-facilitated the effectiveness of the resettlement campaign.[1769]

Authoritarian Regimes

In Authoritarian regimes, the costs are lower in suppressing social movements. This is because they exercise control and power over the political, legal, social, economic and cultural aspects of their State. This increases their ability to violently repress opposing NGOS, peoples' and other grassroots' groups. They use their immense power to maximize their own self-interests which may promote short-sighted goals. In this process, long-term development goals get overlooked. Without adequate and legal mechanisms that hold dictators accountable, these actors are likely to either consume scarce resources privately or squander them publicly. In

[1768] Khagram, S. (2004). 'Chapter 1 'Transnational Struggles for Water and Power'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1769] Khagram, S. (2004). Chapter 2 'Dams, Democracy, and Development in India'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.

other words, most dictatorial regimes end up being injurious to development because they may either provide too few or too many government services. The opposing groups instead face violent repression and lack political freedoms. There is absolute disregard to political, social and human rights of indigenous peoples.

However subscription to a democratic form of organizing political activities may not be the only way to support the success of bottom to top movements. An enormous democratization of state structures and procedures, may also help in achieving the same.

For instance, in China, Chinese dams have displaced an estimated 23 million people, and dam breaks have killed approximately 300,000 people.[1770] Regardless, all opposition and protest against the construction of the Three Gorges Dam[1771] (TGD) was suppressed. It led to a massive flood, destruction of bio-diversity and threat to fisheries. The Chines system while claiming to be democratic on paper, functions as an autocratic system in the organization of its public institutions, government bodies, executive actions and judicial processes.[1772] There are no mechanisms for the Chinese people to express their dissent and use extant systems or agencies to safeguard their interests and prevent infringement of their rights. Further, China has begun building such dams in Tibet, Pakistan and other regions, trying to make itself a geopolitical power in the Asian Region with control over the water resources in the region. Water is then seen and used as a political tool by China.[1773] Moreover, the impact of these projects have no existence officially on paper or digitally.

The above discussion proves that democracies are likely to be more conducive to environmental conservation and safeguarding of human rights than autocratic regimes. However, an impetus for broader social and formal reforms to increase their effectiveness may also facilitate a change and even yield the same results as seen in democracies.

V. *The ecological and socio-economic non-viability of Dam Building*

There is a lack of requirements for the formulation, sanctioning, and implementation of big dams. There was a growing loss of free flowing rivers associated with these dam sites. The ecological destruction caused by these dams which, include excessive flooding, depositing of silt and destroying of agricultural activities, has drawn attention to the ecological non-viability

[1770] 'The Great Walls Damming Tibet'. Tibet Nature Environmental Conservation Network. (2018). Retrieved from http://tibetnature.net/en/great-walls-damming-tibet/.
[1771] Li K, et al. (2013). 'Problems caused by the Three Gorges Dam construction in the Yangtze River basin: a review'. Environmental Reviews, Vol. 21, No. 3. Canadian Science Publishing. pp. 127-135. Retrieved from https://www.jstor.org/stable/10.2307/envirevi.21.3.127.
[1772] Khagram, S. (2004). Chapter 5 'Dams, Democracy, and Development in Comparative Perspective'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1773] 'The Great Walls Damming Tibet'. Tibet Nature Environmental Conservation Network. (2018). Retrieved from http://tibetnature.net/en/great-walls-damming-tibet/.

of these structures. Their construction also leads to excessive cutting down of trees as well unbalancing in the salinity levels of the water. It affects the biodiversity of the region by causing loss of life to several fauna and flora found in the region by its operation. They have proved to incur more costs to the government to repair the damage caused to the environment and in finding ways to correct the human interference in the region.

Dam construction also leads to organization and mobilization of critical domestic conservation groups due to loss of livelihoods and displacement of huge numbers of the population. This social outrage results in a change in the political-economic dynamics, leading to a reduced financial viability of and changing economic benefit-cost calculations regarding big dam building.[1774] Mounting public protests against big dams have caused time overruns and cost overruns.[1775] Big dams that result in environmental and social dislocation and reallocations of resources, would thus spawn public mobilization and protest. These affected groups align their efforts with other transnational actors in order to put more pressure on the governments to roll back these developmental projects. This could lead to the formation of transnational coalitions, supported by transnational networks. The effectiveness of such collective political action depend on the mobilization of the actors, creation of social networks, and the exercising leverage over the prevailing political opportunity structures.[1776] This is supported by the institutionalization of norms concerning human rights and the environment which, shape and further get shaped by global spread.[1777] Due to pressure from these grassroots groups, the State becomes compelled to embody transnational norms in their legislations and decision making processes. These then serve as new points of access and leverage for the groups leading the bottom to top movements. Thus, various actors participating in social movements become empowered to engage in ceasing destructive developmental activities or demanding a reform in policies made regarding big dam projects.

All these factors have contributed to the increased economic non-feasibility. This is because big dam builders and authorities have been compelled to investigate and mitigate negative environmental and social effects. This includes adequate rehabilitation and resettlement of

[1774] Khagram, S. (2004). Chapter 6 'Dams, Democracy, and Development in Transnational Perspective'. 'Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1775] Khagram, S. (2004). Chapter 6 'Dams, Democracy, and Development in Transnational Perspective'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1776] Khagram, S. (2004). Chapter 1 'Transnational Struggles for Water and Power'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1777] Khagram, S. (2004). Chapter 1 'Transnational Struggles for Water and Power'. Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.

affected groups and displaced peoples. All these factors would indicate that the projects' economic costs far outweighed their economic benefits.[1778]

Costs may be cheaper for authoritarian regimes as they don't provide any agency for dissident minorities to express their views. They stop these groups from acting as obstacles in State and corporation ambitions for resource development and extraction. They use their supreme power to channelize funds and action into the State's own economic and political agenda, as seen in China.[1779]

VI. *Debates on Dams*

While proponents of dam building use economic and developmental reasons for garnering support, anti-dam advocates claim environmental and social repercussions for opposing the same. The proponents also comprise those who favour dam construction as long as there exists a sound and comprehensive R&R scheme. It becomes difficult to choose a definite path unequivocally. It, thus, becomes important to create a middle ground between these two competing claims and avoid the social tension and economic losses caused due to the conflicts of interest between the two groups.

VII. *An Environmental Economist's approach to policy*

Environmental Economics is a sub-discipline that seeks to understand and influence the economic causes of human impacts on the non-human world.[1780] It applied economic thought to environmental goods.[1781] The assumption behind this approach being, that economic concepts can be used as tools for dealing with environmental concerns.[1782] Since their introduction, they have been used in policy-making concerning the environment.

Environmental Economics see environmental problems as a form of market failure as the environmental costs get unaccounted in the process of producing goods and services. The Environmental Economists propose a market based policy as a middle ground for both groups. This approach considers the environmental costs to be externalities (unintended positive or negative effects of economic activity) created by corporate activities. Usually a command and control mechanism, through imposition of environmental taxes by the government was implemented.[1783] However, imposition of taxes would be while making these environmental

[1778] Khagram, S. (2004). Chapter 2 'Dams, Democracy, and Development in India' Dams and Development: Transnational Struggles for Water and Power. Ithaca. NY: Cornell University Press.
[1779] 'The Great Walls Damming Tibet'. Tibet Nature Environmental Conservation Network. (2018). Retrieved from http://tibetnature.net/en/great-walls-damming-tibet/.
[1780] Carton, W. (2018). *Environmental Economics*. In: Companion to Environmental Studies. Castree, N., Hulme, M. & Proctor, J. (eds.) Routledge, Oxon- New York, pp.281-285.
[1781] *Ibid.*
[1782] *Ibid.*
[1783] Pigou, A. C. (1920), *The Economics of Welfare*. London: Macmillan.

and social costs internalized, would also seem less likely to satisfy the corporate benefit-cost for approving these projects.

A better policy maybe to give tradable rights to the corporates, such as the right to pollute. This was conceived by Ronald Coase, in order to take into account the costs of foregoing the negative externalities by looking at the economic benefits connected to them.[1784] This method would allow the creation and trading of pollution rights.[1785] This would internalize these environmental costs in the form of a possible market of trading rights to damage the environment.[1786] The national government could set a limit on the amount of pollution it is ready to allow, and then sell the equivalent amount of rights to pollute on the market. Only those in possession of these rights, after buying them, could be allowed to carry out economic activities while others would have to face a penalty for doing the same. For instance, the dam builders could bid for the highest price in order to buy the rights to construct the dam. Once bought, only the winning builders would subsequently be allowed to degrade the environment to the extent that their rights permit. The other builders would be penalised for going ahead with their economic activities despite losing the bid and would be subjected to high penalties. Further, if the winning builder also causes damage beyond their permits, they would be liable to penalties.

Another possibility that could be considered is allowing the corporates to sell off rights that end up being in excess, than when they were originally purchased. This could result in a scheme that saves costs and would be preferable to the corporates than taxes. It would also help in a balance being created between controlling environmental degradation and meeting the economic activities and development needs of the State. Due to its popularity, efficiency and flexibility, such a mechanism has also been incorporated in the Kyoto Protocol, a binding mitigation treaty on climate change.[1787]

Allowing tradable permits may not be in line with the UN Water Convention which, mandates all signatories to protect the quantity and quality of water resources. A concern with tradable permits may, also lie in the ethics of attributing value to natural occurring resources, for them to be bought out and used in any manner by private bodies. The permission to use these resources may know no bounds or limits. There could disputes on drawing the line between

[1784] Coase, R. (1960). 'The Problem of Social Cost'. The Journal of Law and Economics, 3. pp 1-44.
[1785] Tietenberf, T.H. (2010). The evolution of emissions trading. In J.J Siegfried (Ed.), Better Living Through Economics (pp.42-58). London: Harvard University Press.
[1786] Dales, J. (2002). Pollution, property & prices. Cheltenham: Edward Elgar Publishing.
[1787] United Nations Framework Convention on Climate Change (UNFCCC). (1997). Kyoto Protocol to the United Nations Framework Convention on Climate Change. Bonn: HeinOnline. Retrieved from http://unfccc.int/resource/docs/convkp/kpeng.pdf .

what could be considered as 'saleable' and what must not be offered up for sale (For e.g. natural occurring seeds). There are also other issues regarding the creation of functional markets in pollution rights.[1788]

VIII. ***Better Resettlement and Rehabilitation measures***

While the environmental costs can be addressed in a way, the human costs of constructing such structures must also be taken into account.[1789] This is because the human costs come within the purview of human rights and well-being of affected peoples. Instead of penalising the corporates for violation of human rights of the indigenous people, there must be ways of rehabilitating and resettling (R&R) the affected groups of people. This cannot be limited to a single payment of monetary compensation to affected families as this would not assure a continuous supply of income for their daily needs or provide alternate means of livelihood for them.

Thus, a comprehensive and equitable resettlement legal scheme must also be formulated by the State. Most States require funds from the World Bank to implement these projects. A part of these loan and credit agreements could have meeting of conditions of R&R as a factor for non-suspension of providing credit facilities.

All States that are signatories of International Labour Organization (ILO) Convention[1790] not only acknowledge the right of tribal populations to the lands that they traditionally occupy but also, in the exceptional instance that they be removed from their lands, their right to the provision of lands at least equal to that of the lands previously occupied by them, suitable for their present needs and future development.[1791] This provision of land for the oustees can be carried out by the purchase of private lands for resettlement purposes[1792]. It can also be done by releasing forest lands to facilitate land-based resettlement to the native people. Only upon receiving approval of their R&R scheme and it being in line with the national legal scheme, must the corporate be granted State approval to proceed with the construction of the dam. The Governments must be made responsible for the overall monitoring and evaluation of the entire R&R effort.

[1788] Glibertson, T., & Reyes,O. (2009). Carbon trading: how it works and why it fails. Critical Currents. Retrieved from http://www.dhf.uu.se/pdffiler/cc7/cc7_web.pdf .
[1789] http://tibetnature.net/en/great-walls-damming-tibet/
[1790] International Labour Organization Conventions.
[1791] Article 12, International Labour Organization Convention.
[1792] Roy, A, (2002), 'The Greater Common Good', The Algebra of Infinite Justice, Penguin Books.

Instead they must be rehabilitated by giving them preference in allocation of jobs on these multipurpose dam projects.[1793] They can also be provided financial support in starting fisheries in some area of the dam location as seen in Indonesia, by which they would be assured of income as well as sources of food from the fishery.[1794] The R&R may also be included and carried out as part of the corporate's social responsibility programme.

IX. CONCLUSION

Dam building has proved to have severe detrimental impacts apart from the economic activities it may generate, namely; social and ecological impact. While doing away with the building of such dams may not be possible, we could incorporate theories of internalizing the external costs of constructing such structures which, would pave a way for the introduction of market based understanding and policy-making of environmental resources. Strengthening the legal rules of corporate social responsibility by providing a comprehensive legal scheme of resettlement and rehabilitation, would also be more advantageous to the locals rather than a single payment of monetary compensation by the concerned corporates. By doing this, the State could mitigate the destructive impact of building dams, and reach a middle ground between the pro-dam and anti-dam proponents without having to compromise on its economic aspirations, or infringing the rights of the native people. This would be a step in considering and including the interests and well-being of the main stakeholders in the decision making process. This could also lead to the opening up participation for the native people, making the decision making process more democratic regardless of the political regime that exists in the country.

[1793]Soemarwoto, O. (1991) 'Minimizing the social impacts of dam construction'. Waterlines, Vol. 10, No. 2. pp. 6-8. Practical Action Publishing. Retrieved from https://www.jstor.org/stable/24679409.
[1794] Soemarwoto, O. (1991) 'Minimizing the social impacts of dam construction'. Waterlines, Vol. 10, No. 2. pp. 6-8. Practical Action Publishing. Retrieved from https://www.jstor.org/stable/24679409.

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BRAIN FINGERPRINTING TEST OR BRAIN MAPPING IN CRIMINAL INVESTIGATION

- **PRITHIVI RAJ & ANTRA PANDIT**

ABSTRACT

During these days of Human Rights protection laws, the questioning upon police for investigations are quite questionable. The use of third degrees and other exploitation makes the accused or suspect forced to admit the crime which he/she has not done. The question of credibility of confession always gets out from the door of the Court room when the suspect/accused retract from the confession made to police. For this reason the scientific dependency is there in the investigation. In this paper the authors will discuss and analyse the Brain mapping process used in criminal investigation.

INTRODUCTION

Psychology is the discipline for studying human behaviour, intention of a person, his/her thought process(es) his/her attitude and behaviour towards his/her fellow beings and the like issues.[1795] Forensic psychology means application of psychology for dissemination of justice within the framework of law.[1796] The application of Forensic Psychology is universally accepted in the field of law to speed up process of booking the criminals and effectively administers Criminal Justice System. It is also applied in psychosomatic subtle changes of body, e.g., brain wave reactions, vibration in vocal cord changes in pulse rate, blood pressure, respiratory system, etc. Forensic Psychology is being used in criminal cases, matrimonial disputes, citizenship, wills, deed, and contract cases, admission to prestigious educational institutions, employment, placement, eluviation, promotion, etc.[1797]

At present Forensic Psychology is engaged in assessing, treating and providing testimonies in several type of Court cases such as custody of child, compensation for workmen, personal injuries, regarding competency and responsibility of accused and in many other fields.[1798]

[1795] Retrieved from www.bbc.co.uk/science/humanbody/mind/articles/psychology_6.shtml on 15 April 2015, at 8 pm.
[1796] Retrieved from http://faculty.ncwc.edu/toconnor/psy/psylect01.htm on 15 April at 9 pm.
[1797] B.R. Sharma, *Forensic Science in Criminal Investigation and Trials*, Universal Law Publication, 2008.
[1798] Retrieved from www.sciencebuddies.org/mentoring/project_ideas/HumBeh_p014.shtml on 16 April 2015 at 1 pm.

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CRIMINAL INVESTIGATION & LAW

Psychology and law are two distinct and different disciplines. Although law needs the help of psychology in solving the court matter but still there was hesitation on its behalf to accept psychology for dispersing justice.[1799]

False confession

Many criminals have guilt feeling and confess crimes which they have not committed. Similarly there are persons who may confess due to psychological disorders. Confession may be made by persons who are eager to please, to gain notoriety or due to low self-esteem or due to procedural tactics of law enforcing officers. Fatigued or frightened suspect(s) may also confess due to prolonged third degree treatment. This is the main reason why they retract their confession when in court. Under duress or stress the subject may selves himself/herself that he/she is guilty. But is other cases he/she may delude himself/herself that he/she is not guilty.

Confession- Not proof of involvement in crime

Confession is a written acknowledgment of guilt by a party accused of an offence. Confession may be before trial of during trial. A confession before trial, if given without any inducement, threat of punishment or coercion, is evidence against the person charged even if he is in custody. Section 164, Cr.P.C. provides for recording of confession by a Magistrate; sections 24 to 30, Indian Evidence Act govern admissibility of such evidence. A voluntary confession is the best proof of guilt.[1800]

Innocence – Actual or legal

The absence of guilt especially freedom from guilt for a particular offence is called "innocence". The absence of facts that are prerequisites for the sentence given to a defendant is "actual innocence". In death penalty cases, actual innocence is an exception to cause and prejudice rule, and can result in a successful challenge to the death sentence on the basis of a defence that was not presented to the trial court. The prisoner must show by clear and convincing evidence that, but for constitutional error in the trial court, no reasonable Judge or juror would find the defendant eligible for the death penalty.[1801] The absence of one or more procedural or legal bases to support the sentence given to the defendant, is legal innocence".

[1799] *Patel Narshi Thakeshi v. Pradyumansinji*, AIR 1970 SC 1273.
[1800] *Lal Chhatrapart Sai v. State of Orissa*, AIR 1976 Cri LJ 1342 (HC).
[1801] *Ram Singh Badhar Singh v. State of Gujarat*, AIR 1960 Cri LJ 1207.

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In the context of a petition for writ of habeas corpus or other attack on the sentence, legal innocence is often contrasted with actual innocence. Actual innocence which focuses on the facts underlying the sentence can sometimes be used to obtain relief from the death penalty based on trial court errors that were not objected to at trial, even if the petitioner cannot meet the elements of the cause-and-prejudice rule. But legal innocence, which focuses on the applicable law and procedure, is not as readily available. Inadvertence or a poor trial strategy resulting in the defendant's failure to assert an established legal principle will not ordinarily be sufficient to satisfy the cause-and-prejudice rule or to establish the right to an exception from that rule.[1802]

Innocent- Not guilty or not responsible for an action or event, or honestly, or without knowledge is called innocent.

Not guilty- A defendant's plea denying the crime charged; or a Jury verdict acquitting the defendant because the prosecution failed to prove the defendant's guilt beyond a reasonable doubt.

Not guilty plea- An accused person's formal denial in court of having committed the charged offence is a not-guilty plea. The prosecution must then prove all elements of charged offence beyond a reasonable doubt if the defendant is to be convicted.

The innocence project submitted that persons were convicted on the basis of mistaken identification by eye-witnesses as such reform was needed in police identification procedure to ensure accuracy of eye-witnesses identification. The innocence project felt that different jurisdictions are served by different methods and suggested different methods for reforming eye-witnesses identification procedure. They were-

(a) Eye-Witness Identification fact sheets;
(b) Model Statute for Eye-witness Reforms;
(c) Model legislation to form an Eye-witnesses I.D. Task Force; and
(d) Model legislation to form an Eye-witness I.D. Pilot program.

There is yet another sequential double blind line-up procedure for the said purpose.

[1802] *Rameshchandra Tukaram Tulekar v. State of Gujarat*, AIR 1980 Cri LJ 1108.

Wrong Conviction - Reasons for - A freedom loving society takes this calculated risks of letting off some criminals for the sake of protection of the innocent. There can thus be no compromise on this fundamental principle of jurisprudence in a society governed by the concept of Rule of Law.[1803]

It is modern day reality that many innocents are convicted by Law Courts wrongfully. If we analyse we many find that following among others are the reasons for wrong conviction :

1. Line-up Photo arrays were not scientifically appropriate,
2. False confessions were obtained from person who had below normal intelligency;
3. The convicted persons were too young to understand what they were doing or saying;
4. Analyses were performed incorrectly;
5. Statements of witness were either incorrect or were misunderstood;
6. Report of scientist was false or conclusions were wrongly drawn;
7. Report of the scientist was not understood or was misinterpreted.

There might be many other case as well. It is our duty to take steps so that such type of wrong convictions may be eliminated or at lest minimised. We have to search for the means and methods to eliminate such wrongs. These objectives are on the top of Innocence Project. Efforts are being made to establish acceptable methods of scientific identification and to avoid false confessions. There must also be a statutory provision to make it easy for convict to challenge his conviction on scientific basis. The Innocence Project has been able To show inherent and apparent weaknesses of the Criminal Justice System and due to its efforts several persons were exonerated who were waiting for the gallows.[1804]

Eye-Witness statements-Accuracy of – By passing of time memory changes and is distorated. On occurring new events original memory is adjusted to fit the additional facts. It has been found that accuracy of eye-witnesses account is qualified by distance from the subject reported, gender and delay in recollection time. Memory has three parts, viz, encoding storing and retrieving, Encoding means perception of events, storing denotes keeping the record of perception, and retrieving is the process of recalling those stored memories in response to cue or query. But retrieving is not like replaying of video disc. It is affected by various factors and more importantly the time elapsed between storing and retrieving.[1805]

[1803] *Som Prakash v. Delhi Administration*, 1974 Cri LJ 784 (SC).
[1804] *Madan Lal v. State of Rajasthan*, AIR 1976 Cri LJ 1485.
[1805] *Haneefa v. State of Kerala*, AIR 1966 Ker 229.

Ethical guidelines for Forensic Psychologists.- The broad guidelines are:

A. Responsibility.
B. Competence,
C. Relationships,
D. Confidentially,
E. Methods, and
F. Communications.

In a nutshell all these guidelines means that the person having specialised knowledge, education, skill and experience should provide services in a responsible manner with highest standard of profession and for the services anticipated costs should be settled beforehand and there should not be hidden or contingency clause and every information which is not directly related to the issue should be kept confidential. Further, standard, accepted clinical and scientific standard of investigation, should be adopted and if any misrepresentation has occurred it should be corrected.[1806]

Further Dangerousness.- Judges are hesitant about granting bail or imposing sentences as they do not know about inherent tendencies of violence of the person. In these sphere the assistance of Forensic Psychologist it taken to report about mental conditions of the accused. Forensic Psychologists are generally considered those who solve crimes. But this statement is partially true. This perception is due to the fact that they know about the criminal behaviour of the person. Actually Forensic psychologists work at every level within the framework of law and even in selection and training of police officers. They advise on jury selection and on jury's decision making behaviour and about reliability of witness and give expert opinion in matters of child abuse, domestic and sexual violence, rape, etc.[1807]

Brain Fingerprinting or Brain Mapping

Brain has been the centre of attraction of neuroscientists for decades. All activites of human body starts from here. The brain has also been the key point in all equipments of lie detection be it polygraph or Lie Detection Test. P-300 or Brain fingerprinting and Narcoanalysis. In these tests Brain fingerprinting is the latest scientific technique for measuring neural responses

[1806] *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300.
[1807] Retrieved from http://www.123helpme.com/search.asp?text=forensic+psychology on 19 April 2015 at 9 pm.

exhibited after an object is shown to the subject or an external stimulus is presented to the subject. It is branch of neuroscience and deals with the study of neuroanatomy.[1808] Since long past scientists are constantly trying to understand the working of human brain. Brain exploration remained the subject of interest from ancient times. But the last 50 years have proved revolutionary in this regard. The modern technology has affected our knowledge about functioning of brain. The researches have dramatically changed our understanding of our brain and the brain has also adapted itself in acceptance of stimulation thurst upon it. The scientists are not focusing attention on disfunctions or diseases of brain rather they are examining the everyday working of normal brain.[1809]

Brain fingerprinting is fact today and not a science fiction. This technique is used to determine whether certain information is present in the brain of a person(s) or not. In other words, brain finger printings a scientific test by which guilty knowledge stored in one's brain can be determined. Brain fingerprinting measures neural responses to images from crime scene. Now these sciences is being used to detect not only crimes but are also used in countering terrorism diagnosing diseases and in regulating the treatment of patient. This is the technology through which the science are gazing our naked thought without any ethical or legal frame-work and with the help of this technology brain activity can be scanned without permission of the person at the custom office or some other places like that. These are new uses of the technique and were not thought of some years ago. It is believed that when one recognizes or sees an important thing the brain of that person processes the event and it is manifested on the scalp as a P- 300. If a serial killer kills persons the killings will certainly leave marks or P-300in his/her brain and it is recorded on a graph through sensor electrodes. These testings are 99% accurate but other scientists, such as Dr. Emanuel Quirion, say that the result and success rating is exaggerated and claim that these tests are not 100% full proof.[1810] Brain fingerprinting device was invented by a U.S. Scientist Dr. Lawrence A. Farewell for identifying criminals and clear innocent persons accurately by measuring brain waves. He is the chief Scientist and President of the Human Brain Research Laboratory founded by him in 1991. His research attracted F.B.I. and C.IA. According to Dr. Farwell Center of every activity is brain and it not only plans activities but orders for its execution. The "Truth detector" is based on these functions of brain. Every event is stored in the brain and when the same or similar event is shown to person the brain responses and response is recorded through computer. If a person has committed an

[1808] *Aher Raja Khima v. State of Saurashtra*, AIR 1989 SC 1174
[1809] Henry T. Greely, "Neuroethics: The Neuroscience Revolution, Ethics, and the Law" Vol 2, 2006, P.221.
[1810] Retrieved from http://www.brainwavescience.com/ on 20 April 2015 at 8 am.

offence the brain will recall its memory and recognize the object and will elicit wave as proof of recognition. But Dr. Farewell himself claims that this technology will not solve every case. It is, at best, one of the tools in the hands of investigator to investigate the crime. Brain fingerprinting only shows that the person was present or not at the place of occurrence but it does not mean and can never mean that record of information present is for the complicity of subject in the commission of crime. The person who has information present in his/her brain may be present on the place of occurrence for some legitimate reason, for example, for saving the victim form the clutches of perpetrator of the crime.[1811] Dr. Lawrence A. Farewell with his associates established a laboratory for researches on human brain. Dr. Farwell postulated a theory that information collected in a brain of a person can be elicited with a high degree of precision. The responses of brain wave can be measured with the help of multifaceted electroencephalographic response.[1812] The brain fingerprinting method adopted by Dr. Farwell is totally different from that which was discovered by Mr. Orwell in 1984. Fingerprinting technique developed by Mr. Orwell was simply to remove the fear of government machinery from one's mind and the test was not possible on persons who resisted the same. In Farwell's technique the person looks on a computer screen and thereafter the brain responses are measured.[1813]

Working of Brain Mapping in Human beings for Investigation

Human brain works like a black box kept in an aeroplane for recording everything happening with the plane. There is an instinctive ability in the brain to identify person, places, objects, etc. and is kept reserved in memory.[1814] The computer-based brain fingerprinting technology is a fact today and not a science fiction. This technique is used to determine whether a certain information is or is not present in the brain of a person. Few electrodes are strapped on the scalp of a person and his/her involuntary responses are recorded through electroencephalogram.[1815] It means that it is the ability of brain to match the information shown to it with the memory reserved in the brain. If the given information corresponds to the information kept reserved in brain, it sends electronic signals and is recorded in EEC (Electroencephalograph). This system tests for knowledge of salient features of crime stored in the brain. We do not remember everything but we do remember significant events. If a person

[1811] Retrieved from www.visnsoft.com/eng/info4htm on 20 April 2015 at 10 am.
[1812] Dr. Jefferey Thompson, "*Brainwave Activity and Ecstatic State*", Vol 1, 2008, p.116.
[1813] Ibid.
[1814] Retrieved from www.web.us.com/brainwavesfunction.htm on 20 April 2015 at 11 am.
[1815] Koichi Hirata, "*Recent Advances in Human Brain Mapping*", 2009, p.93.

commits a crime it will be stored in the brain of the person. Similar to a computer whose central processing unit (CPU) transfersinformation to or from one hard drive, the human brain emits an electrical brain wave which istermed as P-300. If a person knows an event and it is shown to him/her, the P-300 electrical brain wave responds to that fact. The MERMER not only respondsto P-300 electrical wavesbut also additional data occurring more than 800 milliseconds after the stimulus.[1816] This test has its own limitations. The test is cionducted by human and it is possible that they fail to fully and truthfully analyse the brain waves.

Brain Fingerprinting- First Admissibility in Court

When a person commits a crime then the details of criminal act and the things found at the place of occurrence remains stored in his/her brain.the information never dies but when a person, who is innocent but falsely implicated, would not have the information relevant to the criminal act. Brain fingerprinting was first used in U.S.A. in Terry Harrington case for reversing the judgment of conviction into acquittal. The plea of *alibi* of convict was not accepted by the Court and he was convicted but after brain fingerprinting it was found that salient features of crime were not found in his brain and information regarding *alibi* matched with the brain. Retrial was done and accused was acquitted.[1817]

Brain fingerprinting- Indian Scenario

Brain fingerprinting in an study in neuroanatomy. In India is is being used in high profile cases or to trace out a terrorist or criminal in a person. In cirminal investigation three methods are applied for knowing the state of brain.First method is use of lie detection test, i.e., polygraph. It determines whether a person is lying or speaking truth; the second method is P-300 response, i.e., brain mapping (fingerprinting); and lastly the naracoanalysis test.[1818]

Brain fingerprinting laborateries – Breakthrough in India,- The Forensic Science Laboratory at Bangalore is engaged in research on brain. According to its Assistant Director DR.S. Malini if a guilty person is shown the description of the site where crime was committed the brain of the person will emit waves different from the person who was only an eye-witness or the innocent suspect. This is certainly an advancement on the experiment of Dr. Farwell. When the person is involved in the crime structural changes occur in him at the time of brain mapping . These are called P-300 or the Event- Related Potentials (ERPs).But at present only functional changes

[1816] Ibid.
[1817] *Terry Harrington v. State of IOWA*, Case No. 01-0653, U.S.
[1818] P R Anderson, Newman, *Introduction to Criminal Justice*, McGraw Hill, New York, 1993.

are measured and efforts are going on measuring functional changes simultaneously with structural changes and such equipment or instrument has be developed.[1819]

Brain Mapping or P-300 test

Procedure for- In brain mapping on P-300 test the suspect is first interviewed and interrogated to find out whether he/she is concealing any information. The activation of brain for the associated memory is carried out by presenting list of words to the subjects. There are three types of words in the list used for Brain Mapping test, Part I consists of neutral words, which have no direct relationship with the case, Part II consists of probe words directly related to the case and suspected to elicit concealed information, which all suspects have had opportunity to come to know during the course of events related to the case. Then comes Part III this part are based on confidential findings which the suspect does not know. EEG-ERP Neuroscan cording System. It is carried our by asking the suspect to international system, and 32 discrate electrodes are placed over the scalp directly. While conducting ths test twice by presenting each word in three parts randonly, the suspect in instructed to relax and listen to the wordsthe witness. The conclusion drawn by the experts after the conduct of the test to indicate the possession of the knowledge about the relevant subject which is helpful in the investigation and collection of evidence. In this case it is also not direct violation of the body, in ordinary sense of the words conducted .It will be seen that what is received at the conclusion of such test is indication of the fact that the accused or the suspect does have or is in possession of knowledge about the subject on which he was questioned. Here there is no verbal response from the witness. Except touching the physique of the person both tests do not involve invasion of the body in the ordinary sense of the term.[1820]

Advancement of technique in India.- Dr.farewell patented his technique of brain mapping in U.S.A.in 70s which was projected to be an a major breakthrjough in forensic science as it involved formulated probes, i.e., key words or phrases or pictures which were likely to stimulate brain waves of the subject. Spoken words or pictures collected and related to the crime are mixed with irrelevant words and pictures and is flashed on screen and the subject is called to press the button on the correct option . But the difficulty arises when the suspect presses wrong button or does not presses any button at all. To meet this error or eventuality Dr. Mukundan of Brainex (Brain Experience) Company at Bangalore has designed an special

[1819] K J Aiyar, *Judicial Dictionary*, 13th Edition, Butterworths India Publications, 2001.
[1820] Arther and Richard, *The Scientific Investigation*, Springfield Publication, 1999.

software called "Brain-Electrical Activation Fingerprinting". It is said to be modified version of Dr Farewell's technique. In this technique the entire crime scene is recreated and is shown to the suspect and his/her brain's reactions recorded. There is another change. Sometimes information is gathered from frontal of brain and sometimes from posterior lobe, sometimes vice versa. However, this technique cannot be used on mentally ill or heavily alcoholic suspect and may not be helpful in cases of habitual criminals. But according to Dr. Mukundan "it is so specific that one can even find out how much money was paid to a contract killer or who called him up the day before the killing".[1821]

Brain fingerprinting – Admissibility in Indian Courts

(i) Abhishek Kasliwal's case[1822] – Truth alone triumph**.-** Mr. Abhishek Kasliwal son of a leading Mumbai industrialist Ambuj Kasliwal owner of Shri Ram Mills was accused of raping a 52-year old woman in his car in the Mills compound. According to prosecution case the victim was waiting at the Prince of Wales Museum at Colaba, South Mumbai when the accused offered her a lift in his dark green Mercedes Car. The accused was in drunken state and he took the victim in his Mills compound and raped her repeatedly. The victim lodged a report with the police as she had noted down the number of the car. The accused was charged with Sections 325/376,IPC as he had allegedly raped the victim/complainant four times and had badly assaulted her resulting in fracture of her right hand and also serious injuries to her. The medical examination of victim confirmed the sexual assault and forced rape. On 19-3-2006 Brain mapping and Polygraph tests were conducted on Abhishek Kasliwal at Central Forensic Science Laboratory, Bangalore and tests results confirmed the prosecution case of Kasliwal. 32 electodes were attached to his scalp and he was shown words and pictures associated with the crime and his brain responses were observed and recorded. This method of lie detection is said to be 99.99% accurate. The allegation on Abhishek Kasliwal is that he picked up 52-year-old woman from a sheet in his Mercedes car and raped her in a parking lot of family business house. The witnesses stated bruises and scratches on her person and she faced difficulty in walking, she had a broken hand also. She is alleged to be a prostitute but that is not the point here because even a prostitute cannot be sexually assaulted without her consent. The relevant point here is whether this new technology is helpful in detecting a lie. After the brain mapping

[1821] R L Gupta, *The Law and Methods of Criminal Investigation*, Central Law Publications, 2012.
[1822] *Abhishek Kasliwal v. State of Maharashra*, AIR 2006 SC 766.

and polygraph tests it was cleared by CFSL, Bangalore that "if the EEG helps prove it was, as one more piece in a solid array of evidence in an strong case fighting a very biased scenario, then great".[1823]

(ii) Rahul Mahajan's case[1824]

Constitutional safeguard- In a drug abuse case involving Rahul mahajan and Sahil Zaroo the special Court had granted permission to the prosecution (Delhi Police) for conducting brain mapping test on Mr. Rahul Mahajan and Sahil Zaroo. The plea of defence lawyer against the aforesaid tests were rejected. According to prosecution some evidences in the matter was destroyed and the Court was of the view that for a proper investigation the brain mapping tests were necessary and request for the same by the prosecution was not mala fide but the court directed that fitness of the accused for facing the test should be ascertained (an aide of Rahul). In this case Delhi High court stayed Rahul Mahajan's brain mapping test. Rahul Mahajan filed caveat in the Supreme Court to install possible move of prosecution to get this stay vacated. Filing of caveat means that order will not be passed without hearing the petitioner. Rahul had challenged the lower Courts order for brain mapping on the ground that it would violate his privacy and order violates Article 21 of the Constitution. Earlier the lower Courts had rejected the objection of Rahul that it would harm him and Court ruled that it was a harmless test in which three types of questions are put to accused and an EEG is conducted without administrating any medicine. The argument of prosecution was that Rahul refused to sign his disclosure statement and had not cooperared with the prosecution, therefore, test was necessary. Earlier both narcoanalysis test and brain mapping test were requested but later on request for narcoanalysis test withdrawn. The prosecution wanted to take Rahul Mahajan and co-accused Sahil Zaroo who admitted supplying drug to Rahul to undergo brain mapping test at Forensic Science Laboratory, Bangalore for "seeking answers for some vital questions about late night drug-and-booze party and hope to put the jigsaw puzzle in place after putting him to the test" and also to know "the source of cocaine, which was found in the body of Rahul and Bibek Monitra (an aside of rahul)" who was bouoght to hospital dead.[1825]

(iii) Film maker Madhur Bhandarkar and actress Preeti Jain's case[1826]

[1823] *Ibid.*
[1824] *Rahul Mahajan ,Harish Sharma and others v. State of NCT of Delhi*, AIR 2008 SC 409
[1825] *Ibid.*
[1826] *Arun Gulab Gavali v. State of Maharashtra* 2006 Cri. LJ. 2615.

Preeti Jain is an actress who alleged that the film maker *Madhur Bhandarkar* promised film roles in exchange of sex but refused to fulfil his promises. It was alleged by *Bhandarkar* that *Preeti Jain* hired an assassin of a gangster-turned-MLA Arun Gavali's gang to kill him and in turn Madhur Bhandarkar paid Rs. 50,000 to Arun Gavali to file complaint against Ms. Jain. The hit man was Naresh Pardeshi, a former associate of Gavali, was put to narcoanalysis and brain mapping tests and it was revealed that Rs. 50,000 was paid by Bhandarkar to Gavali to file complaint against Ms. Jain.

(iv) Ijju Sheikh's Case[1827]

In the Mumbai Serial Blasts case in 1993 RDX was used which was smuggled from Gujarat coast to Mumbai. On 28th April, 2006 Ijju Sheikh, an aide of Dawood Ibrahim, an Underworld Don was arrested from Mumbai. He had given certain information to the police and police made him face-to-face with Dawood aide Umar Miyan Bukhari who was deported to Mumbai from Dubai in December 2005 and was subjected to Narcoanalysis and brain fingerprinting tests at Gandhinagar, Ahmedabad.

(v) 2006 Mumbai Serial Blasts[1828]

In the case of serial blasts in sub-urban trains of Mumbai on 11th July, 2006, the Anti-Terrorism Squad (ATS) of Mumbai Police had sought permission from the Court for conducting lie detection, brain mapping and narcoanalysis tests on the arrested suspects, viz., Kamal Ahmad Ansari, Mumtaz Maqbool Chaudhari, Faizal Sheikh, Mujammil Sheikh, Dr. Tanveer Ansari, Sohail Sheikh, Jameer Sheikh, Kalid Aziz Sheikh and Etesham Siddiqui. It is believed that the suspected persons have link with Lashkar-e-Toiba. Narcoanalysis, brain mapping and lie detector tests were conducted on the suspects.[1829]

(vi) Abdul Karim Ladsab Telgi's case[1830]

A multi crore stamp paper scam was committed by *Abdul Karim Telgi*. About three hundred brain mapping test and also lie detection test were conducted on him which showed that *Telgi* was guilty of the crime. In the brain mapping test *Telgi* was made to sit in the chair and was

[1827] Retrieved from http://timesofindia.indiatimes.com/city/surat/Ijju-Shaikh-booked-for-atrocity/articleshow/12448933.cms on 20th May 2015 at 8 pm.
[1828] *Kamal Ahmad Ansari and ors. v. State of Maharashra*, AIR 2006 SC 890.
[1829] *Ibid.*
[1830] Retrieved from http://indiatoday.intoday.in/story/jailed-for-11-years-in-fake-stamp-paper-case-abdul-karim-telgi-health-deteriorates/1/239521.html on 20th May at 9 pm.

asked to close his eyes and then a head band equipped with 32 electrodes was attached to his scalp. The target words were presented to him and his changed brain activation pattern was recorded on EEG. The admissibility of brain fingerprinting in Indian Courts has to face prohibitive mandates of Article 20(3) and Article 21 of the Constitution. Article 20(3) prohibits evidence regarding self incrimination while Article 21 deals with right to self privacy. Polygraphy and fingerprinting have been made admissible by various Court pronouncements but no authentic ruling regarding brain fingerprinting has been given. It has been held in *State of Bombay v. kathi Kalu Oghad*[1831], taking thumb – impression or fingerprints is not covered by Article 20(3) and is not self- incriminating."Self-incriminating" means the accused is compelled to give information from his/her personal knowledge. The law has been ultimately crystallized by the Supreme Court in the case of *Nandini Satpathy.*[1832] In *Ramachandra Reddy v. State of Maharashtra*[1833], the Court came to the conclusion that it is not a statement in relation to the first two tests (*i.e.* Brain Mapping and Lie Detector Tests) and in relation to the third test (*i.e*. Narco test) it is a statement entry of which in evidence is adequately protected by various provisions of laws[1834]. Article 20(3) of the Constitution of India, recognizes the right of the accused to be silent. The Investigation Officer has come out with a version that the accused has volunteered to undergo such a test. Such a contention of the Investigating officer is disputed by the accused now.[1835]

CONCLUSION & SUGGESTION

The Court recognized the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties. Subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the `right against self-incrimination' and also violates one's personal liberty guaranteed under Article 21 of the Indian Constitution.[1836] The court affirmed that the fundamental rights of the

[1831] AIR 1961 SC 1808.
[1832] *Nandini Satpathy v. P.L. Dani,* AIR 1978 SC 1025 :1978 Cri LJ 968.
[1833] AIR 2004 All MR (Cri) 1704.
[1834] 2005(1) CCR 355 (DB) : 2004 (1) Bom Cr (Cri) 67.
[1835] *Dinesh Dalmia v. State*, 2006 Cri LJ 2401.
[1836] Maneka Gandhi v. Union of India AIR 1978 SC 597

people are always on a higher pedestal and laid down that the accused cannot be involuntarily administered the tests just for the sake of clearing pending cases, the duty and responsibility of the police and the investigating authorities cannot be done at the cost of fundamental rights of the accused. The court further stated that there can be no exception made so as to make involuntary administration of the tests constitutional in cases effecting public interests as this would amount to legislating, which the court is not empowered to do but the legislature.[1837] The only point that is to be taken in lime light that the questions asked by the Medical Expert should not be the leading question. In most of the cases we see the Medical Expert ask that much of question or the leading question to get the probable answer he requires. That should not be happen. In fact the questions should be open questions to explain.

[1837] Smt. Selvi & Ors. v. State of Karnataka, (2010) 7 SCC 263

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AN OVERVIEW OF CITIZENSHIP (AMENDMENT) ACT 2019

- MANISH JAISWAL

1. INTRODUCTION

India has an age old tradition of offering humanitarian assistance to refugees. But there is In dia has neither signed the Convention of Refugees, 1951 not is there any specific refugee la w in the country till date. The refugees are dealt with on the basis of a combination of judici al pronouncements and ad hoc executive policies. Different treatment is meted out to differe nt refugee groups.

Indian Constitution is one of the finest legal documents drafted in the history of mankind. In itially its efficacy was doubted by many but the lengthiest constitution of the world has been successful in running the largest and one of the most diverse democracies with efficacy. On e of the important issues related to refugees addressed by the Constitution is that of the citize nship. At the time when the Constitution commenced every person who had his domicile in I ndian Territory and who was born in Indian Territory or either of whose parents was born in the Indian Territory or who ordinarily had been resident in the Indian territory of India for at least five years immediately preceding such commencement, shall be a citizen of India.

A person who migrated to the Indian territory from the territory which now is included in Pa kistan is deemed to be a citizen of India at the commencement of this Constitution if he or ei ther of his parents or any of his grandparents was born in India as defined in the Governmen t of India Act, 1935 , in the case where such person has migrated before 19 July, 1948, he ha s been ordinarily resident in the territory of India since the date of his migration, in the case where such person migrated on or after the 19 of July, 1948 he has been registered as a citiz en of India by an officer appointed in that behalf by the Government of the Dominion of Ind ia .However no person shall be registered unless he has been resident in Indian territory for a t least six months immediately preceding the date of his application.

- A person who left Indian Territory and migrated to Pakistan after 1 March, 1947, shall not be deemed to be citizen of India. However where a person migrated to the Pakistan but

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returned to the Indian Territory under a permit for resettlement or permanent return is sued by or under the authority of any law, he shall be deemed to have migrated to the territory of India after the 19 July, 1948.

- Any person who or either of whose parents or any of whose grandparents was born i n India as defined in the Government of India Act, 1935 and who is ordinarily residi ng in any country outside I
  ndia shall be deemed to be a citizen of India if he has been registered as a citizen of I ndia by the diplomatic or consular representative of India in the country where he is f or the time being residing.
- If a person voluntarily acquires the citizenship of any foreign State, he shall not be a n Indian citizen by virtue of Article 5 or 6 or 8.
- Every person who is or is deemed to be a citizen of India under any of the provisions of the Constitution shall, continue to be such citizen subject to the provisions of any law that may be made by parliament.
- The Parliament is empowered to regulate the acquisition and termination of citizenshi p and all other matters relating to citizenship by law.

2. CITIZENSHIP LAW

The Indian Constitution that was implemented in 1950 guaranteed citizenship to all of the country's residents at the commencement of the constitution, and made no distinction on the basis of religio n. The Indian government passed the Citizenship Act in 1955. The Act provided two means for for eigners to acquire Indian citizenship. People from "undivided India" were given a means of registr ation after seven years of residency in India. Those from other countries were given a means of nat uralization after twelve years of residency in India. Political developments in the 1980s, particular ly those related to the violent Assam movement against all migrants from Bangladesh, triggered re visions to the Citizenship Act of 1955.

3. OBJECTS OF THE CITIZENSHIP AMENDMENT ACT, 2019

- Protection of the de-facto refugees (de
  facto because in India refugee is an administrative rather than legal category)
- Protection of national security by regulating immigration in India

ISSN: 2581-6349

These objectives have been vetted by the Supreme Court itself. The court has considered refugee i nflux as external aggression under Article 355. It was the Supreme Court which took the initiative on the NRC in Assam. At the same time, it has been proactive in protecting the rights of the de-facto refugees from Bangladesh (National Human Rights Commission v. State of Arunachal Prad esh (1996). As for the Ahmediyas and Rohingyas, nothing prevents them from seeking Indian citi zenship through naturalization. In any case, since India follows the principle of non-refulgent, they would not be pushed back. It would see the CAB, when it becomes an Act, as an evo lution of Indian citizenship jurisprudence over a period of time rather than a sudden sharp move by the Bharatiya Janata Party. The law is constitutionally sound and historically prudent.

4. IMPORTANCE OF CITIZENSHIP AMENDMENT ACTS

Allowing immigrants a path toward becoming citizens and fully integrating into everyday life will create a sense of belonging and attachment to our nation. We cannot allow those who have immigr ated to our nation to believe they are just a permanent subclass of worker, without an opportunity t o work toward their Dream. That idea of an underclass, a group that can reside in the India legally b ut can never vote or become full equal members, runs completely contrary to the ideals upon whic h our nation was founded. Creating the opportunity to earn citizenship is not simply the best thing t o do for the identity of our nation. Creating that opportunity also has economic benefits that are unr eachable by legalization-only immigration reform.

Citizenship opportunities would mean higher wages for naturalized immigrants immediately and over the long term. Higher wages create more consumers spending. That increased consumer spe nding would allow the Indian economy to strengthen and grow. When our economy is strong, busi nesses benefit with increased revenue and they grow, expand and hire more Indian workers.

On the other hand, research shows significant economic costs, in terms of lost growth, earnings, ta x revenues and jobs, associated with the failure to provide a path to earned citizenship for immigra nt families. Compared to the benefits of citizenship, providing legal status alone to currently undo cumented workers would, over the next decade, result in 568 billion less national productivity, an d 321 billion less total income. 820,000 fewer total jobs would be created, and federal and state gov ernments would lose out on 75 billion in additional tax revenue according to outside estimates. Cit izenship also creates certainty in the lives of hardworking immigrants, their families and employe rs. Employers will not have to worry about having to retrain an employee, sometimes at high costs , as occurs when employees lose their work visas. Along with the stability created for employees t

ISSN: 2581-6349

hrough citizenship comes stability needed for employers to invest in more education and job traini ng. A better educated and more experienced Inian workforce is key to a successful future for our n ation.

5. CONSTITUTIONAL PROVISIONS ON CITIZENSHIP

Citizenship is listed in the Union List under the Constitution and thus is under the exclusive jurisdi ction of Parliament. The Constitution does not define the term 'citizen' but details of various categ ories of persons who are entitled to citizenship are given in Part II (Articles 5 to 11). Unlike other pr ovisions of the Constitution, which came into being on January 26, 1950, these articles were enfor ced on November 26, 1949 itself, when the Constitution was adopted.

- **Article 5 of Indian Constitution:** It provided for citizenship on commencement of the Co nstitution.
  All those domiciled and born in India were given citizenship. Even those who were domici led but not born in India, but either of whose parents were born in India, were considered ci tizens. Anyone who had been an ordinary resident for more than five years, too, was entitle d to apply for citizenship.
- **Article 6 of Indian Constitution:** It provided rights of citizenship of certain persons who have migrated to India from Pakistan. Since Independence was preceded by Partition and migration, Article 6 laid down that anyone who migrated to India before July 19, 1949, wo uld automatically become an Indian citizen if either of his parents or grandparents was bor n in India. But those who entered India after this date needed to register themselves.
- **Article 7 of Indian Constitution:** Provided Rights of citizenship of certain migrants to Pa kistan. Those who had migrated to Pakistan after March 1, 1947 but subsequently returned on resettlement permits were included within the citizenship net. The law was more symp athetic to those who migrated from Pakistan and called them refugees than to those who, in a state of confusion, were stranded in Pakistan or went there but decided to return soon.
- **Article 8 of Indian Constitution:** Provided Rights of citizenship of certain persons of Ind ian origin residing outside India. Any Person of Indian Origin residing outside India who, or either of whose parents or grandparents, was born in India could register himself or hers elf as an Indian citizen with Indian Diplomatic Mission.

- **Article 9 of Indian Constitution:** Provided that if any person voluntarily acquired the citi zenship of a foreign State will no longer be a citizen of India.
- **Article10 of Indian Constitution:** It says that every person who is or is deemed to be a citi zen of India under any of the foregoing provisions of this Part shall, subject to the provision s of any law that may be made by Parliament, continue to be such citizen.
- **Article 11 of Indian Constitution:** It empowers Parliament to make any provision with re spect to the acquisition and termination of citizenship and all matters relating to it.

3A. EXEMPTION OF CERTAIN CLASS OF FOREIGNERS

Persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religiou s persecution or fear of religious persecution and entered into India on or before the 31st December , 2014

- without valid documents including passport or other travel documents and who have been exempted under rule 4 from the provisions of rule 3 of the *Passport (Entry into India) Rule s, 1950* or
- with valid documents including passport or other travel document and the validity of any o f such documents has expired,

are hereby granted exemption from the application of provisions of the *Foreigners Act, 1946*, and t he orders made there under in respect of their stay in India without such documents or after the expi ry of those documents, as the case may be. The Rules had been further amended in 2016 by addin g Afghanistan to the list of countries. Exemptions were granted to north eastern regions of India in the clause (4) of section 6B:

"Nothing in this section shall apply to tribal area of Assam, Meghalaya, Mizoram or Tripu ra as included in the Sixth Schedule to the Constitution and the area covered under "The In ner Line" notified under the Bengal Eastern Frontier Regulation, 1873"

6. EXCLUSION OF PERSECUTED MUSLIMS FROM PAKISTAN, BANGLAD ESH AND AFGHANISTAN

Muslims from Pakistan, Bangladesh and Afghanistan are not offered eligibility for citizen ship under the new Act. Critics have questioned the exclusion. The amendment limits itself

ISSN: 2581-6349

to the Muslimmajority neighbors of India and takes no cognizance of the persecuted Muslims of those countries. According to *The Economist*, if the Indian government was concerned about religious persecution, it should have included Ahmadiyyas a Muslim sect who have been "viciously hounded in Pakistan as heretics", and the Hazaras another Muslim sect who have been murdered by the Taliban in Afghanistan. They should be treated as minorities. India's minister of minority affairs, Mukhtar Abbas Naqvi defended the exclusion of the Ahmadiyyas by saying that India does not consider them as nonMuslims. A landmark 1970 judgment from the Kerala High Court deemed Ahmadiyyas to be Muslims by the Indian law. Naqvi added that India has provided refuge to different persecuted sects at different times, and Ahmaddiyas will not be forgotten.

Pakistan, Afghanistan, and Bangladesh are Muslimmajority countries that have modified their constitutions in recent decades to declare Islam their official state religion. Therefore, according to the Indian government, Muslims in these Islamic countries are "unlikely to face religious persecution". The government says that Muslims cannot be "treated as persecuted minorities" in these Muslimmajority countries. The BBC says that while these countries have provisions in their constitution guaranteeing nonMuslims rights, including the freedom to practice their religion, in practice nonMuslim populations have experienced discrimination and persecution.

7. EXCLUSION OF OTHER PERSECUTED COMMUNITIES

The Act does not include migrants from nonMuslim countries fleeing persecution to India, Rohingya Muslim refugees from Myanmar, Hindu refugees from Sri Lanka, and Buddhist refugees from Tibet, China. The Act does not mention Tamil refugees from Sri Lanka. The Sri Lankan Tamils were allowed to settle as refugees in Tamil Nadu in 1980s and 1990s due to systemic

violence from the Sinhalese of Sri Lanka. They include 29,500 "hill country Tamils" (Malaiha). The Act does not provide relief to Tibetan Buddhist refugees, who came to India in the 1950s and 1960s. Their status has been of refugees over the decades. According to a 1992 UNHCR report, the then Indian government stated that they remain refugees and do not have the right to acquire Indian nationality. The Act does not address Rohingya Muslim refugee

s from Myanmar. The Indian government has been deporting Rohingya refugees to Myan mar.

8. REFUGEES

Hindu refugee families in Assam, living since the 1960s in a refugee camp and who had bee n denied Indian citizenship so far, said that the Amendment had "kindled hope" at first. The y added that the recent protests against the Act and demands for its cancellation have made t hem fearful of the future. In New Delhi, about 600 refugees from Pakistan living in a camp c onsisting of tiny shanties celebrated the new law. A delegation of Sikh refugees who had ar rived from Afghanistan three decades ago thanked the Indian government for amending th e citizenship law. They stated the Amended law would allow them to finally gain Indian citi zenship and *"join the mainstream"*. Some Rohingya Muslim refugees in India were not opt imistic about the Amendment and feared they would be deported. Other Rohingya refugee s expressed gratitude at having been allowed to stay in India, but did not make any commen ts specific to the Act lest they provoke a backlash. They said that local police had asked the m not to protest against the Act. More than 200 families have arrived in the Indian state of P unjab with all their belongings after the law was enacted.

9. CONCLUSION

- **THE PATHS TO INDIAN CITIZENSHIP**

There are several routes to citizenship under the Citizenship Act, 1955: birth, descent, registration , naturalization and acquisition of a foreign territory.82 Prior to an amendment in 2004, any person born in India after 26 January 1950 was considered to be a citizen of India, regardless of whether o ne or both of his or her parents were illegal immigrants.

After the amendment, a person born in India after 26 January 1950 but before 1 July 1987 is an Indi an citizen regardless of whether one or both of his or her parents were illegal immigrants.84 A pers on born in India on or after 1 July 1987 but before 3 December 2004, is a citizen if one of his or her p arents was a citizen of India at the time of his or her birth, even if the other was an illegal immigrant. However, those born in India after 3 December 2004, are only Indian citizens if both parents are cit izens of India or if one parent is a citizen of India and the other is not an illegal immigrant at the time

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of his or her birth.86 This signifies a shift in Indian citizenship law from jus soli (citizenship by birth) to jus sanguine.

The citizenship by descent route applies to those born outside India. Under this path, a person born outside India after 26 January 1950 can be a citizen if either his father or mother was a citizen at the time of the former's birth. There are complicated rules that govern this route to citizenship.
A person born outside India after 26 January 1950 but before 10 December 1992 can be a citizen under this route if his
father was a citizen at the time of the former's birth. A person born outside India on or after 10 December 1992 can be a citizen if either his father or mother was an Indian citizen at the time of the former's birth. The rules get a little more complicated if the father or mother were citizens by descent only. After 3 December 2004, a person cannot be registered as a citizen by descent unless his birth is registered at an Indian consulate within a certain time-frame.

India is not a signatory to the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. However, these instruments require contracting states to provide refugee status to those who have a "well-
founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and not merely on grounds of religious persecution. Contracting states have to apply these instruments "without discrimination as to race, religion or country of origin". The CAA would fall foul of these instruments had India been a signatory to them.

The right to equality under the Indian constitution is not reserved for citizens alone. True, discrimination against returning Muslim immigrants from Pakistan was a hidden premise prevalent at the founding of the Indian republic. However, those times were different. Muslim immigrants were then prevented from coming here because of partition-
era housing shortages and to prevent communal rioting in a charged environment. Those conditions do not exist today. Further, while the discrimination against returning Muslim immigrants between 1948 to 1850 was embedded in the Constitution itself, the discrimination inherent in the CAA has no constitutional basis. While original Constitutional provisions, like the citizenship clauses of the Constitution, cannot be declared discriminatory or unconstitutional, the CAA certainly can be.

- **CLASSIFICATION NEED NOT BE SCIENTIFICALLY PERFECT**

It is emphasized that CAA is for giving citizenship to persecuted minorities from Bangladesh, Pak istan and Afghanistan in line with our tradition of "*Vasudev Kutumbakam*" and is not taking away any Indian Citizenship. No fear mongering will be accepted, we need to look after persecuted min orities from these countries. Others, still have the provisions of Citizenship act of 1955, available t o them in case of need. As far the NPR is concerned, it is in line with the Citizenship Act, which has been implemented earlier and the data is required for issue of identity cards. For the NRC, It is for a ll Indians irrespective of their religion and other dimensions. It is a national security issue and as a r esponsible country it is an absolute necessity, and must be carried out with least inconvenience.