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ABOUT US

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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CRITICAL ANALYSIS OF ARTICLE 21 OF CONSTITUTION OF INDIA

- HARSHITA SHARMA

ABSTRACT

In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guarantee in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. The word 'life' as employed by Article 21 takes in its sweep not only the concept of mere physical existence by also all finer values of life including the right to work and right to livelihood. This right is a fundamental right guaranteed to all persons residing in India, citizens and non-citizens alike. right to life including right to livelihood and work as guaranteed by Article 21 is not reduced to a mere paper platitude but is kept alive, vibrant and pulsating so that the country can effectively march towards the avowed goal of establishment of an egalitarian society as envisaged by the founding fathers while enacting the Constitution of India along with its Preamble.

INTRODUCTION

According to the Constitution, Parliament and the state legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or ultra vires. This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. The judicial interpretation of Article 21 of the Indian Constitution and judicial activism on the part of the Supreme Court of India. It examines the reasons for judicial creativity and justifies the role played by the Supreme Court of the India in protection the fundamental rights of the citizens, when the legislative and executive failed in performing their duties. To some extent, judicial activism on the part of judiciary derives from underlying weakness and failure on the part of the other machineries of the state to perform their duties. Right to life and personal liberty is the most cherished and pivotal fundamental human rights around which other rights of the individual revolve and,

therefore, the study assumes great significance. The study of right to life is indeed a study of the Supreme Court as a guardian of fundamental human rights. The Constitution of India provides Fundamental Rights under Chapter III, which are guaranteed by the constitution.

BACKGROUND

The scope of Article 21 was a bit narrow till 50s as it was held by the Apex Court in A.K.Gopalan vs State of Madras that the contents and subject matter of Article 21 and 19 (1) (d) are not identical and they proceed on total principles. In this case the word deprivation was construed in a narrow sense and it was held that the deprivation does not restrict upon the right to move freely which came under Article 19 (1) (d). at that time Gopalan's case was the leading case in respect of Article 21 along with some other Articles of the Constitution, but post Gopalan case the scenario in respect of scope of Article 21 has been expanded or modified gradually through different decisions of the Apex Court and it was held that interference with the freedom of a person at home or restriction imposed on a person while in jail would require authority of law. Whether the reasonableness of a penal law can be examined with reference to Article 19, was the point in issue after Gopalan's case in the case of Maneka Gandhi v. Union of India , the Apex Court opened up a new dimension and laid down that the procedure cannot be arbitrary, unfair or unreasonable one. Article 21 imposed a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty.

This view has been further relied upon in a case of **Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others** as follows: Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful. The law of preventive detention has therefore now to pass the test not only for Article 22, but also of Article 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. In another case of Olga Tellis and others v. Bombay Municipal Corporation and others , it was further observed : Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform the norms of justice and fair play. Procedure, which is just or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating

the law which prescribes that procedure and consequently, the action taken under it.As stated earlier, the protection of Article 21 is wide enough and it was further widened in the case of Bandhua Mukti Morcha v. Union of India and others in respect of bonded labour and weaker section of the society.

It lays down as follows:

Article 21 assures the right to live with human dignity, free from exploitation. The state is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the State Government are therefore bound to ensure observance of the various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the directive principles of the state policy. It was observed in **Unni Krishnans** case that Article 21 is the heart of Fundamental Rights and it has extended the Scope of Article 21 by observing that the life includes the education as well as, as the right to education flows from the right to life.

As a result of expansion of the scope of Article 21, the Public Interest Litigations in respect of children in jail being entitled to special protection, health hazards due to pollution and harmful drugs, housing for beggars, immediate medical aid to injured persons, starvation deaths, the right to know, the right to open trial, inhuman conditions in aftercare home have found place under it.

Through various judgments the Apex Court also included many of the non-justifiable Directive Principles embodied under part IV of the Constitution and some of the examples are as under:

(a) Right to pollution free water and air.

(b) Protection of under-trial.

(c) Right of every child to a full development.

(d) Protection of cultural heritage.

Maintenance and improvement of public health, improvement of means of communication, providing human conditions in prisons, maintaining hygienic condition in slaughter houses have also been included in the expanded scope of Article 21. this scope further has been extended even to innocent hostages detained by militants in shrine who are beyond the control of the state.

The Apex Court in the case of S.S. Ahuwalia v. Union of India and others it was held that in the expanded meaning attributed to Article 21 of the Constitution, it is the duty of the State to create a climate where members of the society belonging to different faiths, caste and creed live together and, therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardized or endangered. If in any circumstance the state is not able to do so, then it cannot escape the liability to pay compensation to the family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21 of the Constitution. While dealing with the provision of Article 21 in respect of personal liberty, Hon'ble Supreme Court put some restrictions in a case of **Javed and others v. State of Haryana** , AIR 2003 SC 3057 as follows: at the very outset we are constrained to observe that the law laid down by this court in the decisions relied on either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice- economic, social and political- cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

CRITICAL ANALYSIS OF ARTICLE 21

Parliament and the Indian state legislatures have the power to make laws within their respective jurisdictions, according to the Constitution. This power in nature is not absolute. In the judiciary, the Constitution holds the power to judge the constitutional validity of all laws. If any provision of the Constitution is violated by a law made by Parliament or the state legislatures, the Supreme Court has the authority to invalidate or ultra vires such a law. The founding fathers, despite this check, wanted the Constitution rather than a rigid governance framework to become a flexible constitution which can become accommodate to the necessitate changes.

Judicial interpretation by the Supreme Court of India of Article 21 of the Indian Constitution and its activism has played a key role in interpreting Article 21. It examines the reasons for the creativity of the judiciary and justifies the role played by India's Supreme Court in protecting

citizen's basic freedoms when the legislative and executive failed to fulfill their responsibilities. It will be available not only to all the citizens of that country, but also to be a person who is not a citizen of that country, according to the tenor of the language used in Article 21. Through the constitutional regulations, even those who are not a citizen of this nation and come here simply as visitors or in other capacities are entitled to their life. As in the event of **Chairman, Railway Board v. Chandrima Das**, they also have a right to "Life" in this nation.

Without an overview of the traditional strategy, it is difficult to fully understand how far rights are being developed. The traditional interpretation of Article 21 of the Constitution in the case of **A. K. Gopalan v. Union of India** was that a legal procedure can deprive an individual of his right to life. Thus, this provision's earliest interpretation was a limited and procedural one. The state had to show that the interference with the right to life of the individual is granted in accordance with the procedure established by the law correctly implemented.

It didn't matter if the law was reasonable and fair. Furthermore, in the case of Gopalan, the Court refused to impose the guarantee of due process of law contained in Article 21 with substantive content, arguing that, as long as the statutes of preventive detention had been duly enacted in accordance with the procedures of Article 22, the requirements of due process had been met. The judgment in the case of Maneka Gandhi of the Constitutional Bench of Seven Judges (overruling the case of Gopalan) became the starting point for a dramatic legal development in (individual) human rights instances. Thus, the principle laid down in this case by the Supreme Court is that the procedure laid down by legislation to deprive an individual of his right to life must be just, reasonable and fair. In **Maneka Gandhi's case**, the new interpretation of Article 21 has innovated a new era of expanding the horizons of the right to life and personal freedom. The broad dimension provided to this right now includes multiple aspects that may or may not have been visualized by the constitution's founding fathers. The term "law-based procedure" is the same as the Fifth Amendment of the US Constitution. Even if the term "due" is not specifically stated in Article 21, the Supreme Court interpreted the term more broadly and dynamically in its numerous decisions.

The extended view of Article 21 in the aftermath of Maneka Gandhi has expanded the scope of Article 21. There are some of the landmark judgments of the Supreme Court as follows

Education rights are considered to be the third eye of men without whom no one can live well, decently and with dignity. Earlier education rights were part of the State policy guidelines. But according to changing social needs, the Supreme Court in the case of **Mohini Jain v. State Of Karnataka** and **Unni Krishna v. State of Andhra Pradesh** ruled that education rights are the

fundamental right because they are derived directly from the right to life. In the past, Courts interpreted the Right to Education in Article 21 but Article 21A was incorporated into the Constitution in 2002 and the Right to Education was expressly recognized as the fundamental right.

In the case of **Kharak Singh v. Uttar Pradesh** the problem was raised for the first time. In the minority judgment, Justice Subba Rao stated that privacy is the result of personal freedom expressions. This decision of the minority paved the way for further growth. In the case of **R. Rajgopal v. State of Tamil Nadu** the Supreme Court noted that the right to privacy is nothing but the right to be let alone and is implicit in the right to life and personal freedom guaranteed by Article 21 of the Indian Constitution. In the historic case of **Puttaswamy v. Union of India** the nine-judge bench of the Supreme Court recognized privacy as constitutionally protected right in India. It is inherently protected right like other rights as guaranteed in part 3 of the Constitution of India.

The right to livelihood is born out of the right to life as no one can live without the livelihood means. If the right to livelihood is not considered a part of the right to life, it would be most easily deprived of its livelihoods by an individual. Not only would the deprivation of livelihood deny the life of its effective content and meaning, but it would make life impossible to live. In the case of **Olga Tellis v. Bombay Municipal Corporation**, the Supreme Court held that the concept of "right to life and personal freedom" guaranteed under Article 21 of the Constitution includes the "right to live with dignity" which, in turn, includes the right to livelihood.

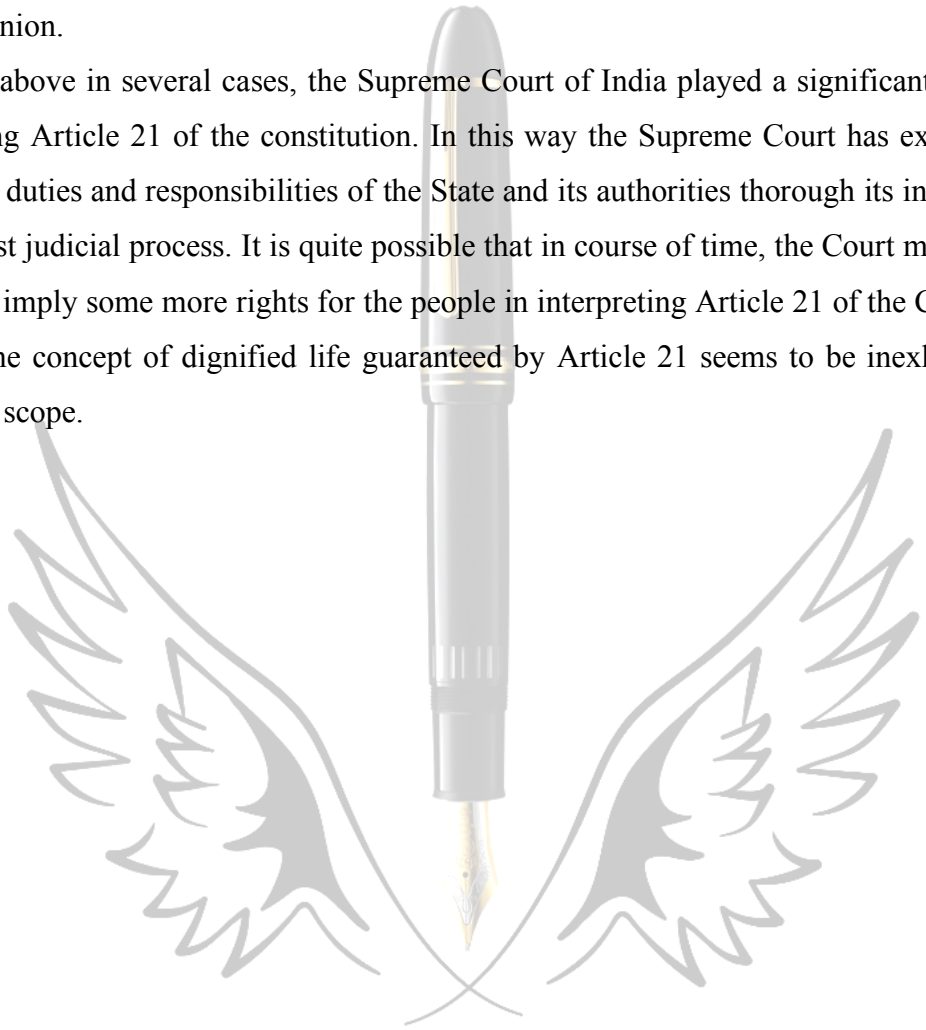
The speed of proceedings constitutes a fundamental right implicit in guaranteeing the life and personal freedom enshrined in Art. 21 of the Constitution and, in order to enforce that right, any accused person denied this right for prompt proceeding has the right to approach the Court. In the case of **Hussainara Khatoon (I) v. Home Secretary, State of Bihar**, the Supreme Court held that speedy trial is a basic right implied in the guarantee of life and private freedom enshrined in Art. 21 of the Constitution and any accused rejected this right of speedy trial is entitled to contact the Supreme Court pursuant to Art. 32 for the purpose of implementing such right and in fulfilling its constitutional duty, the Supreme Court has the authority to give the state the required guidelines.

CONCLUSION

The most respected public institution in India is the Supreme Court, respected by the elite and the illiterate alike. If the Court has come increasingly effective in its role as the final arbiter of

justice, it is because of the confidence the common man has placed in it. The Court has no army at its command. It does not hold any purse strings. Its strength lies largely in the command it has over the hearts and minds of the public and the manner in which it can influence and mould public opinion.

As stated above in several cases, the Supreme Court of India played a significant role while interpreting Article 21 of the constitution. In this way the Supreme Court has expanded the liabilities, duties and responsibilities of the State and its authorities thorough its interpretative and activist judicial process. It is quite possible that in course of time, the Court may possibly be able to imply some more rights for the people in interpreting Article 21 of the Constitution because the concept of dignified life guaranteed by Article 21 seems to be inexhaustible in range and scope.



DOMESTIC VIOLENCE AMID COVID-19 LOCKDOWN

- ANANYA NAMDEV & SPARSH SHUKLA

"At any given moment you have the power to say this is not how the story is going to end even during the Lockdown."

Home may be considered a safe place for some; it is not the safest place for all. In fact, with COVID-19 lockdown, there has been a surge in cases of domestic violence. All over the globe, victims of domestic violence are more vulnerable and at risk to a frighteningly new degree of violence. Here in India, the National Commission for Women (NCW); a government organization in India has raised an urgent alert about the increase in the number of domestic violence cases since the national lockdown has began with the rise in the number of distress calls during the Covid-19 lockdown.

Domestic violence involves a pattern of psychological, physical, sexual, financial and emotional abuse. Acts of assault, threats, humiliation, and intimidation are also considered as the acts of violence. Domestic violence refers to a form of violence which is committed by a spouse or partner in an intimate relationship against the other spouse or partner though it is a much broader concept and also involves violence against children, parents, or the elderly. Globally, the victims of domestic violence are mostly women. In fact domestic violence is one of the most under reported crimes against women across the world.

The condition of women has deteriorated further during this pandemic and become an important issue. The Governments in most part of the world took recourse to one measure to contain the spread of corona virus. Little did they perceive that this would surge the family violence and risk the lives of women and children.

CAUSES FOR THE SHOOT OF DOMESTIC VIOLENCE OCCURANCES DURING LOCKDOWN IN INDIA:

The reason for this upsurge happens to be with shelter in-place measures and widespread organizational closures related to Covid-19. The other contributory factors to this issue are stress and associated risk factors such as unemployment, frustration, reduced income, limited resources, alcohol abuse and limited social support are likely to be further compounded. Another serious issue with respect to domestic abuse or family violence is an increasing risk of domestic violence-related homicide.

INTERNATIONAL SENARIO IN THE SURGE OF DOMESTIC VIOLENCE CASES DURING LOCKDOWN:

The issue of domestic violence is not restricted to India only. It is perpetrated all over the world as a follow up to the lockdown mandate. The problem has risen alarmingly and steeped across jurisdictions that are from Brazil to Germany, Italy to China. Now, with families in lockdown worldwide, hotlines are lighting up with abuse reports, leaving on governments to address the crisis. Policies are being formulated across the globe, since no jurisdiction governed by rule of law could ever predict a complete lockdown in the present manner. The vital question, therefore, arises whether we can adopt punitivism or penal sanctions on perpetrators of domestic violence during lockdown? A detailed study by Ms. Radha Iyengar at Harvard University reveals that punitive action in cases of domestic violence have worsened the situation and actually increased intimate partner homicides. So given the situation if we analyze further the vicious cycle of domestic violence, once the tension gets high any trigger can set off the 'abuse'.

REMEDIES AVAILABLE IN INDIAN LAWS FOR THE VICTIMS OF DOMESTIC VIOLENCE:

I. In 1983, domestic violence was recognized as a particular criminal offence by the introduction of **Section 498-A** into the Indian legal code. This section deals with cruelty by a husband or his family towards his wife. A punishment up to three years and fine has been prescribed. The expression 'cruelty' has been defined in wide terms so on include inflicting physical or mental harm to the body or health of the wife (women) and indulging in acts of harassment with a view to coerce her or her relations to satisfy any unlawful demand for property or valuable security. Harassment for dowry falls within the sweep of latter limb of the Section i.e. **Section 304/B.** Creating a situation driving a woman to commit suicide is also one among the ingredients of 'cruelty' dealt under **Section 306.**

Section 498A reads as follows:

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation – For the purpose of this section, "cruelty" means-

- Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

The **Code of Criminal Procedure, 1973** provides for legal provisions regarding relief to the wives and children. The provisions of maintenance of the Code of Criminal Procedure are applicable to persons belonging to all religions and have no relationship with the personal laws of the parties. Therefore, according to Section 125(1) of the Code, the following persons are entitled to claim maintenance under certain circumstances:

(1) If any person having sufficient means neglects or refuses to maintain.
(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time Direct.

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Provided further that the Magistrate may, during the pendency of the proceeding may order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother and the application for the same shall be disposed of within sixty days from the date of the service of notice of the application to such person.

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order.

(3) If any person so ordered fails without sufficient cause to comply with the order, the Magistrate may, for every breach of the order, issue a warrant for levying the amount due in

the manner provided for levying fines, and may sentence such person, to imprisonment for a term which may extend to one month or until payment if sooner made:

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, from her husband if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

II. National Commission for Women, a government organization which has now been working 24/7 even during this lockdown period has successfully shifted the victims to hostels or help them to reach their parents' home. However with the shoot in the number of cases the NCW has now launched a WhatsApp number **7217735372** too on which women can easily shout for redressal.

CONCLUSION

This family violence that women go through in the society is basically a result of age old patriarchal structure prevailing in India. The extent is so much that even in the time of natural disaster like corona virus which is the most unpredictable incident that has occurred across the globe; women are having a real tough time staying indoors. Therefore, the onus is now on the governments that while putting the plans together to respond to one of the biggest disaster mankind has ever faced called as Covid-19, the issue of domestic violence must be prioritized. In India, the government has overlooked the need to formally integrate domestic violence and mental health repercussions into the public health preparedness and emergency response plans against the pandemic. But rather putting the blame on the government we should promote awareness about domestic violence and highlight the various modes through which complaints could be filed.

MENTAL HEALTH : A CAUSE OF CONCERN

- **AASTHA RANJAN & NEHAL RATHI**

"Mental pain is less dramatic than physical pain, but it is more common and also more hard to bear. The frequent attempt to conceal mental pain increases the burden: it is easier to say "My tooth is aching" than to say "My heart is broken."

C.S. Lewis[1]

Mental Health as we know it is related to our emotional and psychological well-being which is to a great extent affected by our surroundings, but the joke is on us because we humans form the society in which we ourselves live but like many other topics Mental Health is considered a taboo as well. The quote above very well explains how society has been viewing mental health or mental illness for that matter. The worst part being that it is something which a lot of us go through, its not uncommon or rare but still its treated differently. Isn't brain a part of our body? We all know the answer to it then why is it that we treat mental illness any differently. Why can't it be treated like any other discomfort we feel physically or why is it so hard for us to talk about it.

Fun Fact- According to World Health Organisation, India was ranked to be the most depressed country in the world!

The Mental Healthcare Act of 2017 defines Mental Illness as,

"a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence."

The definition itself is enough to paint a picture in one's mind about the state of affairs with respect to mental health in India. All said and done, howsoever progressive we call ourselves we surely tend to look down upon on people suffering from some form of mental illness. Examples of mental illness could be depression, anxiety issues, eating disorders etcetera.

[1] https://www.goodreads.com/quotes/422155-mental-pain-is-less-dramatic-than-physical-pain-but-it#:~:text=C.S.%20Lewis%20%3E%20Quotes%20%3E%20Quotable%20Quote%20%E2%80%9CMental,broken.%E2%80%9D%20%E2%80%95%20C.S.%20Lewis%2C%20The%20Problem%20of%20Pain

Depression is the most common form of mental illness that people suffer with these days and have been suffering with from the past few years and not just in India but all across the globe there is a huge chunk of population dealing with the same. As many as 322 million people worldwide suffer from depression[2], according to the World Health Organization. No wonder why is it said to be the leading cause of disability in the world. In India itself according to the study conducted by the World Health Organisation (WHO) around 200 million people in India may suffer from depression, i.e. one in five people.[3]

One major source of confusion is the difference between having depression and just feeling depressed. Almost everyone feels down from time to time, getting a bad grade, losing a job or even something as minor as a rainy day can stir feelings of sadness in a human. Sometimes there's no trigger at all and it just pops out of the blue, then circumstances change and those sad feelings disappear. But clinical depression is different, it's a medical disorder, and it won't go away just because we want it to. Clinical depression is marked by a depressed mood most of the day, and a loss of interest in normal activities which the person would normally enjoy, changes in appetite, feeling worth less or excessively guilty, sleeping either too much or too little, restless, or recurrent thoughts of committing suicide etcetera which tends to linger for nothing less than a fortnight. If a person has at least 5 of those symptoms according to psychiatric guidelines one can qualify for a diagnosis of depression. Elizabeth Wurtzel has rightly said that, "If you are chronically down, it is a lifelong fight to keep from sinking."[4]

Some people think Depression is trivial and not a genuine health condition. They are wrong — it is a real illness with real symptoms. Depression is not a sign of weakness or something you can "snap out of" by pulling yourself together.

A quote that best describes the state of being in depression would be,

"Depression is being colour-blind and constantly told how colourful the world is."

Atticus[5]

And this is exactly how people with depression or for that matter mental illness are treated by the society. Social Media has taken a toll everyone's life mostly we are actually living in an era where we are barely know each other, forget about face to face communication and we are just connected socially in this so called social world.

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[2] https://policyadvice.net/health-insurance/insights/depression-statistics/

[3] https://www.financialexpress.com/lifestyle/health/around-200-million-people-in-india-suffer-from-depression-are-indians-taking-their-mental-health-seriously/1529675/

[4] https://www.goodreads.com/author/quotes/4370.Elizabeth_Wurtzel

[5] https://www.goodreads.com/quotes/8373709-depression-is-being-colorblind-and-constantly-told-how-colorful-the

Person suffering from depression is afraid to pour out his or her feelings due to the stigma attached to the same, plus the lack of awareness just adds on to their miseries. They fear of being judged by the society, or being lashed out by their own family or sometimes it goes on to the extend of being called a lunatic and an act done to gain sympathy which even makes it more difficult for the person affected.

Social media has had a major impact not just on our lifestyles but also on our mental health. The tendency to compare one's life with that of another, or attempts to ape what they see online, or for the sake of approval from their peers or the fear of not being able to fit in etcetera stirs all sorts of emotions in us majorly that being of low self-esteem, low confidence, inferiority complex, sense of insecurity. But what people miss out here is that like people do not post their ugly photos online same ways no one would post about how they are feeling low, or that they are going through a bad phase. People fail to understand that social media is mostly a façade and not the reality. The reality of a rich and fancy kid isn't just his posts and nor is it all, there is just so much besides and behind those 10 posts of his or her. People are just sharing the glories parts of their lives which is just 10% of what actually is happening around them. A person although capable of helping himself or herself is incapacitate by the society to do any good to themselves and being stuck in that pit for as long as it may take. Society does not let those suffering at least majority of them if we talk about to take cognizance of their own mental health nor does it facilitate the process in any way, leaving a person feel helpless in most cases.

To talk about how this mental health breakdown also leads to drastic steps, a decision that's life changing because it puts an end to one's existence altogether. It's just not about a day, a death, a person but about humankind as a whole, about this society as a whole. That how a person is driven by the surroundings so much so to make him or her unfit for the society. Mental breakdown is a fight against your own self and no one else. People tend to discover to ways to fight a mental breakdown but that's just not it, what triggers that part in you is unknown to us. You can't put a finger on one of the reasons nor can come up with one universal solution to it. But the least we could do, assure each other that yes we are there. So much so that we start to discuss mental health, how that we ought to stand for each other, be a helping hand or the least to lend an ear, it needn't be due to his changed behaviour but because they are humans too, what might hurt you might not hurt me. It doesn't work that way. Mere words of assurance can do wonders, just one call can make a difference, a conversation can actually be life changing. We need to more open minded when we talk about mental health, it shouldn't come like a season in one's life that right now it's a trending topic so let's discuss, we should be more open to it in general, be more accepting and considerate.

IMPACT OF LOCKDOWN AND COVID 19

- SOUMYA DUBEY

Earth is a beautiful place. Presently it has been hit by a huge pandemic globally. Covid-19 has impacted whole globe adversely. Economic, political, and social life came to standstill. Outbreak of this unexpected virus not only affected world particularly but affected in general. Many big and small businesses, trades, occupations, etc suffered huge losses. Several were even shut-down permanently. Economies of many great nations, such as, USA, Canada, Brazil, China, USSR, India fallen down effecting daily lives of its citizens. Heath care systems even struck by this virus pandemic. Currently whole globe is under pressure and life became vulnerable.

This virus pandemic is no less than a huge atrocity faced by both men and women. In one of the analysis conducted by World Economic Forum (WEF), it was found that once this pandemic get over it will be women all around the globe who would be adversely affected than others. It is established fact that in some parts of the country women are paid less than men. Discrimination is being practiced on this class worldwide. It is a challenging job for them in regards of employment even in many developed nations, especially in rural and marginalized areas. Despites many revolutionary developments, in some parts of the country they are still subject to discrimination. Men are even facing difficulties in earning their livelihood. Due to shutting down of many industries there is a huge loss of employment. All these adverse affects of virus outbreak made it tough to earn basic necessities for some people –poor and marginalized. In real, it is no one in this world who left unaffected by this virus outbreak.

One side where this virus adversely affected daily lives, on other side, it also opined with new scope for emergence of many new opportunities. Government is taking every possible step which is necessary to neutralize the effect of Covid-19. State is trying to provide citizens specially poor and marginalized to fulfill their basic requirements- food, shelter, medical facilities, etc. Many Yojnas , schemes, and policies were launched on this regard. As per the Directive Principles of State Policies it is even the duty of government to take care of needs of its citizens. In order to safeguard the basic Human Rights and Fundamental Rights of its people

government is doing what is possible. In order to satisfy public interest at large and to cease impact of Covid-19 government is opening as many Covid hospitals as possible.

With the aid of MGNREGA, Pradhan Mantri Rojgar Yojna, Prime Minister Health Care Fund, etc government is also trying to create more jobs for the jobless labours . In respect to increase job opportunities these schemes and policies are laying positive effects. Also it proving very helpful in development of rural India. Face of New Bharat is now emerging clearly. Rural developments, construction of wells, ponds, tanks, roads and many under construction activities will soon change face of whole India. Today rural India is providng more jobs to labours than urban cities. Many great scientific developments that are taking place in agricultural sector could also be seen as a mark of innovative progress in generating employment opportunities in rural India.

By the year 2020 internet uses has also been risen up. As per one of the analysis conducted by Goggle Co., internet uses has risen up to fifty per cent worldwide. This is because though people are stuck at home but some are utilizing this time as an opportunity by working over the internet more effectively and efficiently. Many new platforms over the internet media have opened up. New job opportunities are been created. A positive utilization of internet resource is clearly visible. Even schools and colleges started taking online classes which have boosted distance-learning programs. It's is due to this pandemic which opened doors for many new online learning opportunities among students. And such rise of internet uses had never been seen before in Indian soil. In regard to this changing circumstances, government of India has recently launched a New Education Policy 2020 (NEP) by replacing thirty four years old NPE. This policy aimed at enhancing limits of education system and to achieve aim of hundred per cent literacy rate in India.

Now moving towards impacts of Covid-19 on environment one can clearly see how once a crisis of pollution is reducing to its initial state. In reference to this NASA space research org. was first to publish a report on this subject matter. As per this report, it was observed that due to the several imposition of lockdowns throughout the world has reduced pollution rate. Presence of Carbon compounds on ozone layer such as CO2,carbon monoxide, and such other toxic gases has been reduced. Due to this, ozone is now nourishing itself. Shutting down of many industries and factories thus led ozone to rebuilt itself to its initial state. Mountains and hills are now clearly visible from widows of those cities where pollution once replaced this

nature's beauty. Thus it is clearly visible that earth is nourishing itself and making atmosphere healthy for us again.

Though this has pandemic proven cruel for some but it also became a boon for those animal species which were once endangered to become extinct. Many animals around the world are returning to their home and resources are also restoring to its initial state. As per environmentalists, scientist and geologist it is well recommended that, 'either take this pandemic as an opportunity to help environment to keep itself pollution free, which would directly benefits to us ,or again repeat the same mistake to let the pollution to once again became a crises'

The aforementioned instances and facts is conclusive to state that this pandemic has brought many changes in every spheres of life. People have become more conscious about their health. Need of strong immune system is need of time. This is something which diverted people's attention from money seeking race towards healthy and prosperous living. Today many Remarkable developments could also be seen in Ayurveda and other science. Doctors, nurses, police, and all others are contributing great efforts to deal with this deadly virus. People are developing more concern for environment. Positive utilization of resources could even be seen. New platforms are emerging on internet media to earn livelihood. Way of learning and teaching has also undergone a huge changes. Since this unexpected guest covid-19 has brought many hustles in life, it cannot stop people taking breathe. Life exists and it will continue existing on earth even after this pandemic get over. It is the duty of every citizen to follow each and every rule made by the government in order to fight with this virus accordingly. This is the need of time to be more positive enough to deal with is deadly virus in order to cease its impact completely.

CORPORATE CRIMINAL LIABILITY- THROUGH THE LENS OF THE BAZEE.COM CASE

- SWAPNA RAMASWAMY

INTRODUCTION

"Corporate criminal liability" is the method of attributing criminal liability to a company as it is attributed to a natural person for committing a criminal offense.[6] The same exists because the company is an artificial person. The company enjoys a separate legal entity in the eyes of the law; it has to be run by a certain group of individuals. Hence the attribution of liability is ideally for the individuals who orchestrated the criminal act.

The concept of corporate criminal liability finds its roots in the doctrine of *Respondeat Superior* holding the master responsible for the acts of the servant[7]. The doctrine is important because the company has a separate entity with its shareholders, directors, and other individuals related to it.

The genesis of the concept of corporations dates back to the 15th century, however, the concept or idea of recognizing corporations as legal persons, crudely existed in the Roman laws, around the 12th century concerning the clergymen and their associations.[8]

Before the case of *Solomon v. Solomon & Co Ltd*[9] one of the earlier cases that addressed the concept of creating a company as a separate entity in the eyes of law was the case of *Re Kondoli Tea Co. Ltd.*[10] where the Calcutta high court rejected the company's shareholder's view of treating the company and themselves as the same person and gave its view that the company is a different person when it is in comparison with the shareholders, and they cannot be viewed as the same.

Legal Position in India: through case laws

There are crimes in the Indian Penal Code that define serious offenses where they can also be found guilty under a corporate entity, and the penalty imposed is a compulsory term of custody.

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[6] US Legal, *Corporate Criminal Liability Law and Legal Definition*, US LEGAL, (Jul.25, 2020, 10:00 PM), https://definitions.uslegal.com/c/corporate-criminal-liability.

[7] *Ibid*

[8] EDWARDS GROSS, "ORGANISATION STRUCTURE AND ORGANISATION CRIME", IN GILBERT GEIS AND EZRA SCOTLAND (EDS.) WHITE-COLLAR CRIME, *20-30 (Theory and Research, Sage Publication (1980).*

[9] *Solomon v. Solomon & Co Ltd* (1895-99) ALL.ER 33(HL).

[10] *Re Kondoli Tea Co. Ltd.* (1886) Re ILR.

In the case of **Standard Chartered Bank vs. Directorate of Enforcement**[11], The Company was held liable for criminal offenses and was punished. The Supreme Court has rejected the notion that in cases where a custodial sentence is mandatory, the company could avoid criminal prosecution. Since the company cannot be sentenced to imprisonment, this penalty cannot be imposed by the court, but if imprisonment and fine are ordered as a penalty, the court may impose the fine that may be enforced against the company.

The trend in issues about corporate criminal liability

The concept of the lifting of the corporate veil has been proved beneficial in proving and punishing the ones behind the commission of the crime, with the advancement of technology, there is a new perspective that is given to corporate criminal liability. The cases of *Iridium India Telecom Ltd v. Motorola Incorporated & ors*[12] and *Sunil Bharti Mittal v. Central Bureau of Investigation & ors*[13] managed to clarify the position of criminal liability and punishment provided to the fraudsters. One of the facets that are not most commonly discussed when it comes to attributing criminal liability to the director of the company, is most often in e-commerce cases.

With the development of technology at an advanced level, there is an emergence of new trends in the frauds that are being committed. These trends include Media scams, e-commerce scams, scams related to cloud computing, and virtual currency scams.[14]

One of the interesting cases that brought froth the nexus between the Information and Technologies Act, 2000, and the Companies Act 2013 is the case of *Avnish Bajaj v. state*[15] popularly called the "Bazee.com" Saga.

The facts of the case were as follows: the website www.bazee.com, (which currently is eBay) had an obscene video listed for sale. There was an immediate complaint launched against the contents for sale, and the video was immediately taken down. The managing director, Avnish Bajaj, and the manager of the website, Sharat Digumarti were held responsible as they were involved with maintaining the contents of the website.[16] Though the main crux of the case was to analyze which provisions of the Indian Penal Code, and the Information Technology Act,

[11] **Standard Chartered Bank vs. Directorate of Enforcement, AIR 2005 SC 2622**
[12] *India Telecom Ltd v. Motorola Incorporated & ors* (2011)1 SCC74.
[13] *Sunil Bharti Mittal v. Central Bureau of Investigation & ors* AIR 2015 SC 923
[14] Deloitte India, *Deloitte India Fraud Survey-2014,* the de Lottie, Deloitte India (Jul 31 2020, 10:30PM), http://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-finance-annualfraud-surveynoexp.pdf.
[15] *Avnish Bajaj v. state* 2008(105)DRJ 721.
[16] Tanisha Khanna, Pooja Kapadia & Gowree Gokhale, *The Bazee.com Saga unraveled,* Nitish Desai Associates (Aug, 1, 2020 11:30 PM), http://www.nishithdesai.com/information/news-storage/news-details/article/the-bazeecom-saga-unravelled-supreme-court-clarifies-intermediary-liabilities-for-hosting-obscene.html.

2000 applies, there is one aspect that links it to the provisions of company law and corporate criminal liability.

Upon being pressed with charges, Avinsh Bajaj filed a petition, requesting the court to quash the criminal proceedings that were charged against him on the pretext that, the transfer that happens using the websites are solely between the buyer and seller, and the website, is nothing more than a mere platform that is used for the transfer.

To judge the particular matter, the court applied section 85 of the Information Technology Act, 2000 relating to offense by companies which states that if any company or its directors are found to be a part of the same transaction, which forms the commission of the criminal offense, then the punishment would be adhered accordingly, however, if he can prove that he was not aware of the criminal transaction and he had taken all the necessary due diligence he would not be punished.

With the analysis of this section, it was pointed out that the criminal proceeding against Avnish Bajaj was to be quashed as the company was not an "arraigned" plaintiff to the suit, and the Indian Penal Code did not discuss the punishment for criminal liability when the company was not a party to the suit itself. However using section 85 of the Information Technology Act, 2000 the court held that Avnish Bajaj must be convicted because the section gave the interpretation such that, anyone who is associated with a company, when it commits a crime under the Information Technology Act, 2000 would be liable.[17]

Though this view was overturned in 2012, and the court acquitted Avnish Bajaj, on the pretext that the company was not a party to suit when the case has begun, and subsequently amended the legislations about the Information Technology Act, 2000.

ANALYSIS

The case brought about a new perspective in terms of attributing criminal liabilities to companies. Often going by the traditional approach it is mainly attributed to major things, like financial fraud, insider trading, environmental hazards, and more. With the developing side of technology, it has become a necessity to make laws that cover the lacuna that tend to occur in different situations.

In the case of Bazee.com, the director of the company was not liable for the act of having obscene content sold on his website, simply because he was not a party to the suit, this creates and confusion and paves way for loopholes in the future.

[17] Id.

This is one area of law that needs to be amended to bring in the purview of criminal liability in such situations. Not having a law that would address the issue of holding a company liable for the sale of obscene materials would probably increase if left unnoticed.

The company, in this case, the e-commerce website which is a form of company, must take responsibility for everything that is been brought and sold on the website, as it is their responsibility. This would help in keeping track of the misuse of the website by a person and ensure that no such criminal liability is received by the company as well.

CONCLUSION

For criminal law jurisprudence, it is a well-settled principle of law concerning criminal liability on companies. A company could commit a crime and be held liable for the criminal offense. But India's laws aren't in line with these innovations, so they don't hold companies legally accountable. Even if the laws and judicial definitions do so, they enforce no other penalty than a fine. Even the Supreme Court said there was a need for separate law making provision for the corporations to be given criminal liability.

With the development of technology, social media have tended to have deeper access to our daily lives. Be it a social networking site or an online shopping website. These have formed large corporations by themselves. At this juncture, the attribution of criminal liability to the technologically advanced media becomes a necessity.

With a globalized economy, attributing criminal liability to corporations would ensure that there is a greater amount of accountability that can be expected to maintain. Especially with online banking becoming an integral part of people's life, imposing the right amount of criminal liability would ensure that the websites that handle these transactions are careful and fraud is not encouraged.

PM CARES FUND NOT UNDER RTI: LACK OF TRANSPARENCY IN DEMOCRATIC SYSTEM

- AKSHITA KHANDELWAL

INTRODUCTION

On March 28, 2020 Prime Minister Narendra Modi announced Prime Minister's Citizen Assistance and Relief in Emergency Situation Fund(PM CARES Fund) to accept donations and to provide relief during COVID-19 pandemic and other similar situations. On April 1,2020 Sri Harsha Kandukuri student of Azim Premji University filed RTI application to provide Fund's trust deed and government orders, notifications and circulars in relation to its creation and operation. He appealed because he didn't receive any response within 30 days and then he received response on May 29, 2020.

The response is that PM CARES Fund is not a public authority under section 2(h) of RTI Act,2005 and relevant information in relation of PM CARES Fund can be seen on the website pm cares.gov.in".

Mr. Kandukuri plans to appeal further.

There is another RTI request on the said issue by activist Vikrant Togad and this RTI is also rejected and PMO cites a Supreme Court observation in this regard that "indiscriminate and impractical demands under RTI Act for disclosure of all and sundry information would be counterproductive"[18].

NEED OF PM CARES FUND-

After declaration of PM CARES Fund many people are questioning related to its need. Many of them questions that when PMNRF is there then what is the need of establishing PM CARES Fund? So, for studying its need we first have to understand "what is PMNRF Fund?".

- **WHAT IS PMNRF?**

It is Prime Minister's National Relief Fund . This fund was established in 1948 in pursuance of an appeal by then Prime Minister Pt. Jawaharlal Nehru. It was established to help displaced person from Pakistan at that time but now it is used for helping people in natural calamities,

[18] Priscilla Jebaraj,PM CARES is not a public authority under RTI Act: PMO, THE HINDU, May 30, 2020, 22:50 IST.

accidents, riots, medical treatment like heart surgeries, kidney transplantation, etc. It receives donations from public[19].

- **PMNRF V. PM CARES Fund**

1. In PMNRF Fund, the sole power of disbursement of money is with Prime Minister but PM CARES Fund does not give entire power to PM as PMNRF does. In PM CARES Fund there are other members also who are participating in decision making in which experts of different fields are also included[20].
2. PMNRF is used for restricted purpose but PM CARES Fund is used for public health emergency such as COVID-19, the pharmaceutical and healthcare facilities, funding research and any other emergency and calamities[21].

DEFINIATION OF PUBLIC AUTHORITY UNDER RTI ACT, 2005-

"Public Authority" means any authority or body or institution of self government established or constituted—

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government,

and includes any—

(i) body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government[22].

BODY OWNED, CONTROLLED OR SUBSTANTIALLY FINANCED-

This point of RTI Act,2005 is in question because PM CARES Fund is a public authority under this point.

In **National Stock Exchange of India Ltd. V. Central Information Commissioner**[23] , the Court held that these 3 conditions- owned, controlled and substantially financed are different.

[19] https://pmnrf.gov.in/en/about

[20] ForumIAS, When PMNRF already existed what was the need of PMCARES Fund?, May 27, 2020,https://blog.forumias.com/when-pmnrf-already-existed-what-was-the-need-of-pmcares-fund/.

[21]Mohammed Kudrati,PM Cares v. PM National Relief Fund: All You Need to Know, boomlive, April10,2020, 3:06pm, https://www.boomlive.in/fact-file/pm-cares-vs-pm-national-relief-fund-all-you-need-to-know-7618.

[22] RTI Act, 2005 §2(h)

[23] 2010 (100) SCL 464 (Del.)

If one of the condition is satisfied by any body it would be enough to declare it a public authority.

In **Thalappalam Service Coop. Bank Ltd. V. State of Kerala**[24]**,** Supreme Court made observation that "the control of the body by the appropriate Govt. has to be substantial and not merely supervisory or regulatory".

In PM CARES Fund Prime Minister is the ex- officio Chairperson of the Board of Trustees with Minister of Defence, Minister of Home Affairs and Minister of Finance as trustees of fund. As the Chairperson of the trust, Prime Minister has power to nominate three persons to Board of Trustees from field of research, health, etc. as other trustees. Trustees has full discreation for management of trust. Persons who are in this trust are constitutional functionaries and therefore gives impression of public office and therefore their power is substantial rather than supervisory or regulatory[25].

WHY PM CARES FUND IS A PUBLIC AUTHORITY?

1. PM's pictorial representation and references of the office of Prime Minister in every advertisement, gives impression that it is done by government. This is not allowed by Emblems and Names Act, unless these symbols are being used by the Central government itself or permission to use them has been obtained from by the Central government[26].

2.PM Cares uses State Emblem of India. It creates impression that it is related to government. Use of State Emblem of India is a prohibited offence unless allowed by Central Government[27].

3.Ministry of Corporate Affairs notified to public on March 28,2020 that "Govt. of India has set up the Prime Minister's Citizen Assistance and Relief in Emergency Situation Fund" . This means govt. of India has control over it[28].

4.PM CARES Fund website has its domain name as gov.in.

Eligibility for registration under gov.in domain at the third level would be following-

[24] 2013 (16) SCC 82

[25] Yaqoob Alam, PM Cares Fund: What is a public authority under the RTI Act,2005, Barandbench, June8,2020, 6:05PM IST, https://www.barandbench.com/apprentice-lawyer/pm-cares-fund-a-public-authority-under-the-rti-act-2005.

[26]Rohan Deshpande, Here is why PM CARES should be scrutinized by the CAG- not by independent auditors, Scroll.in, July 29,2020, https://scroll.in/article/963376/here-is-why-pm-cares-should-be-scrutinised-by-the-cag-not-by-independent-auditors.

[27] Rohan Deshpande, Here is why PM CARES should be scrutinized by the CAG- not by independent auditors, Scroll.in, July 29,2020, https://scroll.in/article/963376/here-is-why-pm-cares-should-be-scrutinised-by-the-cag-not-by-independent-auditors.

[28] 5 Reasons Why the PM CARES Fund should Come under RTI, The Quint, July 9,2020,https://youtu.be/chug7egGteU.

I. Apex Offices(such as Offices of the Hon'ble President of India, Hon'ble Vive President of India, Hon'ble Prime Minister of India)
II. Ministries/Departments of the Government of India and their attached/subordinate offices/ Directorates and Statutory Bodies of such Ministries/Departments.
III. State Governments & Governments of the Union Territories for States/UT's constituting the Union of India.
IV. Parliament of India including both the houses and offices of their speaker/chairman.
V. Judicial Bodies
   a. Supreme Court of India as established by Part V, Chapter IV of Constitution of India.
   b. High Courts for the states established under Article 214 of the Constitution of India.
   c. Tribunals.
   d. All other bodies created by law, by the assent of Government of India to perform any other judicial/quasi-judicial functions such as National Level Lok Adalats and National Legal Services Authority.
VI. All the other Legislative bodies and attached institutions of the Government of India.
VII. Commissions/Councils created by or under the Constitution of India, statute/executive order of the Government of India[29][30].

This is the requirement needed for having gov.in as domain name . Then how can PM CARES Fund Website is having gov.in as its domain name if it is not controlled by government?

These points clearly show that PM CARES Fund is a public authority according to RTI Act,2005 and thus they are liable to give information under this.

AMOUNT IN PM CARES FUND-

Description	Amount Donated (Rs crore)	Amount Pledged (Rs crore)
By government agencies (including staff salaries)	Rs 4,308.3 crore	Rs 1,250 crore
By private companies, industry bodies, social organisations (including staff salaries)	Rs 5369.6 crore	Rs 772.4 crore

[29] Order No. 7(3)/04-CC&BT dated 20th November,2004,F.No. L-13/14/2014-IGD,Ministry of Electronics and Information Technology,Oct.23,2019, https://registry.gov.in/Gov.In%20Guidelines.pdf
[30] 5 Reasons Why the PM CARES Fund should Come under RTI, The Quint, July 9,2020,https://youtu.be/chug7egGteU.

Foreign donations		Rs 22 crore
By individuals		Rs 53.77 crore
Total	Rs 9,677.9 crore	Rs 2,098.2 crore

India spend says that they have derived the Rs 9,677.9 crore figure by tabulating press releases on the government's Press Information Bureau website, and from media reports on private companies and individuals donating and/or pledging money to the fund. The actual corpus would be higher[31].

NEED OF TRANSPARENCY IN PM CARES FUND-

On June 11,2020 PM CARES Website was updated and announced a company called SARC& Associates as independent auditors for the fund. This firm is headed by Sunil Kumar Gupta. It is to be noted that both PMNRF and PM CARES Fund have same company as their independent auditor[32]. This fund is audited by an independent auditor and not by the Comptroller and Auditor General, the constitutional office which is charged with auditing all receipts and expenditure of Central as well as State govt. and account of all authorities which is substantially financed by the government. If PM CARES Fund has been audited by CAG, then it can make it more transparent. Under Section 13(b) of the CAG Act, it is the duty of the CAG to audit "all transactions" of the Union relating to public accounts.

Under Article 266(2) of the Constitution, "public moneys received by or on behalf of the Government of India", which is not on account of revenue from taxes, duties, repayment of loans and the like should be credited to the Public Account of India[33].

After declaration of PM CARES Fund , within weeks millions of money poured into PM CARES Fund. People from all over India donated money. Money which is there in this fund is of public and they should have right to know how much it is collected, how it is used and each and every information and thus it should be covered under RTI.

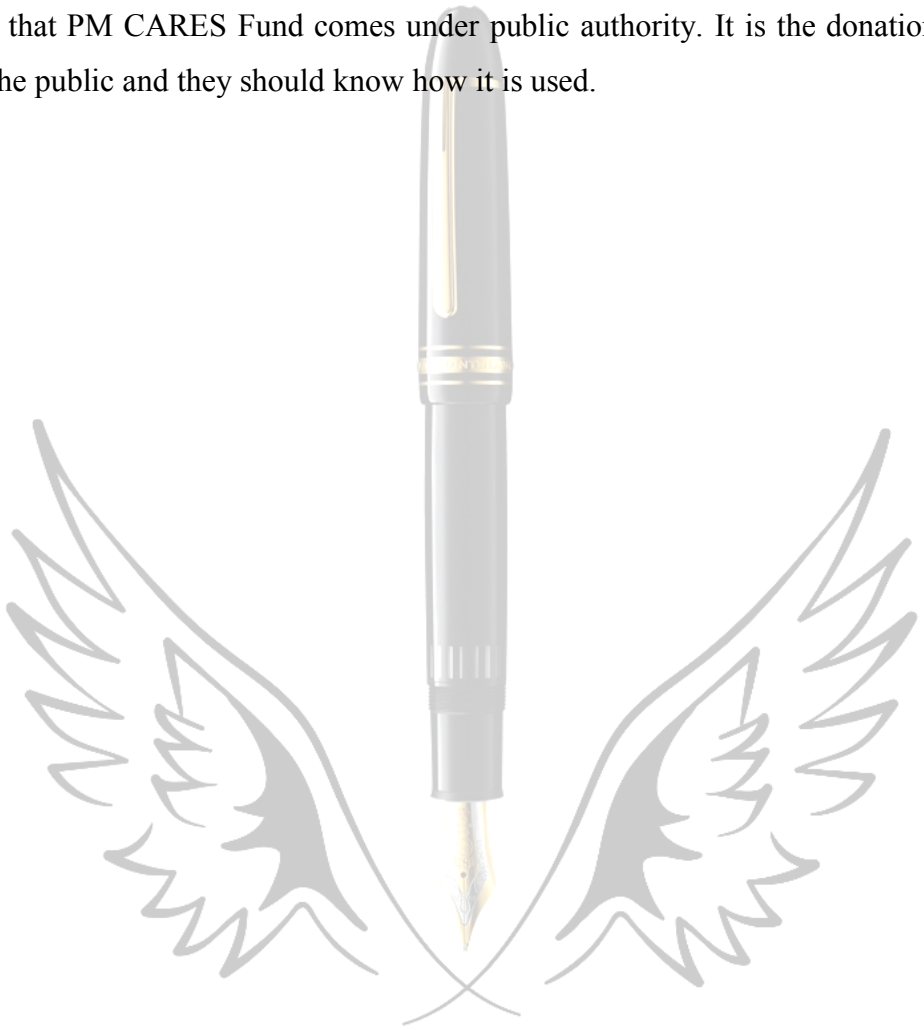
[31] Anoo Bhuyan, Prachi Salve, PM CARES received at least $1.27 Bn in donations- Enough to Fund Over 21.5 Mn COVID-19 Tests, IndiaSpend, May 20,2020,https://www.indiaspend.com/pm-cares-received-at-least-1-27-bn-in-donations-enough-to-fund-over-21-5-mn-covid-19-tests/.

[32] Saket Gokhale, PM CARES Fund now has independent auditor but remains beset by lack of transparency, The Wire, June 19,2020,https://thewire.in/government/pm-cares-fund-now-has-independent-auditor-but-remains-beset-by-lack-of-transparency.

[33]Rohan Deshpande, Here is why PM CARES should be scrutinized by the CAG- not by independent auditors, Scroll.in, July 29,2020, https://scroll.in/article/963376/here-is-why-pm-cares-should-be-scrutinised-by-the-cag-not-by-independent-auditors.

CONCLUSION-

By analyzing all these points it is very clear that PM CARES Fund created is not transparent at all and thus creates question mark on government. If we take a look on above points it is very clear that PM CARES Fund comes under public authority. It is the donations which is given by the public and they should know how it is used.



MENTAL LYNCHING – PSYCHOLOGICAL ASPECT OF MOB LYNCHING IN INDIA

- **OINDRILA MUKHERJEE**

"*It may be true that the law cannot make a man love me, but it can stop him from lynching me, and I think that's pretty important*.**"- Martin Luther King Jr**.

INTRODUCTION:

In India , there are four wings of the government ,namely the Executive , Legislature, Judiciary and fourthly the Hon'ble court of mob justice which has been increasingly overpowering the third wing of our government. 17 year old Manav jumped of his balcony and committed suicide after being convicted for harassment by the celebrated fourth branch of our government, which has been a symbol of (In) justice for quite some time in India. Mob lynching is the most heinous form of psychological crime which strips of a man's fundamental right to be heard and fails to recognise the importance of engineering the consent of the People through fixed procedures of law. India doesn't have a Central Law to curb mob lynching. Therefore, several states including Manipur and Rajasthan have passed Anti-lynching Bills and are awaiting assent of the president. The Indian Judiciary as well as the legislature fails to recognise that an act of mob lynching is different from that of murder and grievous hurt as it is backed by a social stigma of majoritarianism and causes psychological impact on the victim and the society as a whole. This Article analyses the fallacies of anti-lynching laws in India and addresses the following issues:

a) Whether Mental harassment by a mob falls within the ambit of mob lynching in India ?
b) How is Mob Lynching different from any other hate crime ?
c) Whether there are special provisions to treat the mental health of Minor offenders and the Minor victims of Mob Lynching ?

(I) MOB JUSTICE AND MENTAL HARASSMENT:

"No one has the right to become the guardian of law claiming that he has to protect the law by any means."-**Justice Dipak Misra**[34]

[34] Tehseen S. Poonawalla V Union Of India And Others. (2018) 9 SCC 501.

India does not have a Central law that defines the offence of mob lynching and recognises the psychological aspect of it. The most widely accepted definition of mob lynching in India is a single or a series of planned or spontaneous ***act(s) of violence*** or any aid or abetment to commit such act(s) of violence to enforce upon a person the desire of the mob.[35] The definition limits the scope of mob violence and mob lynching to only an act of physical violence and fails to recognise mental cruelty or mental harassment as an act of violence within the scope of the definition. Mob violence mentally and physically traumatises the victim and leads to long term memory consolidation that links previous experiences of the people in the mob with the current situation. The psychological scarring deters the victim against any form of passivity causing autoimmune disorders triggering rheumatoid arthritis and many other psychological disorders[36].The Judiciary in several occasions has observed that [37]Physical violence is not absolutely essential to constitute cruelty and that mental agony and torture can also fall within the ambit of violence and cruelty.

The Uttar Pradesh Combating of Mob Lynching Bill ,2019 and The Rajasthan Protection from Lynching Bill, 2019 defines the term "**Victim"** as "*a person, who has suffered physical, **mental, psychological** or monetary harm as a result of the commission of any offence under this Bill* " and further provides for psycho-social and trauma counseling and psychiatric services to the victims of the crime. However , the Manipur Protection from Mob Violence Bill, 2018 and the Madhya Pradesh Anti Cow Slaughter Amendment Act, 2019 fails to recognise mental and psychological harassment as a form of Mob Violence under the scope of the Ordinance. In dearth of an unified anti- lynching law in India, most of the States avail the general remedies available under section 141,32 , 129 and 299 of the Indian Penal Code,1860 and 375A of the Criminal Procedure Code .

The Supreme court in *Kodungallur Film Society v. Union of India*[38] directed the State Governments to formulate anti-lynching laws with due regard to the nature of the psychological injury incurred by the victims of the crime. Further ,the celebrated Poonawala judgment[39] advocated for compensation of psychological injuries under section 375A of the Criminal Procedure Code .

[35] Manipur Protection from Mob Violence Bill, 2018 ,No. 13, (India).
[36] Roudedge and Kegan Paul , Group Conflict and Co-operation: Their social psychology, London, (1966) .
[37] A. Jayachandra v. Aneel Kaur, 2005 (1) CTC 215 (SC) : 2005 (2) SCC.
[38] (2018) 10 SCC 713.
[39] Tehseen S. Poonawalla V Union Of India And Others. (2018) 9 SCC 501.

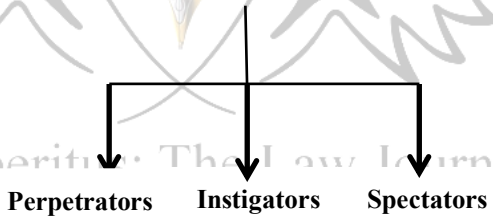
Though, the judiciary recognises psychological injury as an effect of mob lynching and provides remedies for it , it does not essentially acknowledge psychological harassment as a form of mob violence that can trigger the cause of action of the crime. Till date , no case of psychological injury or Mental cruelty inflicted by a mob has been tried under the ambit of the Mob lynching crimes in India and is usually categorized under the Mental harassment and Anti-bullying laws of the Country.

(II) MOB LYNCHING A PSYCHOLOGICAL HATE CRIME :

"*They are' no better than terrorists who kill innocent people for no rhyme or reason in a society which is governed by the rule of law***" –Justice P. Sathasivam** [40]

The Act of mob lynching is not as simple as grievous hurt or murder .It is a demonstration that mob justice is beyond the law and the government adding the fuel of encouragement to the preachers of self –righteousness .It is a crime against our fundamental right to equality and freedom of religion and is a gross violation of Article 14 and 15 of the Constitution of India . Psychologically the accessories of the crime can be divided into 3 categories:

Types of Offenders



Perpetrators are a group of participants of the crime who unite to act as a single entity in order to gain trust, recognition and validation of the society .The automated synchronisation of the perpetrator's expression and movements result in a reflexive emotional contagination in the mob. Therefore, the action of the mob is not a result of conscious reasoning and analysis. The Act of mob lynching is the brainchild of the instigators of the crime who is the principle source of aggression. The Persisting legislations in India fail to acknowledge this category of offenders as they are usually not physically present during the act of lynching. These

[40] National Human Rights Commission v. State of Gujrat and ors., (2009) 6 SCC 342.

instigators help the perpetrators of the crime by spreading anti-victim sentiments amongst the offenders. The Anti- Lynching Ordinance of Uttar Pradesh , West Bengal , Gujarat , Rajasthan and Manipur recognises the role of the instigators of the crime and imposes strict penalty on them. The Spectators are the notorious onlookers and the videographers of the crime who are the biggest threat to our society and can be booked under section 299 of the Indian Penal Code for their illegal omission of duty as defined under section 32 of the Indian Penal Code,1860.These Spectators conveniently escape conviction for non-performance of duty and requires special consideration in the anti-lynching laws.

(III) MINOR LYNCHERS: THE PSYCHOLOGY OF SMALL MINDS :

"*A child is a person who is going to carry on what you have started…. He will assume control of your cities, States, and nations.***"-Abraham Lincoln**

In the Pehlu khan Lynching case[41] the minors were given a punishment of just 3 years under the Juvenile Justice Act. The law fails to recognise that mob violence has a ripple effect over the society and can instigate more people to indulge in such crimes. The Indian Penal Code , State Anti- lynching laws and the Guidelines laid by the Apex court fails to make special provisions for minor lynchers who escape such heinous crimes with a mere punishment of 3 years .On the other hand the society that inculcated such violence and self -righteousness in the minor roams around freely in search of a new suspect.

The legislature and the judiciary fails to acknowledge that the real criminals behind a minor lyncher is the instigators of the crime who spreading anti-victim sentiments amongst the minor offenders. Mob lynching is a high intelligence crime and deserves and deserves to be categorised according to the maturity level and intelligence of the offenders spreading anti-victim sentiments amongst the offenders.[42]

The Persisting Anti-Lynching ordinances in India fails to provide special rehabilitation schemes , psycho-social and trauma counseling and psychiatric services to the minor victims of the crime and treats the psychological injury of a Minor equal to that of an Adul

A WAY FORWARD :

[41] (2016) 5 RCR (Criminal) 22
[42] *Roper* v. *Simmons,*2005 SCC OnLine US SC 12

The center formed the ***Empowered Group of Ministers*** Headed by our Hon'ble Home Minister Amit Shah to form a new law on Mon Lynching in India. The new law should provide a wide and a comprehensive definition of mob lynching that should particularly recognise Mental harassment and public humiliation as a form of violence. The new law needs to study the psychological factors that instigates such violence and justifies such injustice towards victims of our society .

SABARIMALA: CONSTITUTIONAL MORALITY OVER CUSTOMS

- ADITI PANDA & BHABA BHAYA HARA RATHA

Intricate and tangled are the threads that constitute the framework of India's history and society. Generations have been witnessing such unity in diversity which has been encompassing each and every person who ever landed in the country. Amidst all the religious, social and cultural heterogeneity, it is impossible not to notice the continued influence of customs and beliefs in the lives of every citizen and non-citizen.

"Greater than his fear of death, dishonor, dismemberment, has been men's respect for menstrual blood…the primitive woman, unable to separate herself from her blood, knew that upon her tabooed state depended the safety of the entire society."[43]

Since times immemorial, a woman has been made to believe that menstruation: believed to be *the flow at the dark of the moon, the healing blood of the moon's birth*; is a curse to her family and to the society at large. She, very often, forgets that a gift courses through her, cleansing the body of last month's death, preparing the body to receive the new month's life- for repose and restoration, for the knowledge that life comes from between her legs and *that life costs blood*.[44]

India, a religious country, houses many religions, cultures, traditions and customs. The customs, followed by the people, are well-recognized source of law and with continuous usage of these custom, they have gained the force and sanction of law. However, sometimes these customs are fueled by superstitions of people and act as barrier between the society and its forward development.

The Sabarimala case greatly highlights how women have acquired the privilege of being discriminated in a society powered by superstitious beliefs. The Sabarimala temple houses the Naisthik Brahmachari, Lord Ayyappa, believed to have been born out of Shiva and Mohini (female incarnation of Vishnu). When he defeated the demoness *Mahushasuri*, she turned into a beautiful woman. The young woman proposed to Ayyappa for marriage, but he refused her saying that he had been ordained to go to the forest, live the life of a brahmachari and answer prayers of devotees. However, the young woman was persistent, so Ayyappa promised to marry her the day *kanni-swamis* (new devotees) would stop visiting him at Sabarimala. Unfortunately for the woman, Sabarimala was visited by *kanni-swamis* every

[43] The book, The Curse: a cultural history of menstruation
[44] Anita, The red tent

year and she was unable to marry Ayyappa.[45] The temple authorities took the brahmacharya of the Lord to impose ban on entry of women between 10-50 years (the period of menstruation) to enter the temple premises as even the slightest deviation from celibacy observed by the deity is not caused by the presence of women.

However, there have been several recorded instances of women entering the Sabarimala temple. Prior to 1991 when the Kerala High Court forbade the entry of women to Sabarimala, several women had visited the temple, although mostly for non-religious reasons. There are records of women pilgrims visiting the temple to conduct the first rice-feeding ceremony of their children at the temple premises. On 13 May 1940, the Maharani of Travancore is recorded to have visited the temple. Former Karnataka minister Jayamala has claimed to have entered Sabarimala at the age of 27 and touched the idol in 1986.[46]

In 1990, S Mahendran filed a petition, alleging that young women were visiting Sabarimala. The verdict on the petition, which came in 1991 by the Kerala High Court, banned entry of women between ages 10-50 from entering Sabarimala, stating that such restriction was in accordance with the usage prevalent for a long time. In addition, the High court directed the Government of Kerala to use the police force to enforce the order to ban entry of women to the temple.[47]

In 2006, six women, members of the Indian Young Lawyers' Association, filed a writ petition in the Supreme Court of India to lift the ban against women between the ages of 10-50 entering the Sabarimala temple and questioned the validity of provisions in the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules act of 1965 which supported it; their contention being the practice was a violation of their constitutional rights.

The Sabarimala case challenged the very practices in Hindu religion and customs which had been followed without questioning or opposition. The Supreme Court, while deciding the matter of such religious importance, bore utmost consideration to the founding principles of the Constitution and their wide ambit. The major contention which was to be proved was whether the validity of the bar of the entry of women in their reproductive age (10-50 years) was violative of the fundamental rights guaranteed under the Constitution.

The essence of Article 14 is the right to equal treatment in similar circumstances, both in the privileges conferred and liabilities imposed by law.[48] It was held in majority by the Court that

[45] "Entry of women to Sabarimala" Wikipedia
[46] "Entry of women to Sabarimala", Wikipedia
[47] "Entry of women to Sabarimala", Wikipedia
[48] D.D Basu's Shorter Constitution of India

said practice failed to prove the test of reasonableness under Article 14 which says that any law should not be arbitrary, artificial or evasive and there should be an intelligible differentia, that distinguishes persons or things grouped together in the class from others left out of and there must be rational nexus between the basis of classification and the object sought to be achieved. Also, discriminating on the basis of physiological factors is certainly discriminating on ground of sex only as menstruation is a characteristic of women alone which violates Article 15(1).

The exclusionary practice not only fuels a social stigma upon women but also promotes an unhealthy attitude towards menstruation, thereby having a huge psychological impact on women. Women, while menstruating, are considered polluted and unfit for undergoing the 41-day Vritham (which is considered essential for undergoing the pilgrimage to Sabarimala), thus, promoting a form of untouchability resulting in the violation of Article 17 as the expression in "any form" in Article 17 is wide enough to cover menstrual discrimination against women.

Article 21 of the Indian Constitution is one of the most important Articles for it enshrines the right to life and personal dignity. In the words of Justice Bhagawati, "*Article 21 embodies a constitutional value of supreme importance in a democratic society.*" The Article is directly and indirectly related or the basis of every fundamental right. And menstruation is intrinsically related to a woman's right to life with human dignity. It is not a girl's or woman's issue; it is an issue that makes her who she is: a woman. Article 21 is violated by the exclusionary practice as it undermines the dignity of an ovulating and menstruating woman in the society.

Article 25 of the Constitution gives every person the right to freely profess, practice and propagate religion. Taking that into account, women have the right to practice the religion. The exclusionary practice, prima facie, violates the right of a Hindu woman to enter a Hindu temple. Moreover, the practice is arbitrary and unreasonable. Also, the exclusionary practice is not protected under Article 26, for it is based on superstitions and does not constitute an essential religious practice.

Section 4 of the Kerala Places of Public Worship (Authorization of Entry) Act, 1965 and Rule 3(b) made under the said section which disentitles certain categories of people from entering any place of public worship and this includes women who, by custom or usage, are not allowed to enter a place of public worship. It was held by the Apex Court that Rule 3(b) is ultra vires the 1965 Act and is also unconstitutional for it violates Articles 14, 15, 17, 21 and 25 of the Constitution in so far as it prohibits women from entering a public temple. The court, in the majority judgment by Chief Justice Dipak Misra, and Justices A. M. Khanwilkar, R. F. Nariman and D. Y. Chandrachud with Justice Indu Malhotra dissenting, ruled thus:

We have no hesitation in saying that such an exclusionary practice violates the right of women to visit and enter a temple to freely practise Hindu religion and to exhibit her devotion towards Lord Ayyappa. The denial of this right to women significantly denudes them of their right to worship.[49]

The Supreme Court recognized that among fundamental duties, practices which are derogatory and destructive to the liberty of women are discarded. The aftermath of the Sabarimala verdict however raised a distressing political sceptre. The first issue is the threatening political mobilization which apparently is to protect superstitious and derogatory beliefs under the jacket of religion. The second issue is that no court can leave the formulation and initiation of social reform entirely on the society. The third one is a politics of bad faith over social reform and an outright cynical itch to provoke more political conflict.

Two women aged below 50 walked into the Sabarimala temple in Kerala before daybreak on 2 January 2019, becoming the first to do so since the Supreme Court ordered the end of an 18 year old restriction by the 1991 Kerala high court judgment on women of menstrual age entering the shrine.[50]

Religion and faith do not attack; they accept, they evolve and help and their followers evolve.

[49] Indian Young Lawyers Association v The State of Kerala,
[50] "Entry of women to Sabarimala", Wikipedia

SUICIDE: AN INCOGNITO PANDEMIC

- SHIKHA SHARMA

THE STORY SO FAR **–**

"If you want to see your son alive, arrange Rs. 5 Lakh by tomorrow."

This is not a cliché dialogue from a Bollywood movie. This message was actually sent to a father, a few days back; by his own son who happens to be an IIT-ALUMNI! He did so to mask his failure of not being able to crack CAT exam, two consecutive times. His plan was to buy some time by faking his own abduction. And while his parents get busy with the police proceedings, he would use that time to muster the courage to jump off a moving train. The boy was under acute depression and wanted to commit suicide. Even after passing out from one of the most prestigious institution of our country (which can be deemed as success in itself) he was made to feel the need to achieve more in his already accomplished life. This is not an uncommon story. The society that we live in, believes in pushing its students beyond the edge, while keeping aside their well-being; physical as well as mental. The cost of this endless insane competition is often paid by the students with their own lives! However, in this case, the boy was fortunate enough to be tracked down by the police on time and handed over to his parents. But the dice doesn't roll in one's favour every time.

The recent suicide of talented Bollywood actor *Sushant Singh Rajput* has sent shockwaves of fear all-round the globe, bringing into limelight the much-needed conversation about mental health back into the public diaspora, hopefully with more vigour.

WHO cites that globally one suicide takes place every 40 seconds. So by the time you finish reading this article, around 50 people would have committed suicide! In our country itself, more than one lakh people commit suicide every year, and yet, there still exists strong cultural taboos in discussing suicide. A total of *1,34,516* suicides were reported in the year *2018* (data provided by NCRB); '*Family problems*' and '*illness*' being the major cause for the same. Adding to this worry, *COVID-19* pandemic has created a global panic. Currently, many of us are experiencing emotions, thoughts, anxiety, fear of contagion, uncertainty, insomnia, chronic stress and economic difficulties. In the light of the above situation, it becomes imperative to address the issue of mental illness and suicide as part of the routine life.

SUICIDE AND MENTAL ILLNESS- WHAT DO WE KNOW?

Suicide is derived from the Latin word '*suicidium*' - '*sui*' meaning 'of oneself' and '*cidium*' means 'a killing'. Thus, suicide etymologically means, 'deliberate killing of oneself'. This might sound simple, but suicide is rather a complex web of life experiences, personality traits, psychiatric diagnosis, cultural beliefs, relationship issues, acute stressors and other factors that combine and ultimately converge into a person's decision to take his own life.

The history of suicide among humans is a nebulous subject. The first recorded person to commit suicide was *Empedocles*. He died by throwing himself into the Sicilian volcano, *Mount Etna*. The first ever note considered to be a *suicide note* was from 2040 BC in Egypt. In ancient India too, suicide was permissible under certain circumstances. *Govardana & Kulluka*, in their commentaries on Manu said '*A man may undertake the mahaprasathana (Great Departure) on a journey which ends in death, when he is incurably diseased, or meets with a great misfortune, and that, it is not opposed to Vedic rules which forbid suicide*.' *'Sati Pratha'* or voluntary suicide of Indian Widow by burning her alive was abolished by *Commission of Sati (Prevention) Act,1987*. The Jains still practice *Sallekhana* (death by fasting). However, the fight to bring mental health to the forefront in India has been a long-fought battle. The *Indian Lunacy Act,1912* was first such attempt by the Britishers. It focused on eliminating the '*lunatics*' from the society by sending them to asylums instead of curing them. This outdated act was replaced by the *Mental Health Act, 1987*, drafted by '*Indian Psychiatric Society'*. But it wasn't truly flawless either and was criticized for not recognizing the rights of the mentally ill. In 2013, the then Health Minister, *Ghulam Nabi Azad* introduced the Mental HealthCare Bill in the Rajya Sabha. But it was only in 2017 that *The Mental Healthcare Act* finally saw the light of the day and rescinded the existing *Mental Health Act, 1987*.

The most remarkable provision of the Act is *Section 115* which provides that 'any person who *attempts to commit suicide* shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under Section 309 of the Indian Penal Code, 1860.' It draws a rebuttable presumption of law in favour of the accused. It also casts an additional duty on the appropriate Government to provide care, treatment and rehabilitation to such person and reduce the risk of recurrence. Section 309 has been facing a constitutional dilemma ever since *1994*, when a *Division Bench* of the *Supreme Court* in *P. Rathinam* held that it is violative of *Article 14 and 21* of the Constitution. However, in *1996* a five-member *Constitution Bench* of the apex court in *Gian Kaur*, over-ruled its decision of *1994* and held that *'Extinction of life is not included in protection of life'*. *Aruna Shanbaug v. Union of India* triggered the debate of

Euthanasia. Finally, in *Common Cause v. Union of India (2018)* Supreme Court held that an individual has a *Right to Die with dignity* as a part of 'Right to Life' under Article 21 and allowed *passive euthanasia*. After passing of *The Mental Healthcare Act, 2017*, Section 309 of IPC has lost its utility in the present-day context and has become redundant. This is in tune with the *210th Law Commission Report, 2008* which also recommended repealing of Section 309.

SUICIDE AND MENTAL ILLNESS – WHAT DO WE NEED TO KNOW?

A number of theories have been developed to explain the causes of suicide. Psychological theories emphasize personality and emotional factors, while sociological theories, stress the influence of social and cultural pressures on the individual. French sociologist *Émile Durkheim* has scientifically proved that suicide is not an individual act, but rather an individual's ***'societal integration'*** and ***'moral regulation'*** determine the rate of suicide at a given place. He classified suicide into four categories –

- ***Anomic*** – suicide due to breakdown of social equilibrium, bankruptcy, loss of job, loss of family, etc. (*not enough moral regulation*) for instance, suicides during the current COVID-19 pandemic, economic boom, depression, etc.
- ***Fatalistic*** – society sets such high expectations that burdensome people feel the need to remove themselves from that environment (*too much moral regulation*) e.g. slaves or prisoners in jail committing suicide.
- ***Egoistic*** – social isolation leads a man to destroy himself (*not enough social integration*) – e.g. celebrity suicide like Sushant Singh Rajput, Avicii, Robin Williams etc.
- ***Altruistic*** – degree of social integration among individuals is so high that they keep the values of society above their own lives; e.g. sati, jauhar, suicide bombers, etc.

It's astounding as to how a theory propounded almost a century ago still holds water in the present-day scenario. Today, the ratio of murder to that of suicide and attempt to suicide is – ***1: 3: 75***; which means *for every single murder, there's been 3 suicides and 75 suicide attempts*. In *2016*, India's suicide rate stood at ***16.5*** (WHO report) while the global suicide rate was merely *10.5*. An estimated *150 million* people across India are in need of mental health care (according to *India's National Mental Health Survey 2015-16*). Yet, these issues are stigmatized and remain a hidden but a potential threat to public health.

SUICIDE: LET'S END THE STIGMA!

Have you ever wondered how someone gets to a place where suicide feels like the only option left?

Around *90%* of the people who attempt or die by suicide have *mental illness* at that time; *depression* being the most common. Depression corrodes one's thinking ability. *It's a flaw in chemistry and not in character*. When someone is depressed, suicide makes sense. Suicide is not an act of *cowardice*. No one attempts it because they want to die. It's a desperate act to get relief from the pain. Suicide is not the problem, rather it's a result of underlying mental illness which needs immediate attention, just like any other physical illness would receive. There exists an underlying presumption that people who are poor, weak, who live on the margins of society, stranded labourers, farmers, etc are more prone to suicide. However, the reality is: **No one is immune to depressing thoughts.** *Jim Carrey* who made his career by making people laugh suffered from depression. *Elton John* attempted suicide in 1969. *Miley Cyrus, Ellen DeGeneres, Dwayne Johnson, Deepika Padukone, Robin Williams, Charles Darwin, Issac Newton, Michael Phelps, Sigmund Freud* and even *Princess Diana* had mental illness.

Therefore, there is a dire need to reframe how we view suicide and mental illness; and make treatment, care, help and support more accessible. We need to talk more openly about it and also listen without any prejudices. Public awareness and counselling at ground level- in schools, colleges, offices will go a long way. Mental illness / suicide is a 'human experience'. Anything that's 'human' is mentionable, and anything that's mentionable is manageable. When we talk about our feelings, they become less overwhelming, less upsetting, and less scary. We can start from our near and dear ones, our relatives, neighbours, friends and make sure we stay connected with them. Because, if not us, then who? And if not now, then when?

"We live in a world in which we need to share responsibility. It's easy to say, ' It's not my child, it's not my community, it's not my world, it's not my problem '. Then there are those who see the need and respond. I consider those people as my heroes."

– Fred Rogers

TRANSCENDING GENDER IDENTITY

- RIYA WASADE & MAYURA JOSHI

Gender and sexual orientation of an individual has, for the longest time, been a topic to avoid. Such avoidance has unfortunately led to rigid ignorance, which is not only harmful for the individuals that are prejudiced against but for the society as a whole, as it tends to disturb the semblance of peace when there are clashes between any two groups of people.

One such topic that people tend to avoid is that which concerns transgenders. Transgender or commonly known as the 'third gender', are those people that identify their gender as different from what they were assigned at birth, unlike cisgenders, whose identity of their gender remains the same as is assigned to them at birth.[51] The term 'transgender' is often used as an umbrella term for a variety of people who struggle with their gender identity and may also include people who do not identify exclusively under the parameters set by society to be masculine or feminine such as non-binary, bigender, pangender, among others. When it comes to being transgender, it is often misconceived that the identification is based on sexual orientation. Another misconception is that trans people are only the same as intersex people, who are those that are born with physical characteristics of both the predefined sexes, and are also often specifically mislabeled as 'eunuchs' and are treated as such.

Focusing only on trans individuals, they are a major part of our societies that face discrimination almost on a daily basis, not just because they are not often accepted socially but also because in a lot of countries there aren't any or enough laws to protect them from discriminatory situations. Transgender people face a plethora of problems, like the absence of legal protection, excessive poverty, lack of employment and educational opportunities, mental and physical harassment and violence, absence of proper health care, problems with the accuracy in their identity documents,[52] and the worst problem that mostly stems all of these other problems, the stigma associated with their very existence.

[51] Millan, K. (2020, August 2). *What's In a Name? Understanding the Importance of Transgender Identity*. Retrieved from Michael's House: https://www.michaelshouse.com/blog/whats-in-a-name-understanding-the-importance-of-transgender-identity/

[52] Cushing, I. (2018, August 16). *Why We Care About Transgender Equality (And What We Should Do About It!)*. Retrieved from REACH - Beyond Domestic Violence: https://reachma.org/why-we-care-about-transgender-equality-and-what-we-should-do-about-it/

Around the world, transgender rights are at different stages in its subsistence, and there are some places where they don't even exist. They are victims of violence at shockingly high rates and systematic marginalisation has been a major cause towards increasing suicide rates and a diminishing social and economic status, despite these communities having been in existence in every culture, race etc. since human life has been recorded.[53]

This systematic marginalisation has also established itself quite solidly in India as well. First traces of discrimination on the basis of gender identity can be found in the Criminal Tribes Amendment Act, 1879[54] which referred to eunuchs in particular. This act furthered the 'divide and rule' policy of the British rulers, while categorizing several communities as "criminal tribes" amongst which were those defined as "eunuchs" under the act. The Britishers labelled them as hereditary criminals who would follow in the footsteps of their ancestors' caste-based occupation. The members of the so called "criminal tribes" or de-notified tribes had to be registered with an appointed authority and their movement was heavily encumbered. They were heedlessly suspected of sodomy, as under S. 377 of the Indian Penal Code, 1860[55], kidnapping and castration of children or of abetting the commission of any of the offences. These communities were subject to harassment, torture and humiliation from the authorities and police for more than half a century until the act was repealed, in 1952.

In the post-colonial era, the repealed Criminal Tribes Act, 1871[56] which had created prejudicial notions in the minds of citizens about Hijras, Kinnars, Kothis and other de-notified tribes. continued to have its effect by means of the Habitual Offenders Act, 1951[57].Then the transgender population in Karnataka was further subject to oppression specifically by virtue of S. 36A of the Karnataka Police Act, 1963[58]. Meant to keep a tight rein on the activities of the "eunuchs" by suppressing or controlling their undesirable activities[59], this provision was added in 2011. The unbridled use of this provision led to the police keeping a constant watch on the actions of the hijra community and intimidating them. It was upon such discriminatory acts of

[53] Powell, T., Shapiro, S., & Stein, E. (2016, November 11). *Transgender Rights as Human Rights*. Retrieved from AMA Journal of Ethics: https://journalofethics.ama-assn.org/article/transgender-rights-human-rights/2016-11
[54] Criminal Tribes Act, 1871, Act No. XXVII of 1871 modified in 1899.
[55] The Indian Penal Code, Act No. 45 of 1860.
[56] Criminal Tribes Act, 1871, Act No. XXVII of 1871
[57] Bombay Habitual Offenders Act, 1959 Bombay Act No. 61 of 1959
[58] Karnataka Police Act, 1963, Act. No. IV of 1964
[59] (2014). *Report of the Export Committee on the Issues to Transgender Persons.* Ministry of Social Justice & Empowerment.

the police which violated their fundamental rights guaranteed under the constitution[60] that a writ petition[61] was filed challenging the constitutional validity of S. 36A before the High Court. This issue garnered much support from the public which resulted in the government to amend the 1936 Act and replace the word "eunuch" with "person" in the Karnataka Police (Amendment) Act, 2016.[62]

It was only in the year 1994 that transgender persons were given voting rights, but due to limitation of options in the gender category there arose the problem of issuing them identity cards which defeated the whole purpose of giving them separate rights. In 2005, after years of activism finally they had an option to choose the category 'E' for 'Eunuchs' in the passport application and 'T' for 'Transgender' in the passports that are issued to them by the government. They have the right to get their voter identity cards with 'Third Gender' in it. Though these steps uplifted their status in some ways, it wasn't enough to bring change in the mindset of people. Not only do they face discrimination in just about every walk of life, they are treated as social outcasts and are not even represented in laws that are generally applicable in the country, such as laws related to inheritance, adoption, access to employment opportunities, etc. They face problems availing even basic amenities and facilities such as access to bathrooms/toilets, which has been found to be a situation where they face the most discrimination.

Fast forward to 2014, the Supreme Court of India, in a ground-breaking judgement,[63] declared that trans persons belong to a socially and economically backward class which entitles them to receive reservations in education and employment;[64] that they have a fundamental right to change their genders, without having to opt for surgery. The state and union governments were also directed to frame welfare schemes. Keeping in accordance with this judgment, many government documents began providing an option for third genders.

In 2015, the Rights of Transgender Persons Bill, 2014 was passed by the Rajya Sabha, which sought to guarantee rights and reservations in education, jobs, legal aid, unemployment

[60] INDIA CONST. art. 14, art. 19, art. 21.
[61] WRIT PETITION NO.1397 OF 2015
[62] Karnataka Police Act, 1963, Act. No. IV of 1964, modified in 2016.
[63] National Legal Services Authority v. Union of India [AIR 2014 SC 1863]
[64] *The Current Status of Transgender Rights in India*. (n.d.). Retrieved from Global Human Rights Defence: https://ghrdorg.wordpress.com/transgender-rights-in-india/

schemes, skill development among others. It also sought to specifically prohibit discrimination against, prevent exploitation and violence towards transgender people. Unfortunately, because of multiple anomalies, the bill was never voted upon in the lower house.

After this, the Transgender Persons (Protection of Rights) Bill, 2016, was introduced in the Parliament once in 2016, and then again in 2017, but it was heavily criticised for not addressing questions of adoption, marriage, divorce etc. Although it was passed initially, it lapsed with the dissolution of the then Lok Sabha.

Finally, in 2019, the Transgender Persons (Protection of Rights) Bill, 2019 was introduced in the Parliament. Although the definition of 'transgender' was considered inclusive, and it emphasised on a person's right to choose their identity to be male, female or transgender, under the Bill, they are required to go to a district magistrate to get their identity as their chosen gender certified, and provide proof of surgery for sex reassignment.[65] Despite its fallacies, it sought to prohibit discrimination in nine fields such as healthcare, education, amongst others. Unfortunately, the Bill doesn't provide any real remedies or changes to be made for trans people's integration into public spaces, improve their quality of life, how the government intends to implement any decided changes or even what the penalties for discrimination towards them would be like. Notwithstanding the positive notes and the many criticisms, the Bill was passed into a law making it an Act in 2019.

With changes that need to be brought about in order make trans people more socially and economically acceptable, police reforms and efficient implementation of legal provisions, are the most important. The police must set up committees to address violations directly with support from human rights and social activists and also undergo sensitization in order to tackle social prejudices while training to deal with the community in a humane manner. Apart from reforms from the ground-root level, there is constant need for educational workshops regarding sex education at the school level along with reforms at work place by institution of special committees to look into these issues. Despite constant efforts to thwart their survival, the transgender community in not just India, but the world, continues to fight their battles every day, right in the face of adversity.

[65] Sasha. (2019, November 30). *Trans Bill 2019: Why India's transgender community is opposing a Bill which is supposed to Protect their rights*. Retrieved from SOCIALSTORY.

COMPETITION LAW AND E-COMMERCE: THE HIPSTER IDEA OF PLATFORM NEUTRALITY

- SMARAKI NAYAK

INTRODUCTION:

The e-commerce sector in India is growing at a staggering rate of 51% since 2017, making it the fastest growing market for e-commerce in the world.[66] Additionally, in India, 64% of digital retail is through online platforms.[67] In the light of such developments, it became imperative for India's Competition Law watchdog to delve deeper into the said sector to understand the nuances and latent issues, directly or indirectly impacting competition. In April of 2019, the Competition Commission of India (CCI) commenced the "Market Study on E-Commerce in India". The report of results of the said study, titled "Market Study on E-commerce in India: Key Findings and Observations", were published by the CCI on 8th January, 2020.[68]

A Brief Summary of the Study:[69]

The study was a culmination of questionnaire survey, focused group discussions, secondary research, one-on-one meetings, a multi-stakeholder workshop and written submissions of stakeholders. It involved participants from various kinds of digital businesses that run on various e-commerce platforms. The study covered three major categories of e-commerce: consumer goods – lifestyle, groceries, mobiles and electronics, hotel services and food delivery services.[70] E-commerce platforms (16), business entities (164), including sellers, manufacturers and retailers, and hotel and restaurant service providers participated in the study.[71] Seven payment system providers from across India also participated.[72] Additionally, 11 industry associations represented different stakeholder groups.[73]

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[66] E-commerce Industry in India, India Brand Equity Foundation (June, 2020), https://www.ibef.org/industry/ecommerce.aspx.
[67] *Ibid.*
[68] Market study on e-commerce, Competition Commission of India (Jan. 08, 2020), https://www.cci.gov.in/node/4637.
[69] Market Study on E-Commerce: Key Findings and Observations, Competition Commission of India (Jan. 08, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

[70] ETGovernment, CCI releases report on 'Market Study on E-commerce in India', ETGoverment.com (Jan. 08, 2020, 08:05 PM), https://government.economictimes.indiatimes.com/news/governance/cci-releases-report-on-market-study-on-e-commerce-in-india/73159776.
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

The study ascertained five issues:[74]

i) Platform neutrality;
ii) Platform-to-business contract terms;
iii) Platform price parity clauses;
iv) Exclusive agreements;
v) Deep discounting.

In this essay, we deliberate upon the first issue at hand, i.e., platform neutrality.

PLATFORM NEUTRALITY: NEED AND IMPLICATIONS

As the term suggests, platform neutrality means non-differential treatment by, in this case, the e-commerce platforms, of the various sellers and brands that conduct their business through such platforms. The rhetoric idea of having platform neutrality is appealing from a legal and economic point of view, however, ensuring the same is, prima facie, impossible. The e-commerce platforms enjoy many advantages because of their unique position in the marketplace against the sellers that they represent. These platforms act as an intermediary between the sellers that they represent and the end consumer who is availing the platform's services. Platform neutrality would imply that the e-commerce platforms cannot create situations in favour of their own services. The essence of neutrality lies in non-discrimination. The Report raises the issue of e-commerce platforms granting "preferred seller" status to some of the sellers for additional commissions which defeats the concept of platform neutrality. According to some sellers who participated in the study, the preferred sellers seem like an extension of the platform itself. Reportedly, those sellers get special discounts on products from the B2B arm of the platform.[75] Brands are entering into agreements with those "preferred sellers" for joint-funding of various discounts that they provide through the said platforms.[76] The platforms are able to control the seller's representation on their websites and mobile applications. They provide their platform specific badges to some sellers. For example, e-commerce giant Flipkart provides some sellers a "Flipkart Assured" accreditation, a "quality

[74] Chapter 4: Observations, Market Study on E-Commerce: Key Findings and Observations, Competition Commission of India, 29 (Jan. 08, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

[75] IANS, CCI to study preferential treatment by e-commerce platforms, ETRetail.com from The Economic Times (Feb. 01, 2020, 10:43 AM), https://retail.economictimes.indiatimes.com/news/e-commerce/e-tailing/cci-to-study-preferential-treatment-by-e-commerce-platforms/73829905.

[76] *Ibid.*

and speed" assurance badge.[77] It gives the end customers a guarantee on the quality of the product. The badge also ensures the delivery of that product to be free of any shipping charges if its price exceeds Rs.500.[78] Flipkart claims that the badge is given solely on the basis of performance. Similarly, another big player Amazon has the "Amazon Fulfilled"[79] and "Prime Eligible Items."[80] The first accreditation implies that all the storing, packaging and dispatching is done by Amazon itself. The facility of package tracking up to the customer's doorstep is also provided along with free shipping for products worth Rs.499 and more. It also provides free replacements for the said products. Along with that, customer services are handled by Amazon. Prime Eligible Items are available for free and faster deliveries along with all those perks that come with the Amazon Fulfilled products.

E-commerce are also accused of leveraging. Leveraging occurs when an enterprise plays two roles in a single market – one of an intermediary and the other of availing the service of the said intermediary. In the first role, the platforms receive very sensitive and pivotal information regarding all the products and services they provide. In the second role, they use such pivotal information to the advantage for their own brands and preferred sellers.

To leverage control to give their preferred sellers added advantage, the e-commerce platforms use a method called search bias. Such manipulation of search results aids their preferred sellers and their own brands to have a conspicuous presence on the platform which shifts the end consumer's attention to the said sellers and brands. This results in the rest of the sellers being limited to lesser visibility on the platform and lesser access to the consumers on the platform. However, the Competition Act, 2002 only deems an entity's actions limiting and restricting of market and market access a violation under Section 4 only when a dominant enterprise commits them.

CONCLUDING REMARKS AND SUGGESTIONS:

[77] Team Flipkart Stories, What is Flipkart Assured? Here's Everything You Need To Know, Flipkart Stories (Aug. 19, 2016), https://stories.flipkart.com/flipkart-assured-faq/#:~:text=Flipkart%20Assured%2C%20a%20new%20quality,new%20benchmark%20in%20online%20shopping.&text=Flipkart%20Assured%2C%20India's%20first%20'Quality,in%20the%20fastest%20time%20possible.

[78] *Ibid.*

[79] About Items Fulfilled by Amazon, Amazon.in, https://www.amazon.in/gp/help/customer/display.html?nodeId=202001380#:~:text=Fulfilled%20by%20Amazon%20indicates%20that,are%20eligible%20for%20FREE%20delivery

[80] About Prime Eligible Items, Amazon.in, https://www.amazon.in/gp/help/customer/display.html?nodeId=202085280#:~:text=Amazon%20Prime%20members%20receive%20FREE,deals%20on%20Prime%20eligible%20items.&text=Items%20are%20eligible%20for%20FREE%20Standard%20delivery.

The in-depth market study has identified various issues that are potential threats in the e-commerce ecosystem. The Competition Commission of India prioritises enforcement and advocacy in the e-commerce sector by stimulating meritorious competition in the market to harness efficiencies for consumers, increasing transparency to ensure fewer impediments to competition and reduce information imbalance, and developing sustainable business relationships between all stakeholders.

The problem or the lack of platform neutrality is deeply entrenched in the digital marketplace. Excerpt from the study report reads, "The issue of preferential treatment by e-commerce platforms to its own products, or its own/related entities, including factual establishment of the same and its effect on competition, is thus a matter of case-by-case determination by the Commission."[81] The lack of enforceability of platform neutrality can be attributed to the inability to pinpoint the dominance of any e-commerce player and the abuse thereof. An entity can be deemed dominant when it is capable of functioning independently of the tug of the market. The e-commerce giants like Flipkart-Amazon and Swiggy-Zomato operate in the market in a duopolistic model. Hence, due to the thrust of the relevant competitor in the market, no single e-commerce platform can be said to be enjoying a dominant status. The Competition Act, 2002 does not provide for joint-dominance under the purview of section 4, which has provisions for abuse of dominant position. Hence, an investigation under the same cannot be maintained. Ensuring platform neutrality is a requirement under the said Act, albeit, for dominant players only.

The e-commerce entities enjoy a fair share of privileges owing to the afore-discussed dynamics of the concerned marketplace and escape the punishment that abusive practices like leveraging and ranking biases entail. The CCI could switch its approach from a form-focussed one to a substance-focussed one. Such change in approach could make the e-commerce entities swerve towards a more holistic and platform neutral marketplace. Ensuring platform neutrality is a long road ahead and required safeguards must be put in place for the victims of the lack of the same.

[81] Market Study on E-Commerce: Key Findings and Observations, Competition Commission of India (Jan. 08, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

WOMEN'S ACCESS TO PUBLIC SPACES: ENSURING SAFETY OR ASSERTING GENDER ROLES?

- APARNA STHAPAK

The thought-provoking article, "Why Loiter? Radical possibilities for gendered dissent authored by Shilpa Phadke, Shilpa Ranade and Sameera Khan" analyses and challenges the social conventions which hinder women's access to the public realm. The authors attempt to showcase dissent and resolve this hindrance by making a strong case for women's expression of pleasure and citizenship by actively 'loitering' in urban public spaces. Through this essay, I shall attempt to address two questions, first, whether restrictions are placed on women's access to public spaces for their safety or controlling them. Second, the plausibility of the author's endeavor to reclaim public spaces by 'loitering'. I will be focusing on the social constructs of gender roles, relations and regimens which become manifest in the framework of cities and deter women's freedom with the help of social sanctions.

Women have been systematically removed from public spaces worldwide but in the Indian context the poor and unemployed have also faced the brunt in this regard. Though no explicit anti-loitering laws exist in India, they take the form of anti-vagrancy laws which are enforceable against those having no means to support themselves. These laws primarily focus on curbing the practice of begging and directly affect low socio-economic classes when they outlaw loitering done by individuals belonging to this stratum. Meanwhile those who are employed and able to support themselves are exempted. This highlights the social construct of the Indian society, wherein class is predominantly used as a tool of discrimination.

For understanding the existing structure of women's partial access to public spaces, it is pertinent to understand how this structure developed. "Being a social construct, gender is not something fixed, but varies according to time, place and culture" (Lahiri-Dutt, 50). Therefore, Gender roles were so constructed that they suited the immediate requirements of a society, and eventually became its culture. Once these roles were established, the populace was socialized into performing the genders assigned to them. Genders were learnt and performed in conformity with the standards of the society (Giddens, 619). The Gender-differences arising from this were not only "present in major institutions but were systemically important to them" (Connell, 1987).

Even in the Indian context, culture was used as a means of reinforcing gender roles. Notions of being a 'good woman' were developed, according to which she had to maintain her respectability and morality, a theme consistent with today's modern woman. Additionally, a special premium was placed on her sexuality, as she personified her family's respect. During the colonial period, this perspective was substantiated with the Victorian understanding of an ideal woman, docile and subversive, "*enveloped in family life, seeking no identity beyond the roles of a daughter, wife and mother; a social corollary of this identification is the association between womanhood and domestic-purity*" (Auerbach, 69). This association between 'womanhood and domestic-purity' still finds its place in the Indian society. Remnants of this understanding are responsible for the status quo of Indian women, with respect to public spaces, i.e., only working women from upper-middle classes are able to gain access to public spaces, and even that is restricted to 'fulfilling a purpose' (Phadke, 189).

In my opinion, Talcott Parson's "idea of efficient families" also plays an important role in culminating a divide between the private and public spheres, thus leading to the current designated presence of women in the private and absence from the public. His "sexual division of labor" dictated that gender-roles were assigned naturally through biological-processes, wherein women held the 'expressive roles' of caretakers while men played 'instrumental roles' of providers in the public sphere (Parson and Bales, 151). This was challenged by feminists claiming that such division was only a device to control women and these roles were merely "social, which were promoted for the convenience of men" (Giddens, 621).

Connell explains how gender regimes are established with the help of 'gender' to create an "organized field of human practice and social relations" which are efficiently used as tools to subdue women and keep them in a subordinate position in society (Connell, 1987). These gender regimes are then regulated using 'social sanctions', i.e. "*positive and negative sanctions used by socially applied forces which reward or restrain behavior according to expected standards of the society*" (Giddens, 619). An example of how social sanctions are used to reaffirm gender roles, is Phadke's distinction between the good private woman and the bad public woman. The good private woman is careful and alert, she maintains her privacy even in public spaces, takes as less space as possible and leaves the public space as soon as her purpose is fulfilled, she serves as a positive sanction of femininity; whereas the bad public woman is characterized by her sexual identity and immorality, she is seen as the antithesis of a respectable woman, and is therefore a negative sanction (Phadke, 190).

This form of social sanctioning quickly turns toxic and formalizes oppression of women, "*the real genius of this system lies in the fact that oppression has been recast as a virtue, and erasure*

of self, the most treacherous human rights violation hides in plain sight, sanctified by loving families, perfumed by our definitions of goodness" (Narayan, 2018). This structural oppression results in gender biasness, victim-shaming, and social policing of women, so that they can be protected from the 'evils' of the outside world. This form of protectionism which relies on 'the fear of violence and crimes' and the systematic social sanctioning of women becomes another element of an oppressive gender regime. Hence, to address the first issue of this essay, restrictions are placed on women's access to public spaces to reinforce gender-norms while simultaneously satisfying their male counterparts' 'god-complex'.

Nevertheless, It is necessary to recognize the fact that society is not premised on and perceived from the standpoint of either men or women but has to be acknowledged as being "fundamentally gendered" (Abott, 54). The authors of 'Why Loiter?' claim that even in the modern world, only working women from upper-middle classes have been able to access public spaces, and even that is restricted to 'fulfilling a purpose' (189). They also claim that these women remain largely 'private' in their demeanor even when they are out in the public (Phadke, 189). However, I digress in the fact that though these women remain 'private', it is a choice they make influenced by the socialization they have received. It does not automatically mean that these women have limited access. Instead, representation of other marginalized sections of society is restricted and should be encouraged, such as lower-middle class women who have not been represented in this movement at all.

Another point worth mentioning is the fact that, even if women belonging to upper-middle classes have held back from enforcing their claim in public spaces fully, it is because of the lack of sensitization of public authorities, such as police and other government officials, as well as a lack of proper legal reforms to address instances of victim blaming, eve-teasing, cat-calling and other forms of violence against women. While I agree with the author's opinion on women being subjected to harsher standards of being 'perfect' victims and not being able to exercise their right to public spaces in a more nuanced form due to these outlying social constructs; I do not agree with 'loitering' being an effective form of dissent.

The modern times can be called the age of social reflexivity**.** Anthony Giddens describes social reflexivity as the 'constant reflection' and revaluation of the circumstances in which we live (101). Giddens also rightfully points out that in bringing about social changes "*voluntary groups and social movements outside the framework of formal politics can have an important role, but they will not supplant the orthodox democratic process*" (101). While 'loitering' is a publicly visible form of expressing dissent, it also brings us closer to chaos and anarchy.

I believe as citizens of a democracy and half of its populace, there are better avenues available to women which could prove more effective and introduce changes in the very framework of urban and rural spaces. While being equally public as 'loitering', they would include demands for reforms. They could take the form of parades similar to pride parades, or peaceful protests. Loitering not only has a negative connotation attached to it but appears to be wasted potential. I believe that instead of encouraging women to loiter, men should be discouraged.

As the authors have admitted themselves, to loiter is 'to wander around without a purpose', but also advocate the use of the exercise 'for the purpose' of safeguarding women's claim. This is contradictory to the very act of loitering. I believe that public gatherings, a walk in a park, or hanging out with a group of friends, all serve a purpose. A purpose does not have to take the undertone of being restrictive, instead of striving to wander around without a purpose, our call should be one which makes the 'pursuit of pleasure' a valid purpose within the understanding of our socio-legal frameworks.

ILLICIT DRUGS AND CONTROL ON ITS ABUSE

- RAESHEL UPADHYAY

"Addiction is like a curse and until it is broken, its victim will perpetually remain in the shackles of bondage. " ***– Oche Otorkpa***

WHAT ARE "DRUGS"?

A typical pharmacological way to define drugs is that it is a 'substance which, when taken into the body, alters the structure or function of any part of the organism'.[82] A drug is any substance (with the exception of food and water) which, when taken into the body, alters the body's function physically and/or psychologically.

Psychoactive drugs disturb the central nervous system and amend a person's mood, thoughtfulness and behavior. Psychoactive drugs may be distributed into four categories: depressants, stimulants, hallucinogens and 'other'.

WHAT IS DRUG ADDICTION? AND WHAT ARE THE DAMAGES CAUSED BY IT?

Drug addiction is a chronic brain disease. It causes a person to take drugs repetitively, despite the harm they cause.

People with addiction often have one or more accompanying health issues, which could include lung or heart disease, stroke, cancer, or mental health conditions. Imaging scans, chest X-rays, and blood tests can show the damaging effects of long-term drug use throughout the body.[83]

DRUG ABUSE IN INDIA

The Ministry of Social Justice and Empowerment, Government of India, has published a report titled, "Magnitude of Substance Use in India, 2019."[84]

The crucial finding of the survey is that there are major dissimilarities among different states

[82] Modell, Mass Drug Catastrophes and the Roles of Science and Technology, 156 SCIENCE 346 (1967). See generally NOWLIs 5-7.

[83] Drugs, Brains, and Behavior: The Science of Addiction by National Institute On Drug Abuse(USA)

[84] Ambekar A, Agrawal A, Rao R, Mishra AK, Khandelwal SK, Chadda RK on Behalf of the Group of Investigators for the National Survey on Extent and Pattern of Substance Use in India. Magnitude of Substance Use in India. New Delhi: Ministry of Social Justice and Empowerment, Government of India; 2019.

in the degree and popularity of use of various substances. Alcohol is the most common substance used followed by cannabis and opioids, followed by cannabis at 2.8% and opioids at 2.1%.

Opioid use is reported in 2.1% of the country's population, with heroin use being highest at 1.14% percent followed by pharmaceutical opioids at 0.96% and opium at 0.52%. The dominance of opioid use in India is three times the global average.

DRUG ABUSE AROUND THE WORLD

Enhanced research and more accurate data have shown that the aggressive health consequences of drug use are more severe and widespread than formerly thought. Globally, some 35 million people are likely to suffer from drug use disorders and who require treatment services, according to the latest World Drug Report, released by the United Nations Office on Drugs and Crime (UNODC).

CURRENT LEGAL FRAMEWORK FOR DRUG REGULATION IN INDIA

Narcotic Drugs and Psychotropic Substances Act, 1985

India is a member to the three United Nations drug conventions.

The NDPS Act came into force on 14 November 1985.

The NDPS Act prohibits cultivation, production, possession, sale, purchase, trade, import, export, use and consumption of narcotic drugs and psychotropic substances except for medical and scientific purposes in accordance with the law.

Act covers three broad classes of substances:

1) Narcotic drugs, that is, those covered under the 1961 Convention

2) Psychotropic substances or those covered under the 1971 Convention

3) "Controlled substances" that are used to manufacture narcotic drugs or psychotropic substances

NDPS Amendments (2014)

In early 2014, the NDPS Act was amended for the third time and the fresh provisions came into force on 1 May 2014. The main features are mentioned below:

• Establishment of a new class of "essential narcotic drugs", which the central government can define and regulate homogeneously throughout the country

• Broadening the objective of the law from covering prohibited use to likewise encouraging the medical and scientific use of narcotic drugs and psychotropic substances

• Making the death penalty discretionary for a subsequent offence concerning a certain quantity of drugs under section 31A.

• Enhanced punishment for trivial offences from a maximum of six months to one year imprisonment

• More elaborate provisions for forfeiture of property of persons accused on charges of drug trafficking.

DRUG REGULATION AROUND THE WORLD IN BRIEF

United States

The federal system in the US is fundamentally the same as in the UK - detrimental drugs are banned, and custody or trafficking results in a criminal charge. Thirteen states, controlled by California, have decriminalized the consumption of cannabis for medicinal drives - while in certain cases the law struggles clearly with federal legislation.

The larger picture is the US government's role in struggling to enclose the flow of drugs from South America - and also Afghanistan - into North American and Europe.

Netherlands

Several people rely on the opinion that some drugs are legal in the Netherlands because of the accessibility of cannabis - but the truth is more complicated. The Dutch system abides licensed "coffee shops", where people can purchase trifling amounts of cannabis for individual consumption. But the trafficking and trade of drugs remains unlawful.

China

In China, if you are caught with drugs, you could be enforced to attend drug rehab in a facility run by the government. Execution is the punishment for some drug crimes.

Iran

The consumption of opium is a specific problem in Iran, in part as it is produced in neighboring Afghanistan. In case you are caught with drugs in Iran, the best case scenario is a large fine and the worst-case scenario is the death penalty.

Saudi Arabia

The trade of drugs in Saudi Arabia almost at all times results in the death penalty. Saudi Arabia and judicial authorities are not persuaded to make exceptions. Alcohol is banned in Saudi Arabia, and ownership or use of alcohol or drugs can be penalized by public flogging, fines, lengthy imprisonment, or death.

Indonesia

Indonesian drug laws are harsh. If you are caught in possession of marijuana, you can get up

to twenty years in prison. Other drugs carry jail terms of up to twelve years, and the sale of drugs is penalized by a death sentence.

Columbia

In case you are arrested in possession of drugs in Columbia, you shall spend a lengthy time in a hostile prison. Law enforcement agency makes numerous arrests a day at airports in Columbia, catching many foreign nationals.

Anti-Drug Action Plan for 2020-21 (India)

In recent times, on the occasion of International Day Against Drug Abuse and Illicit Trafficking an annual Anti-Drug Action Plan for 2020-21 for 272 districts was launched by the Ministry of Social Justice and Empowerment.

The plan comprises **awareness** generation program, **identification of drug-dependent population,** focus on treatment facilities and **capacity-building** for service-providers to curb drug abuse and alcoholism.

Drug abuse or **substance abuse** is the use of illegal drugs (Heroin, Morphine, Opium etc.), or the use of prescription drugs for **purposes other than those for which they are meant to be used.**

Key Points

De-addiction Facilities: These would be set up in the "utmost affected" 272 districts recognized by the Narcotics Control Bureau concentrating on building up treatment and de-addiction services and giving stress on reaching the youth and high risk population.

Drop-in-Centers for Addicts: The focus will be on setting up drop-in-centers for addicts and similarly on peer-led community based outreach programs for high risk populations – predominantly the youth.

Integrated Rehabilitation Centre for Addicts (IRCAs): Funded by the Ministry, IRCAS would spread out to communities to assist those affected by drug addiction.

Drug-Free India Campaign**:** The ministry also declared the launch of the 'Nasha Mukt Bharat'**,** or Drug-Free India Campaign which emphases on community outreach programs.

A FEW POLICY RECOMMENDATIONS

1. Uniformity: ensuring coordinated application of drug regulatory standards throughout the nation.
2. Regulatory Agency Autonomy: A financially autonomous and technically independent statutory regulatory agency(politically accountable to Parliament)

3. Human Resource and Training: to facilitate time bound, effective and efficient regulatory duties
4. Financing: to enable greater elasticity in arrangement and operationalization of institutional strategies
5. Public Outreach and International Co-operation: an approach to strengthen regulation

CONCLUSION

The new **Anti-Drug Action Plan for 2020-21** targets at addiction-free India by defying the growing menace especially across colleges and universities. However, there is a necessity to design a more targeted campaign in contradiction of drugs and substance abuse. Addiction should not be seen as a character flaw, but as an infirmity that any other person could be struggling with. Therefore, the stigma associated with drug taking needs to be reduced through social awareness and voluntary processes like medical help by psychologists, as well as strong support from family.

" I urge countries to advance prevention, treatment, rehabilitation and reintegration services, ensure access to controlled medicines while preventing diversion and abuse, promote alternatives to illicit drug cultivation, and stop trafficking and organized crime - all if which will make an immense contribution to our work to achieve the sustainable development goals."
- António Guterres (UN Secretary General)

MARITAL RAPE: A TESTIMONY OF ARCHAIC LEGAL SYSTEM

- DEEPANSHU VERMA

The dominant ideology in the institution of marriage as conveyed by Manusmriti revolved around the concept of 'ideal wife'. Glorified principles of patriarchy overlooked trust and sanctity of a marriage, negating acceptability of sexual violence against women in a marriage. The notion of reducing a women to an inseparable possession of the husband violates the presence of individuality in her.

"Patriarchal notions are used as a shield to violate core constitutional rights of women based on gender and autonomy"

- Justice D.Y Chandrachud

Under Section 375 of the Indian Penal Code (IPC)[85], rape has been codified to include all forms of non-consensual intercourse with a woman. Exception to the same provides for an implicit immunity against the evil of marital rape. It holds that "sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."[86]

Therefore, sexual intercourse with a girl under the age of 15 years of age would be considered statutory rape, irrespective of her consent and regardless of the fact that the man is her husband. Today, 52 countries across the world have recognized marital rape as a criminal offence, but India remains to be one of the 36 countries that have not.

Traditional Evidence & Origin of Marital Rape

Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote that: 'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract. Sex was construed to be a woman's duty within the marriage, which she could not refuse. Blackstone contended that "By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage…"[87]

[85] The Indian Penal Code, 1860 (Act No. 45 Of 1860)
[86] Section 375 in The Indian Penal Code at https://indiankanoon.org/doc/623254/
[87] William Blackstone, Commentaries on the Laws of England. Vol, 1 (1765, Pages 442-445)

Marital rape is the most common and repugnant form of masochism in Indian society, which is hidden behind the iron curtain of marriage. Women were seen by men as a form of property, and it was believed that no man could violate his own property. The deep rooted element of patriarchy in our Indian society has been a lacunae in the implementation of stronger laws towards marital rape.

Law and culture share a symbiotic relationship, especially in our Indian society. In 2015, RIT Foundation filed a writ petition seeking to criminalize marital rape, and shut down on the discrepancy provided under Section 375 of IPC which allowed a free pass for the same. In July 2018, NGO Men Welfare Trust opposed the plea by NGO RIT Foundation, claiming that men become vulnerable to victimization at the hands of women, who file false cases of sexual harassment, cruelty and domestic violence. All India Democratic Women's Association, challenged the constitutionality of Section 375 of the IPC on the ground that it discriminates against married women being sexually assaulted by their husbands. A bench of Delhi High Court consisting of acting Chief Justice Gita Mittal and Justice C. Hari Shankar held in the same that marriage does not mean that a woman always consents to sexual relations with her husband.

But in a statement made by the Centre, it was held that marital rape could not be a criminal offence in India as it would lead to destabilization of the institution of marriage. In August 2019, former Chief Justice of India Dipak Misra said that marital rape should not be made a crime in India, "because it will create absolute anarchy in families and our country is sustaining itself because of the family platform which upholds family values."

Constitutionality

Article 14 of the Constitution of India grants equality before law to every person, and equal protection of law as well. A legislation based on discriminatory and unreasonable classifications is bound to be struck down under the same.

Further, Article 15 of the Constitution of India elaborates the prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth.

In a landmark judgment, *Justice K.S. Puttaswamy (Retd.) v. Union of India*[88], it was held by a 9-judge bench of the Supreme Court that "privacy includes at its core the preservation of personal intimacies, the sanctity of family life, procreation, the home and sexual orientation". Right to privacy was included by the same within the ambit of Article 21 of the Constitution

[88] (2017) 10 SCC 1

which envisages right to life and personal liberty to all.

Previously, in *Bodhisattwa Gautam v Subhra Chakraborty*[89] it was established that the offence of rape is against the guaranteed Right of Life under Article 21 of the Indian Constitution.

Exception 2 of Section 375 of IPC is a provision that discriminates between married women, and unmarried woman in essence. This is because it leaves a married woman defenseless in such a scenario where she may be subjected to rape in her matrimonial bond. While it protects women against sexual violence on one end, it allows marital rape to remain an active evil under our legal system. In *Independent Thought v Union of India*[90], the Supreme Court enunciated upon the artificial distinction created by Exception 2 to Section 375 of IPC, which was held arbitrary and discriminatory. But the same was only made in regard to a girl below 18 years of age, and the court refused to comment on the issue of marital rape where the woman is above 18 years of age.

International Standpoint

India ratified the Convention on Elimination of all forms of Discrimination against Women (CEDAW)[91] in 1993, which is known as the International Bill of Rights for women. The Convention defined discrimination against women, and actively undertakes measures to eradicate the same. In 2007, UN Committee on the Elimination of Discrimination against Women recommended India to widen the definition of rape in its Penal Code, and to remove the exception to marital rape provided by it under the same. Further, the Commission on Human Rights, at its fifty-first session in 1995, titled "The elimination of violence against women", recommended that marital rape should be criminalized. Right to life is an essential human right guaranteed by customary international law and treaties, and marital rape is a clear infringement of the same. But the Central Government of India has failed to act on any of these impediments.

Recognition & Need for Reforms

In 2012, the Delhi gang rape and murder case, known as the 'Nirbhaya Case', shook the nation to its core. The brutal act raised contentions with regard to the existing laws on rape in India. Soon after, a three-member Commission, headed by former Chief Justice of India, Justice J.S.

[89] 1996 SCC (1) 490
[90] (2017) 10 SCC 800
[91] Convention on Elimination of all forms of Discrimination against Women at https://www.un.org/womenwatch/daw/cedaw/statesmeeting/fourteenth.htm (Last visited on 8th August, 2020)

Verma submitted the 'Verma Committee Report'[92] in 2013. It introduced a plethora of changes by an amendment to the existing legal system, including reference to the issue of marital rape. The Law Commission of India in its 172nd Report [93] considered the issue of marital rape, but chose to overlook the deletion of Exception 2 to Section 375 of IPC on the ground that *"*it may lead to excessive interference with marital relationship*"* and may destroy the institution of marriage.

The Protection of Women from Domestic Violence Act, 2005[94] operates as the standalone legislature allowing women to achieve a violence free home. The legislation was enacted to provide protection against physical, sexual, verbal/emotional and economic abuse to every aggrieved woman irrespective of their marital status. However, the legislation does not aggressively deal with the issue of marital rape. A magistrate under the same, does not possess the power to criminalize the act of rape by a man on his wife, but provide for various other civil remedies.

In another major case, *Queen-Empress v Hurree Mohun Mythee*[95], also known as the Phulmoni Dasi case, an eight year old girl died of excessive bleeding due to sexual intercourse by her husband who was in his mid-thirties at the time. But the husband was convicted, not for rape, but for 'causing grievous hurt by doing a rash and negligent act dangerous to life' with one year of imprisonment.

Rape is not a crime against one's body, but a crime against the person's soul and human rights. The rationale of marital rape exemption were based on the notion of 'perpetual, irrevocable and implied consent'. Professor Amartya Sen, a Nobel Prize winner, had penned that women are no longer passive recipients in a society, but instead active agents of change and social transformation. But changes in law and society go hand in hand. The Indian legal system has prima facie failed to protect women against such an act. It remains a reprehensible crime, and one that is regressive in its true nature. Incorporation of unassailable penal laws to criminalize marital rape are the need of the hour, imposing principal liability to validate the sanctity of every woman in a marital bond.

[92] Verma Committee Report on Amendments to Criminal Law (January, 2013)
[93] Law Commission of India, 172nd Report on Review of Rape Laws (March, 2000)
[94] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005)
[95] (1891) ILR 18 Cal 49

DREAMS AT STAKE: CHILD MARRIAGES IN INDIA

- TAHMINA NAZ

"We have a vision where women and girls live in dignity, are healthy, have choices and equal opportunities."

FORWARD (Foundation for Women's Health Research and Development)

When there is age of playing, going to school and living the life to the fullest the vermilion is smeared on the forehead, the dreams are crushed and the tag of wife is sticked. Child marriage is a marriage or union of a girl below the age of 18 and the boy below the age of 21 years. India contributes to 33% of the total number of child brides in the world. As per the UN, with every child bride, the world loses a future teacher, doctor, scientist, entrepreneur or political leader. The UNICEF estimates that 27% of girls nearly 1.5 million girls gets married before they turn 18.

When the girls starts menstruating, then most parents starts finding girl's match because after menstruation they think the girls have grown up to start their own family. Girls are often considered as financial burden to the family because they cannot support economically. Because their work is restricted in the household chores which has no value. The underage marriage in girls are much more than boys. In case of boy's child marriage, the family members think that if the boy is married early he will get to know responsibility early because his wife's burden is on him. The other reason is dowry because of the financial crisis or out of greed they make their son marry early so that their condition would improve.

Researches have shown that if a girl drops out the school at the age of 14 then there is a big possibility of getting married. Though the government has made education free and compulsory up to the age of 14 years. Child brides have to leave their education because of marriage. If the women is uneducated then there is a very less chance of educating their own children and also to give a fight for inequality. The children married at young age do not understand the household chore's responsibilities because of this fight, abuse, violence etc. takes place. The child brides are not strong emotionally and physically. Basically, at this age the child needs pamper from their parents and if they are married then you can understand the scenario.

The child marriage leads to early pregnancies and the early pregnancies leads to various health related problems like weakness, anemia, miscarriages and a greater risk of STDs. Early pregnancies lead to death of the child while birth or the death of the mother while delivering the child.The research shows that nearly 23% of girls are at greater risk of diseases like heart attack, diabetes, cancer, stroke and higher risk of psychiatric disorders. The risk of maternal mortality is highest at 15 years of age. The highest teenage pregnancy among girls married recorded is in Goa 64%, Mizoram 61% and Meghalaya 53%. Child marriage leads to large families and increase in population. Murshidabad in West Bengal has maximum number of child marriage that is 39.9% followed by Gandhinagar in Gujarat 39.3% and Bhilwara in Rajasthan 39.4%. Across the globe, Sub-Saharan Africa has the highest number of child marriage where four in ten young women are married before attaining the age of 18. The second is South Asia, where three in ten girls are married before the age of eighteen.

When girls married at young age, the girls get deprived of the the Rights mentioned in the Convention on the Rights of the Child. The convention includes the Right to Education, Right to Rest and Leisure and Right to protection from mental or physical abuse. In India, child marriages are turned void under the Child Marriage Prohibition Act 2006. But in many countries there is a law of prohibiting child marriage but there do not have priovision of turning the marriage void. Prevention of child marriage is a part of Sustainable Development Goals of UN which deals with gender equality and empowerment of all girls.

The Laws in India for prohibition in child marriage is Prohibition of Child Marriage Act, 2006. The law extends to whole of India except Jammu and Kashmir and it extends to all the citizens of India and abroad. Child marriage is void if the contracting party (means either of the party) is a child. The provision for maintenance and residence to female party is to be given by boy or if the boy is a minor then his family will look after it. The child born with the wedlock will be legitimate for all the purposes and the custody of the child is to be given to either of the parties by looking after the best interest and welfare of the child. The punishment for male adult marrying a child and punishment for solemnising a child marriage is rigorous imprisonment which may extend to two years or with a fine which may extend to one lakh rupees. According to Criminal Procedure Code 1973, an offence punishable under this Act is non-bailable and cognizable. The state government appoints child marriage prohibition officers who prevents solemnisation of child marriage by taking action as he/she deems fit and to collect the evidence for the effective prosecution of guilty person. It is also the duty of child marriage

prohibition officers to create awareness and sensitise the community on the issue of child marriages.

The supreme court in recent judgement held that the Prohibition of Child Marriage Act, 2006 does not intend to punish a male of age between 18 and 21 years for marrying a female adult. The case was concerned with a boy who married 21 year old woman when he was 17 years old. The court had a look on Section 9 of this Act and ruled that neither does the provision punish a male child for marrying a woman nor a woman for marrying a male child. The provision does not punish even a female adult for marrying a male child because the decision regarding marriage is taken by brides family and the girl has very less role in this matters.
The million dreams are crushed and get imprisoned in the four walls. The child marriage takes away the million dollar smile of a child. There is only the pain and sufferings which are left in their life. The child marriage has declined in the world from earlier that is 25 million child marriage are averted in the past ten years. There is 20% decline in child marriage rate in India from earlier. There is a need to create more awareness and sensitise the people on the issue of child marriages.Girls Not Brides is a global partnership of more than 1400 civil society organisations committed to ending child marriage and enabling girls to fulfil their potential. The making of education mandatory up to 18 years of age and strict implementation of laws can help preventing child marriages.

"Every child is important Every dream is important"

"Educating girls is one of the most powerful tools to prevent child marriage."

Girls Not Brides –The Global Partnership to End Child Marriage

ERASING THE GENDER SPECIFIC NOTION OF RAPE

- MRINALINI DOKKA

Gender Neutrality or Gender neutralism, in this context is the idea that proposes removal of differences between sexes in the formation or enacting of laws. It ensures that the laws of the country are drafted in a way that they apply equally to all the genders without any kind of discrimination. First, it is important to understand why rape happens. Most often it is thought that rapists want to fulfill their sexual desires, but according to Holmstrom and Burgess' behavioral studies although rape always included power, anger, and sexuality, sexuality was never the dominant theme. The conclusion was that rape was used as a weapon to express anger or power.[96]

When it comes to rape laws in India, the framework that the victim and perpetrator are women and men respectively has been used. While this is fair enough in the sense that over the years women have been the major victims of sexual assaults and men have been the perpetrators, it does not exterminate the fact that men too become victims to sexual assault and when they do, how do they seek legal recourse?

The Indian penal code has narrowed the victim class only to women and has ignored men and the transgender community. Although children of both sexes are protected against sexual harassment by the POCSO (Protection of children from sexual offences) Act, adult male victims have no option to seek justice. The law only prescribes provisions for sodomy as it is believed that men can only be sodomized and not raped. Lack of statistics to prove that men can also be raped by men and women has led to the idea that men do not really suffer from sexual harassment. The Delhi-based Centre for Civil Society found that approximately 18% of Indian adult men surveyed reported being coerced or forced to have sex. Of those, 16% claimed a female perpetrator and 2% claimed a male perpetrator.[97] There have been many men coming out with their traumatic experiences of being forced to sexual intercourses and literally fulfilling all the descriptions under section 375 of the IPC. The framework of the IPC is in such

[96]Marita P. McCabe and Michele Wauchope, *Behavioural Characteristics of Rapists*, 11 (3) Journal of Sexual Aggression 235 (2005), available at http : //www.hawaii.edu/hivandaids/Behavioural_Characteristics_of_Rapists.pdf (Last visted on July 22, 2020).

[97]Center for Civil Society, *India's law should recognise that men can be raped too,* available at https://ccsindia.org/indias-law-should-recognise-men-can-be-raped-too (Last visited on 29th July 2020)

a way that women are considered incapable of committing crimes of power over one another.[98] This also means that women harassed by women do not have any law protecting them. In this article, the reasons for gender neutrality in rape laws and various cases and bills proposing the same will be highlighted and discussed in brief. It is important to note that neutrality concerning the victim and the perpetrator respectively are two different and important aspects to be taken into account.

The reasons for the need of gender neutral rape laws are quite a few, out of which the most important ones are:

1. **The Notion that only men can rape is false.**

According to section 375 of the Criminal Law Amendment act, only penile-vaginal penetration does not amount to rape. This amendment act came into action after the infamous Nirbhaya Case in 2013. Insertion of objects, oral and anal penetration also constitutes rape which is very well possible by women and cases as such have also been reported. As stated before, the fact that women are not really taken into account as being perpetrators is often ignored because of the stereotype that women carry about being naturally caring and that they do not get as aggressive as men.[99] Another reason for this is the incidents going unreported. Most often men find it humiliating or "not manly" to be assaulted by a woman. This ideology is deep rooted into patriarchy. Hence, the imbalance of sexual offences involving women as the offenders is predominantly the reason why rape of men never comes into light.

2. **The idea of Implied Consent**

Most often, it is implied that any kind of bodily reaction in men during sexual assault is implying his consent. Sarrel and Masters, in their study of eleven males sexually assaulted by females said that, "Men or boys have responded sexually to female assault or abuse even though the males' emotional state during the molestations have been overwhelmingly negative — embarrassment, humiliation, anxiety, fear, anger, or even terror."[100] These physical

[98]The Criminal Law Blog, *Gender Neutral Rape Laws: Need of the Hour* (May 2020), available at https://criminallawstudiesnluj.wordpress.com/2020/05/01/gender-neutral-rape-laws-need-of-the-hour/ (Last visited on July 31st, 2020)

[99]Center for Sex Offender Management, *Female Sex Offenders* 3 (March 2007), available at http : //www.csom.org/pubs/female_sex_offenders_brief.pdf (Last visited on July 21, 2013).

[100] *Id.* at 516.

responses may be confused by the victim as indications of pleasure or unrecognized consent.[101] These are some important facts that have gone unnoticed and have hence led to the notion that the concept of consent with men does not exist. The psychological impacts on men are quite similar to that of women, apart from the societal burden on women.

3. **Women and Men being victims of rape by their own gender is very much possible.**

There have been numerous cases of non heterosexual sexual assaults. This is very much prevalent in homosexual relationships and within the LGBTQ community. It becomes easier for homosexual partners to rape as there is absolutely no way the victim can file any kind of compliant against his or her partner. "The relationship between rape and homosexuality can be best understood by studying male rape. Offenders may deny homosexuality and confuse an aggressive active behaviour with a masculine behaviour. They may project their homosexual feelings onto the victim. In the aftermath of rape, the victim may be ashamed of having lost control and may question himself about his real sexual identity." [102] According to data collected by Centers for Disease Control[103], lesbians and bisexual women are at a higher risk for experiencing intimate partner violence. In Priya Patel v. State of M.P, it was held that a woman can not intend to commit rape.[104] Some cases in other jurisdictions like *People v Liberta*[105] The court of appeals rejected the claim that men cannot be raped by a woman. Such judgments fail to see in depth the gravity of intention of a Woman to rape more than the possibility of it happening, which in my opinion is very flawed and illogical. Hence, there is a dire need to make rape in India gender neutral as anybody- a woman, man is capable of raping another human being irrespective of which gender they belong to.

4. **Right to Equality**

Article 14[106] of the Constitution of India ensures equality and equal protection of law to everybody in the Country and this is further strengthened by article 15[107] which states that

[101] *Id.* at 517.
[102] National Center for Biotechnology Information,*Rape and Homosexuality* (1990) ,available at https://pubmed.ncbi.nlm.nih.gov/2118217/ (Last visited on August 1st, 2020)
[103] National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998), available at http : //rainn.org/get-information/statistics/sexual-assault-victims (Last visited on July 16, 2013).
[104] (2006) 6 SCC 263.
[105] 474 N.E. 2d 567, 577 (N.Y. 1984).
[106] Article 14, Constitution of India.
[107] Article 15, Constitution of India.

discrimination on the basis of gender is prohibited. This clearly means that both men and women in the country deserve the same protection from rape. Although Article 15(3) states that exclusive provisions can be made for women and children, more number of female victims does not mean no male victims. In fact, after the decriminalisation of consensual homosexual intercourse, the rape law should have become stricter. This is because the idea of homosexual intercourse has been accepted and hence no room for sexual violence should be given. If it is possible for people to accept that homosexual intercourse can take place, why is it that same sex rape is not given any attention at all? Furthermore, if same sex rape is very much a possibility, why are women not considered capable of being offenders and why is thought that men cannot be victims of rape?

5. The Transgender community

Now that transgender is also recognised as a separate gender in the country, it is necessary that even the transgenders receive the same protection from rape laws. The People's Union for Civil Liberties- Karnataka investigated on the human rights violation of transgender community and observed the sexual harassment that was caused to the hijras by the police by touching them inappropriately, stripping them naked and in some cases sexually molest them.[108] By only believing the male on female theory of rape, the law is forcing the transgender to identify as one of the two genders only. It also inadvertently reinforces the heterosexual nature of the legal framework.[109]

To combat all the indifference and problems arising due to this predetermined characterization of the framework by confining it only to male-female rape, there have been numerous amendment bills, cases and reports where these issues have been raised and proposals as to how the laws can be made in such a way that they benefit people of all genders have been suggested. In this leg of the article, I will be tracing the developments right from the very first case where the question of Gender neutrality was first raised. In ***Sudesh Jhaku v KC Jhaku***[110]**,** the issue of gender neutrality in rape law was first raised in this case by an advocate from Delhi High Court. The issue began with the question of whether the definition of rape prior to the Criminal Law amendment Act, 2013 could be interpreted to include non penetrative sexual

[108]PUCL-K, Human Rights Violations Against The Transgender Community (2003).
[109]Harshad Pathak, *Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law,* 11 Asian J. Comp. Law 367-397
[110]1998 Cri LJ 2428.

acts. The case further went ahead to discuss gender neutrality but the judge had delivered that the relief asked for could only be given by a legislative amendment. The question raised in this case was eventually challenged in the case of *Sakshi v Union of India*[111]. Following this, in the **172nd report of the Law Commission of India**[112]**,** the Court had directed the Law Commission of India to handle the issue raised by Sakshi. The report proposed to widen the scope of section 375 of the Indian Penal Code and make it gender neutral. The report also suggested that the term "rape" should be replaced with "sexual assault" - a gender neutral term so that it is not only confined to penile-vaginal penetration and it can include penetration by other objects/body parts too. The special feature of this report was that it proposed making the law gender neutral for both the offender and victim. Whereas in the **Justice Verma Committee Report of 2013**[113]**,** it was only proposed to make the victim class gender neutral.

After the 2013 Delhi Gang rape case, the **Criminal Law Amendment Act, 2013**[114] brought in a series of changes in the Indian Penal Code that led to stricter sexual assault laws but did not make any of it gender neutral. The most recent proposal for change was brought out in the **Criminal Law Amendment Bill, 2019**[115] by KTS Tulsi who proposed making rape a gender neutral offence by bringing out a series of recommendations like changing 'penis' or 'vagina' to 'genitals' or by replacing the word " a man" with "any person" etc. Nothing has still been heard about the progress of the bill.

It is essential that Rape should be made a gender neutral offence for the simple reason that the offence goes beyond the pre characterised male-female framework. We have seen in the recent times, men have come out with their stories of sexual harassment by both the genders, how women have highlighted the fact that they have been sexually abused and raped by women and that it is very much a possibility. One of the main concerns of people against this gender neutral idea of rape is that this crime is majorly committed against women and it gives men an upper hand to get away with the crime. It increases the possibilities of the victims to face counter complaints and complicates the entire situation for the female victim as the effects of rape on women and men are very different. Though this may be true to a certain extent, we should not

[111] 1999 CriLJ 5025.
[112] Law Commission of India, *172nd Report: Review of Rape Laws* (New Delhi: Ministry of Law and Justice, Government of India, 2000)
[113] Justice J.S. Verma, Justice Leila Seth and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law*, 416, (2013) available at http : //www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.
[114] *Criminal Law (Amendment) Act, 2013* (India)
[115] *Criminal Law (Amendment) Bill, 2019 (India)*

forget that lesser crimes **do not** mean no crimes and men deserve to avail their basic human rights too. The principle of feminism plays an integral role here.

SUICIDES - A SOCIO- LEGAL LENSING

- ASHANA MISHRA

"Nine men in ten are would-be suicides."

- BENJAMIN FRANKLIN

INTRODUCTION

In basic parlance suicide is the intentional ending of one's own life. This definition comes across as the simplest explanation of the act but the backdrop could be a chain of multiple causative and compelling factors. The society abhors suicidal acts as it views it from the lens of succumbing to the clutches of various forms of weaknesses. The background to such thinking often stems from a lack of empathetic understanding. The concept of suicide has been subjected to debates myriad times and it still remains debatable. It has often been cloaked with different sets of understanding; while some may deem it as a disease, the others may view it as a crime. A broad understanding of this phenomenon is thus crucial.

SUICIDE AS VIEWED FROM THE SOCIAL VANTAGE POINT

The social anatomy rests on two fundamental perspectives. One that involves how the society views an individual and the other is how the individual views the society. It is between these two paradigms that the tug exists. Breaking down the former would imply the preconceived ideas that the society thrusts on an individual explicitly or impliedly and to conform to the norms accompanied by a latent threat that the slightest digression would be followed by ostracization. This ostracization often has a glaring impact on an individual and encompasses several factors that could gradually lead to the degradation of the mental faculties. These acts of the society are not visible in a clear manifested form and it often goes unnoticed. The resultant effect in extreme cases could be a step to putting an end to one's life by being submissive to the self created norms of the society. The accountability factor in most cases often has a narrow escape as it is impossible to pin point and cast aspersions on any single element that could be considered responsible for driving the individual to take that extreme step.

A notable point here is that the term 'society' here not only refers to the external idea that there exists a society but also one that we create for ourselves in our mental domain. It is often the

self driven demons, in many cases influenced by external factors that take center stage in eclipsing man's innate ability to take rational decisions and thus in extreme cases compelling one to question their very existence.

The other perspective that deals with how the individual views society is not completely detachable from the former perspective as it is often induced by influence from the former. How one perceives is backed by how one is taught to perceive and thus the interrelation and correlation can never be ruled out between the two perspectives. An individual's perspective to view society can often be understood as the bearing that events have on his existence. The events could branch out from various factors, the level of competition of scaling heights, level of growth and stagnancy subjective at different strata and where the individual is placed in the society, the bar that the individual has set for him to conform to the ongoing events and his failed attempts in doing so. All of these factors are but the creation of minds that does not shelter those who cannot withstand the self created challenges set forth. The resultant effect again in extreme case could be an end to one's life.

THE LEGAL PERSPECTIVE

In the legal domain killing is a crime. But the pertinent concern is can suicide be placed under the category of a crime. The element of criminality in cases of suicide would be farce as a crime is punishable and in cases of suicides the question of the end result being punishable is ruled out since the subject does no longer exist. However, the laws have undergone major transformation in lifting the veil of pedantic approach and thus ushering in a more liberal interpretation with an element of sensitization in viewing the act of suicide or in many cases the attempt to commit suicide from a broader perspective.

While in India the Constitution of India guarantees the protection of life that is entailed in Article 21[116] . Right to life is perhaps the most fundamental among all the rights guaranteed to the people as it stands on the pedestal of paradigm importance and on which rests the threshold of all other rights. The question of exercising other rights does not arise without the existence of 'life' and a subsequent protection of the same.

ANALYSIS OF THE LEGAL DIMENSIONS

[116] 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

The Indian Penal Code, 1860(IPC for brevity) – Section 309[117] has been a subject of discussions and deliberations for years now to identify the criticisms associated with it. The criminality in cases of an attempt to suicide had gained backlash at various levels. The central idea on which rests this understanding was that the act of suicide is often the result of multiple complexities that plagues the mind of an individual and to subject him to the confines of prisons would only add to the misery. The action thought of was to target the root cause and not to drag life battles into the conundrums of legal battles and make it even worse for the ones who germinated the thoughts of putting an end to their life without our effort of even knowing the cause behind it. The Heydon's principle of identifying the mischief and to weed out its root cause was in defiance of Section 309 of the IPC.

JUDICIAL SCRUTINY OF THIS PHENOMENON

1. In *Maruti Shripati Dubal v. The State of Maharashtra*[118], the Bombay High court had rested its judgment on the fact that section 309 of IPC is in absolute derogation to the ideals of the protection of life and the equality principle as enshrined in the Constitution of India. The Court also demarcated the thin line between physical and mental factors attributing to the commission or attempt to suicides and also laid down in vehement terms that any attempt to suicide on account of failure of mental faculties requires a psychiatric treatment and that any such attempt on account of physical illness requires medical supervision and nursing care. In both such cases confinement to prisons was highly condemned and thus section 309 of IPC was put under scrutiny of testing constitutionality. This also paved way for the Mental Health Act, 1987 (now the act of 2017).
2. In *Rathinam v. Union of India*[119], the Apex Court had reiterated that any attempt to suicide should not fall under the guise of a crime. It requires a sensitive handling of the issue and calls for a more humane approach rather than exposure to dark confines of walled prisons.
3. In *Gian Kaur v. State of Punjab*[120], the Apex Court however had overturned the earlier laid down judgments and held that Right to life does not entail in it the Right to die and

[117] Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year 1[or with fine, or with both].
[118] 1987 CriLJ 743
[119] AIR 1994 SC 1844
[120] AIR 1996 SC 946

thus attempt to suicide could not escape the lens of criminality. However, the Right to die with dignity element still remained unanswered.

4. In *Common Cause(A Regd. Society v. Union of India & Anr*[121], the Supreme Court in a much awaited judgment had laid down that Right to life under Article 21 of the Constitution does entail Right to die with dignity. The element of dignity was crucial to the backdrop of the case. The Supreme Court thus gave a nod to passive euthanasia and to the concept of living wills. This implied that people who were in a persistent vegetative state could take recourse to the former while people suffering from terminal illness could resort to the latter thereby refusing further administration of medical treatment. The Supreme Court had also laid down strict guidelines pertaining to the same.

THE WAY FORWARD – SENSITISATION AND EMPATHY

An absolute elimination of suicide or attempted suicides would be an impractical expectation as the statistics do not support this idea and counters such expectation in a contrary narrative. The need thus is the undeterred efforts to try and reduce the numbers of suicides in the statistical charts and this can be done by instilling a more sensitized and empathetic approach in this direction. This approach should penetrate the different strata of society thus ushering a change in their outlook in preventing loss of lives and gradually eliminating this malaise surrounding suicides.

[121] W.P. (Civil) 215 of 2005

LEGAL SANCTION TO LGBT RIGHTS: A CHANGING ENVIRONMENT IN THE EMPLOYMENT SECTORS

- SNIGDHA CHANDRA

INTRODUCTION

This paper will discuss the Rights of LGBT people and the Right as being a human in the Indian society as well as majorly in the employment sector. The paper is divided into two sections followed by further sub sections. The first section covers the basic difference between LGBT Rights and Human Rights and also a bit of the historical background of LGBT Community. Under the first section, it will also highlight the origin of the LGBT community and how they came into existence in Indian Laws leading to their dignity and recognition in the society with all the constitutional and legal rights a normal human being is entitled for, with the support of the landmark judgment of *Naz Foundation.* Furthermore, it also discusses the consequences they still face on denial or acceptance by society after getting legal sanctity. The second section of the paper emphasizes the changing scenario for the LGBT people in the employment sectors. The question as to whether these LGBT people get employee recognition, benefits and security in the workplace will be answered through this paper.

Keywords: LGBT, Human Rights, Employment sector, Legal Sanctity, Naz Foundation.

LGBT: AN OVERVIEW

LGBT is an acronym for a community which represents Lesbian, Gay, Bisexual and Transgenders. People who belong to LGBT community attract either to same sex or both sexes and some of their gender identity is assigned at birth. It is difficult to trace their existence as they were forced to conceal their facets from society for reasons like religion, personal and social. In the past, various terms have been used for the LGBT community to describe their existence and their characteristics. These people were referred to as deviant, invert or a sodomite which was against the order of nature. They were not accepted by society, their rights were not recognized, and they were asked to leave the surroundings and move far away from the normal social life. A flow of question here arises that 'Aren't they human beings?', 'Don't they deserve to be treated like humans?' 'Who will protect their rights?' 'Are they capable

enough to work in the corporate world?' 'Are they protected under employee protection policy?'. Let's find answers to these questions.

CONSEQUENCES OF DENIAL OF LGBT RIGHTS

The words rightly said by the gay rights activist and the editor of India's first gay magazine, Ashok Row Kavi, *"Your sexuality is just another facet of your personality. It is like the colour of your skin or the colour of your hair. It tells you who you are, but does not tell you what you are capable of doing.*[122]*"* Denial of the recognition of rights for any group of individuals is a denial of their human values. It has a profound impact on livelihood for any individual. It is a natural phenomenon that when we do something which is against societal norms, we are being tortured or harassed by the society. Now, think of that person who is from its birth been rejected or boycotted by society? For LGBT people, it result in discrimination from housing and jobs; there might be a lack of ability to pay for health care and financial securities; harassment and stress which affects the mental health and/or increase in the abuse of substances, smoking, over-eating, or suicide; isolation which leads to depression; sexual risk-taking i.e. exposing oneself and loved ones to sexual health risks, including HIV; physical abuse and injuries; and/or torture and death. This led LGBT people to the ultimate human rights violation.[123] Let us read how they got their identity with respect.

LEGAL SANCTITY TO THE LGBTS

In September 2018, the Supreme Court of India had decriminalised section 377 of Indian Penal Code, 1860[124]. It was a long wait for the LGBT Community in India. The final decision on the landmark judgment of the *Naz Foundation*[125] created a history by securing their dignity, privacy and providing equality to them.[126] Section 377 was applicable to the homosexuals engaging in 'carnal intercourse against the order of the nature'[127]. In practice, the law has been enforced exclusively against homosexuals as a tool to threaten and harass LGBT persons. The

[122] Banerji Aparna, Burns Kevin and Vernon Kate, Creating Inclusive Workplaces for LGBT Employees in India, (2012).
[123] Ibid (2012)
[124] The Indian Penal Code, 1860 (45 of 1860) as amended by The Criminal Law (Amendment) Act, 2018 (22 of 2018).
[125] Navtej Singh Johar v. Union of India W. P. (Crl.) No. 76 of 2016
[126] Mayur Suresh, This is the start of a new era for India's LGBT communities, The Guardian (2018)
[127] Supra

judicial approval became a protection shield for these people as they received an antidote to the word *'hijras'*. It is time for these people to get their identity with dignity and be treated as equal to normal human beings at every place.

CHANGING ENVIRONMENT FOR THE LGBTS POST LEGAL SANCTION IN THE EMPLOYMENT SECTORS.

After getting the legal recognition to the LGBT community, it is now time to shape the judgment into reality and allow homosexuals to enter into the corporate world. The legal recognition has directly provided equal rights to the LGBT people including employment in various companies, industries or corporate sectors. It is the responsibility of such sectors to provide LGBT people a free, secure non-discriminatory work environment so that these people can also feel an equal part of normal livelihood in a society. Human Resource departments and company policies play an important part where language at the workplace, chain-of-command, or decision-making responsibilities are open and respectful, and are not based on gender or identity association. Such change requires continuous follow-up which cannot be achieved through a single policy, action, or reaction. It may be difficult for companies to allow such people to work with them but a fact cannot be denied.[128] It's not enough for companies to use a 'rainbow' filter on their brandings[129] or blogging and creating 'pride banners' to just flash them on their website but this has to be accepted wholly and should become a part of the corporate family. Apart from basic living rights, there are some Human Resource policies which have been formulated so that the companies could follow and provide basic employment opportunities to their employees. These policies are formulated in such a manner that every employee is given benefits with certain rights and privileges such as a friendly working environment, good salary with incentives, cab facility for employees, etc.

CURRENT SCENARIO

In 2019, it was observed in many MNCs that companies are encouraging their policy formation in lieu of the verdict of 2018. But still, they are restricted to only blogging, writing articles about LGBT people, interacting with them through virtual platforms[130]. The LGBT people themselves have also been encouraged to be vocal and articulate in asserting their rights. The

[128] Meena Kavita, Diversity Dimensions of India and Their Organization Challenges: An Analysis, Volume 17, Issue 7, Ver. II (July 2015).
[129] Venugopalan Anjali, Indian MNCs openly allying with the LGBT cause, Economic Times Bureau, June 2019.
[130] Ibid, 2019.

'Pride Walks' were organised recently to remark and celebrate the completion of two years of the legal recognition of LGBT people in India, but that is not sufficient to accept the reality. However, it was noticed that many of them wore masks to conceal their identity in fear that their family or relatives or colleagues would recognise them.[131] After the Indian judiciary struck down section 377, a job fair was conducted in Bengaluru, RISE which was a major step towards imaging equality in employment[132]. Indian companies are now in competition with the global companies that have increased the strength of their workforce environment, including LGBT individuals. Several Indian companies are developing as multinationals and are recognising the growing requirement for diversity and inclusion[133]. It was also observed that most workplaces do not cover protection from sexual harassment for women transgender, which became a tough fight for them as there is no company policy that protect their dignity, says L. Ramakrishnan, public health and human rights worker at SAATHII, NGO, Chennai[134]. Most of the Indian companies are trying to adopt communal change and turn it into a full fledged diverse workplace engaging with LGBTs with equal rights as other employees. For example, in 2019 , Uber was observed interviewing candidates without any biases. Meanwhile NestAway provided probationary training to help understand the workforce to the transgenders. On the other side, Goldman Sachs positioned an LGBTO+ employees as managing director of the company to mentor the Gender sensitization programme. Likewise, Godrej offers medical insurance coverage for employees wanting to undergo gender reassignment surgeries. The most luxurious hospitality brand, The Lalit, provides scholarships to the LGBT people to study hospitality at The Lalit Suri Hospitality School[135]. These active steps towards the betterment of these people shows that the Indian workplace culture is steadily trying to cut down the stereotype thinking about the transgenders and moving ahead taking along the society as a whole.

CONCLUSION

Despite being a landmark verdict that has given legal recognition to the LGBT community, there has been an obstacle of religion and family values that the homosexuals never got their identity amongst the heterosexuals and hence, always violated their Fundamental Right as an

[131] supra (October 2012).
[132] Somak Ghoshal- Is post-Section 377 India ready for its LGBTQ+ workforce? 31 Aug 2019, Livemint.com
[133] supra (October 2012).
[134] supra (June 2019).
[135] supra (August 2019).

individual. Since homosexuality is decriminalized and therefore there is no direct applicability of anti-discrimination law to protect LGBT employees in the workplace, it is a challenge for Indian companies to find a key driver to address the needs of LGBT employees even in accordance to the law[136]. This simultaneously creates a challenge for companies to work on such policies which provide security, privacy and dignity at the workplace. The fact is that there is no specific law to protect LGBT individuals, since Article 15(1) of the Constitution of India prohibits discrimination on grounds of sex and Article 21 provides for right to life and personal liberty[137]. Certain discriminatory acts towards the LGBT community shall be considered violative of these provisions. It is a hope and dream for every queer individual to work freely without any societal obstacle in their life.

[136] supra (July 2015).

[137] The Constitution of India as amended by The Constitution (One Hundred and First Amendment) Act, 2016

FORCE MAJEURE, THE DOCTRINE OF FRUSTRATION AND THE INDIAN ECONOMY

- ARSHEIYA MUNJAL

The Corona Virus pandemic has made it clear that it is here not only to harm the health of millions of people, but also the global economy. During this economical crisis, it has become very challenging for parties to perform their contractual obligations. The law does permit a way out for such cases, which is why every business has one thing in mind: Force majeure and the doctrine of frustration. While large scale corporations and businesses have an army of lawyers who make sure they have force majeure in their contracts to rely upon, it is safe to say that most of the small-scale businesses in India do not.

LEGAL VIEW

Force Majeure is a French term corresponding to "Vis Majeure", which in Latin means "Superior force".[138] The Black's Law dictionary describes Force Majeure as *'An event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled'*.[139] This is an event that is beyond the reasonable control of the affected party, an event that hinders, prevents or impedes the affected party's ability to perform its obligations under the contract and an event that the affected party must have taken all reasonable steps to seek to avoid or mitigate.[140]

Section 32 of the Indian Contract Act, 1872 refers to the Enforcement of contracts contingent on an event happening, and states; "*Contingent contracts 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."*[141] Hence, if a force

[138] Tarun Dua & Geetanjali Sethi, *India: Force Majeure In Times of COVID-19: Challenges And The Road Ahead,* Mondaq, 11 May 2020.
[139] BRYAN A. GARNER, BLACK'S LAW DICTIONARY, page (11 ed. 2019).
[140] 18 CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 111-112 (2009).
[141] The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India).

majeure event occurs, the existence of such a clause in contracts can provide a temporary relief to the parties from performing their obligations.

Furthermore, the basic principles of the doctrine of frustration originated from the case of Taylor v. Caldwell, when the English court stated *"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."*[142] The doctrine of frustration is applicable in two cases; If the object of the contract becomes impossible to perform or if such an event occurs, making the promise of the contract to become impossible.[143] Section 56 of the Indian Contract Act, 1872 deals with the Agreement to do an impossible act, reading; "*Contract to do an act afterwards becoming impossible or unlawful — A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*"[144]

While both force majeure and the doctrine of frustration talk about relieving contractual parties of their obligations, force majeure suspends the contract for a specific time period, hence relieving parties from their contractual obligations for the time of the impossibility of performance, whereas the doctrine of frustration views the contract as void if not performable.[145]

JUDICIAL VIEW

The Indian judiciary is not lenient when it comes to force majeure and the doctrine of frustration. The case of Dhanrajamal Gobindram vs Shamji Kalidas And Co. was heard by the Supreme Court, which ruled against Force Majeure and gave the widest definition of force majeure, stating; *"the main intention of this clause is to save the performing party from consequences which are outside the control of the party".*[146] In the case of Alopi Parshad & Sons, ltd vs The Union Of India, the court held that the contract in question would not be frustrated only because the circumstances of making the contract had changed. They also built

[142] Taylor v. Caldwell,122 ER 309 (1863).
[143] Monika, *Doctrine of Frustration under Indian Contract Act,* ipleaders, Mar. 16 2019.
[144] The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India).
[145] Priyadarshi Debashis Satapathy, *Doctrine of Frustration and Force-Majeure Clause,* LSI.
[146] Dhanrajamal Gobindram vs Shamji Kalidas And Co., (1961), 1961 3 SCR 1029 (India).

the precedent that commercial hardship does not support frustration, and hence cannot excuse performance of the contract.[147]

In the case of Raja Dhruv Dev Chand vs Harmohinder Singh & Anr the court had to set precedent concerning the matter of doctrine of frustration applying to lease deeds, coming to the conclusion that it does not.[148] Moreover, in the case of Satyabrata Ghose vs Mugneeram Bangur & Co. the honorable court stated that English law does not bind us and we must follow Section 56 of the Indian Contract Act, 1872, proceeding to state that the doctrine of frustration does not apply for the sale and purchase of the specific land, despite the then war like situation of the country.[149]

Hence, when the coronavirus pandemic spread to India, in the case of Ramanand & Ors vs Dr. Girish Soni & Anr the Delhi High Court followed precedent to state that relief for rent would only be available if the government orders so, or if it is mentioned in the specific contracts. The court emphasized that section 56 of the Indian Contract Act, 1872 does not apply to sale and lease deeds.[150] Hence, without an existing force majeure clause, the only options are to either perform the contractual obligations or to render the contract void.[151]

ECONOMIC VIEW

The Indian Government ordered a forty-day unprecedented lockdown in India, which was bound to have a negative effect on the Indian economy. Businesses were not operational throughout the country, work from home became the new normal, supply chains were broken and the unemployment rate in India increased from 8% to 23% during April and May.[152] The Ministry of Finance stated that COVID-19 must be considered a natural calamity, and hence the clause of Force Majeure may be imposed.[153] While this has a limited purview, it goes for all commercial contracts.

[147] Alopi Parshad & Sons, Ltd vs The Union Of India, (1960), 1960 SCR (2) 793 (India).
[148] Raja Dhruv Dev Chand vs Harmohinder Singh & Anr, (1968), 1968 SCR (3) 339 (India).
[149] Satyabrata Ghose vs Muhneeram Bangur & Co., (1953), 1954 SCR 310 (India).
[150] The Transfer of Property Act, 1882, No. 4, Acts of Parliment, 1882 (India).
[151] Ramanand & Ors vs Dr Girish Soni & Anr, (2020), RC. REV. 447/2017 (India).
[152] *Unemployment Rate in India,* CMIE, https://unemploymentinindia.cmie.com.
[153] Ministry of Finance, *Office Memorandum,* Gov. of India (19 Feb. 2020), https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.

However, what about small-scale enterprises, who are the backbone of the Indian economy? For a country like India, such businesses increase employment and are a source of income for the local community. They help with economic development and infrastructure, while decreasing poverty and slums, leading to more equitable distribution of national income. Additionally, they need less capital to operate, which is perfect since India has low capital formation. Large corporations rely on these businesses, which is why such businesses being in trouble would have a multiplying effect on the Indian economy. In fact, the Ministry of Home Affairs in March exercised its powers under Section 10 (2)(1) of the Disaster Management Act, 2005 and directed all State and Union Territory governments to take actions for the waiver of rent; which failed to happen.[154] Therefore, small businesses without force majeure would legally either have to perform their contractual duties or render their contracts void.

It must be noted that during the Great Depression, Minnesota passed a law that allowed courts to extend the period of redemption from the foreclosure of sale. The Supreme Court upheld this as the law intended to safeguard the vital economic structure of the state.[155] Furthermore, Singapore released the COVID-19 (Temporary Measures) Act, 2020 in lieu of the spread of the virus, to temporarily protect contractual parties from being sued.[156] In addition to this, China's Council for the Promotion of International Trade has given thousands of force majeure certificates in order to safeguard dying businesses.[157] The acts of these countries come to show how vital force majeure is for the preservation of economy.

Instead, the Indian government decided to arrange a special economic relief package - The Pradhan Mantri Garib Kalyan Yojana, which claims to be giving food grains to over 80 crore Indians in need,[158] and to help ensure employment for low wage earners in organized sectors.[159] However, what India needs is a "circuit breaker" – force majeure. Small scale businesses such as restaurants, small shops, low-income schools, etc. all need to preserve liquidity since it is this pandemic is clearly not leaving anytime soon, and force majeure is the legal way to help small-scale businesses, which the judiciary must support. We must work towards making these

[154] Seema Jhingan & Ankit Sahoo, *India: Possibility of Non-Payment of Lease Rent Due to COVID-19,* Mondaq, 16 Apr. 2020.
[155] Manu Seshadri, *India Needs Legal 'Circuit Breaker' to Save Economy Amid COVID-19*, The Quint, 16 Apr., 2020.
[156] *Id*.
[157] *Id*.
[158] Ritesh K Srivastava, *Pradhan Mantri Garib Karyan Yogana: All about Centre's scheme to help India's poor,* zeenews, Jun. 30, 2020.
[159] *Id*.

small businesses more financially independent as giving away taxpayers' hard earned money under an economic relief package may work till some extent, but at the same time increases dependency on the government.

CONCLUSION

The COVID-19 pandemic has proved to be damaging for the global economy, and the legal way out of this nightmare is force majeure and the doctrine of frustration. However, the Indian Judiciary has always been against this, and while that might work for the country, times change and the judiciary must change its views too. It must be kept in mind that small-scale businesses are the backbone of our economy and the government should give these businesses a chance to redeem themselves by the way of force majeure and the doctrine of frustration, instead of using taxpayers' money which could be put towards other development areas. In fact, world leaders like The United States of America, Singapore and China have done this in order to protect their economies. During this unprecedented time India needs to break its cycle, and this should be the first step.

IF ONLY THE SKY IS THE LIMIT

- AMRUTA S. KADAM

"Law and technology produce together, a kind of regulation of creativity we've no seen before"

-Lawrence Lessig

Until a few years back India had imposed a blanket ban on usage of UAV (Unmanned Aerial Vehicle) due to security reasons. Since then Indian brains have constantly worked hard to mend its shortcomings so that India could also run in this global race with its updated technology. It could have been a terrible curse for India to curb the use of such a powerful invention and limit its potentiality to just a few, therefore, UAV's which were dominantly used for military purpose are now even being used by civilians, for commercial and humanitarian purposes. The government, for the long-run, has recognised its importance and has passed various legislations to regulate the use of such UAV's. In India UAV's are regulated under - AIRCRAFT ACT 1934[160] and CIVIL AVIATION REQUIREMENT 2018[161].

The State has provided a detailed set of rules and regulations which are presented via most uncomplicated language and in an elaborated form to avoid vagueness or misconceptions. India's DGCA[162] announced the country's first Civil Aviation Requirements (CAR) for drones in consonance with The Aircraft Rules, which classifies drones according to Maximum All-Up-Weight (including payload)[163]. Under this, not only citizens of India but as well as foreign nationals get an opportunity to use drones with a security provision of the lease. With certain exceptions, all RPA's[164] are required to obtain UAOP,[165] UIN[166], and other operational requirements. All RPA's are enabled through Digital Sky Platform and follow NPNT (No permission, No Takeoff) scheme. For flying in controlled Airspace, filing of the flight plan and

[160] ACT NO. 22 OF 1934 [19th August, 1934.]
[161] Section 3- Air Transport/ Series X Part 1/ issue 1, dated 27 August 2018/ Effective since 01st December 2018
[162] Directorate General of Civil Aviation
[163] Civil Aviation Requirements- S.-3. Categories of RPA
[164] Remotely Piloted Aircrafts
[165] Unmanned Aircraft Operator Permit
[166] Unique Identification Number

obtaining ADC[167]/ FIC[168] number shall be necessary. Specifically, section 13 lists certain sensitive places to discourage any kind of interference by drones. The current laws are comprehensive, thereby covering all aspects which any drone user may have to deal with in present or in future. As observed in section 16 & 17, RPA operators shall have insurance with the liability incurred by them for any damage to a third party that results from the accident. This makes operators liable for inconvenience caused by them to any third party. Such provisions make every pilot responsible for their actions towards others. Even in cases of assistance, it is backed by an intellectual authority.

Besides the great success of 3-D digital mapping of the Raebareli–Allahabad highway executed by NHAI[169] the idea of drone has fascinated lots of entities such as Power Corporation Grid of India[170], India's leading trans companies[171], Indian Railways[172], Coal India [173] etc. Although the development of 'drones' has brought a lot of benefits to the nation we, cannot fail to address its deficiencies. As its use is no more construed to a particular field but also civilians it has given rise to various challenges. According to the Requirements, some of the UAV/operators have been exempted from obtaining UAOP and UIN. While exempting them we are providing immunity to the threats from nano, micro and other exempted category of drones[174]. Their small size and lookalike bird structure make them more vulnerable. A few years ago, a drone was spotted near Rashtrapati Bhavan and until today[175], its detail remains a mystery. This was possible due to the absence of any kind of record. They become impossible to trace, especially when it is about habitual offenders.

[167] AIR Defence Clearance
[168] Flight Information Centre
[169] National Highways Authority of India- NHAI
[170] Shreya Jai, "Eye in the Sky: Drones to Monitor Power Projects," *Business Standard*, January 20, 2016, http://www.business-standard.com/article/economy-policy/eye-in-the-sky-drones-to-monitor-power-projects-116012000482_1.html.
[171] "Sterlite Power to Use Drones (Unmanned Aerial Vehicles or UAVs) for Power-Line Monitoring in India," *EnergyInfraPost*, August 8, 2016, http://energyinfrapost.com/sterlite-power-sharper-shape-use-drones-power-line-monitoring-india/.
[172] Shantanu Nandan Sharma, "How Various Ministries Are Exploring the Use of Drones for Effective Infrastructure Creation," *Economic Times*, June 26, 2016, http://economictimes.indiatimes.com/news/science/how-various-ministries-are-exploring-the-use-of-drones-for-effective-infrastructure-creation/articleshow/52919438.cms.
[173] Debjoy Sengupta, "Coal India Plans to Use Drones to Conduct Aerial Surveys of Exploration," *Economic Times*, February 11, 2016, http://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/coal-india-plans-to-use-drones-to-conduct-aerial-surveys-of-exploration/articleshow/50938224.cms.
[174] CAR 2018 S.-6.1 and 7.2
[175] "Unidentified foreign man spotted using drone near Parliament," The Indian Express, October 18 2015.

Article 21, is the heart of the Indian Constitution where no person's life or liberty can be harmed unless a legal justification is provided for violation. In this context words 'life' and 'liberty' ensure more than just survival or animal existence by comprising within several other rights. Unfortunately, Drone Rules have always found themselves in conflict with Article 21[176] of the Indian constitution and therefore its rules and regulations should be reconsidered to avoid any kind of violation of Fundamental Rights.

One out of many such problems is '*PRIVACY*', though RPA operators are liable for violations under the guidelines. But this perspective is vaguely drafted leaving citizens helpless. Recently a public notice was released by the Ministry of Civil Aviation regarding Conditional Exemption to Government entities for Covid-19 related RPAs operation[177]. This crucial step will aid the State in dealing with pandemic and cover wide surveillance of any area. But as far as violations by State-owned drones and extent of the State's liability are in question there remains a grey area. Privacy is recognised as an inalienable part of the fundamental rights[178]. However, the exercise of the right to privacy guaranteed by the constitution of India is not absolute and the government can impose reasonable restrictions as and when the situation arises in the interest of the community[179]. But again the question is how far The State can compromise an individual's privacy. Data mishaps or drone accidents are likely to take place during surveillance or any kind of activity where civilian's property is under the drone's eye. To avoid any such kind of mishaps, a certain amount of autonomy can be given to local authorities along with a list of liabilities. India, as a signatory to the Rome Convention 1952 about Aircraft may apply favourable principles of Aircraft and liabilities to drones.

Besides, the rules and regulations lack clarity while dealing with drones concerning recreational and non-recreational use. On the other hand, while classifying drones there is no 'element of speed' to be considered. The 'element of speed' is one of the important features of any drone, it should be given due contemplation while classifying drones besides the existing scale of classification. Level of clarity in such provisions should be enhanced for better delivery of justice. Rules and regulations expect the operator to check the worthiness of the

[176] Article 21 of the Indian Constitution- *No person shall be deprived of his life or personal liberty except according to a procedure established by law."*
[177] Released on 02 May 2020
[178] Justice K.S.Puttaswamy(Retd) vs Union Of India And Ors 2017 (10) SCC 1
[179] Gobind v. State of Madhya Pradesh & Anr., (1975) 2 SCC 148 reference- Kartar Singh v. State of Punjab., (1994) 3 SCC 569.

vehicle however, it is difficult and far from reality to check in most of the cases. The operator may fail to have the proficiency required to judge the worthiness of the vehicle. Therefore rather than just verification of pilot, adequate verification for quality and quantity of the team should be prescribed to maintain drones.

To avoid internal or external terrorism and ensure *bona fide* usage, Military department should be made part of law-making to gain a different insight. Their expertise could be used for not only using such RPAS but also for dealing with emergencies. In 2014 an Air India flight almost collided with a UAV at Leh Airport. To avoid such situations in the future 'Advanced Air Traffic Management' infrastructures should be developed. Every day improving technology results in various kinds of advancements. Unlike the traditional one's, the modern drones can now capture sound and data, however, this is praiseworthy advancement but we cannot deny its effect on private data if it is used for *mala fide* interest. Therefore in the light of the Information Technology Act 2000, rules and regulations should be reviewed again to discourage any kind of data misuse

Some of the nations during this pandemic are opting for contactless delivery via drones and same shall be expected from the world's third-largest affected country. The Ministry of Civil Aviation notified Unmanned Aircraft System Rules 2020 regarding owning, ports and manufacturing of drones. These draft rules shall soon be finalised after deliberation between stakeholders. Alongside DGCA permits food chains to conduct the trial for drones BVLOS (Beyond Visual Line Of Sight), thirteen consortia received permission for the same. But we do not have any protocol for accident management or advanced anti-drone system, our infrastructure isn't well equipped to stop unrecognised drones. With most recent incidents cops had to resolve to a violent shooting at the drone to stop it. Therefore it is pertinent for the State to acknowledge the basic problems before setting our foot high. Indeed two steps ahead and three steps behind still keeps us behind.

When one comes across these rules and regulations we get an insight into some serious lacunae's present in the regulations. It is to be noted in this regard that while granting such exemptions, no safeguards have been provided by the Ministry of Civil Aviation to prevent the violation of fundamental rights of individuals subjected to surveillance of these agencies and therefore it becomes mandatory to expand or maybe restrict certain ambits of present regulations. Innovation is efficient in a simulated atmosphere but in actual battleground it

maybe inefficient than it claims. These issues individually require a comprehensive framework for effective regulation in the civilian airspace for privacy, legal concerns and domestic security to be addressed effectively. Needs of every society differ as per their requirements but while laws of UAV's are in its initial stage we can take inspiration from other countries regarding certain aspects to make our legislation strong and fill these voids. No law can be perfect but all we need is a perfect recipe containing some law, technology and justice. To say, it is our fight to ensure that this time *DRONE-ACHARYA* stands on the right side and not against us.

THE COURT OF SUPREME CONVIENENCE

- ANIRUDH KAUSHAL

"Ultimately, the object of depriving a few of their liberty for a temporary period has to be to give to many the perennial fruits of freedom." – ADM JABALPUR

The Supreme Court has turned out to be a transformative court in the truest sense. However while it seems that the court has indeed given the highest regard to the law of the land ie. The Constitution of India, there have been times that the court has almost yielded to the state. In case of conflicts between the state and the citizens, unfortunately, the court has ruled in favour of the state. The present chapter would be in sharp contrast to the preceding chapter. Whereas in the last chapter we went through the transformative version of the constitution being interpreted by the Supreme Court of India, the present chapter would argue that the court has become a court of Supreme Convenience. There has been a drastic shift in the perception of the Supreme Court, in the minds of legal luminaries and citizens.

The same law is interpreted in a different manner by different benches which leads to incoherence and more inconsistency. Such as been the truism of a lawyer in the Supreme Court that the fate of the case depends not solely on the facts of the case but more on the face of the judge. No tenant has ever lost any case before Justice D.A. Desai. Every husband in a matrimonial matter had a tough time before Justice A.M. Ahmadi was known to give a tough time to every husband in a matrimonial matter. Those on death row would vehemently pray that their matter gets before Justice M.B. Shah. It was believed that his respect for ahimsa never made him confirm a death sentence. Thus, Judges are known to bring their life experiences into the judicial calculus. Moreover, the court's attitude has become dependant on the nature of the litigating party.

While in the previous chapters we analyzed how the Hon'ble Supreme Court has been a champion of fundamental rights, having given utmost regard to civil liberties. In this chapter, we will discover the conduct of the court where the court has drifted away from its responsibilities. The Supreme Court of India, therefore, can at best be called a polyvocalCourt: because at any point in time, it speaks with thirteen or fourteen different voices. This leads to judicial inconsistency – which further leads to the gradual weakening of the centripetal force of precedence.

This has led to the deepening of the credit crisis of the Supreme Court not only amongst the lawyers or academicians, but amongst the public in general. It is important to note that the court is regarded as the custodian of basic rights. Therefore, it not only needs to be impartial but should also remain consistent with the very fundamentals of liberty and rights. The independence of the judiciary is regarded directly proportional to the level of mistrust between the executive and the judiciary. Over the years, there has been no observed mistrust. The state has consistently been a winning party.

The importance of bare minimum mistrust between the executive and the judiciary can be understood from the famous case of *Marbury against Madison*[180], This case gave birth to the constitutional weapon of 'judicial review',

The court was termed as an executive court by several academicians and intellectuals. As PratapBhanuMehta notes "The Supreme Court has badly let us down in recent times, through a combination of avoidance, mendacity, and a lack of zeal on behalf of political liberty. What makes this constitutional moment pivotal is that there is "a looming air of irretrievable finality about the changes that are being enshrined"[181].

Let us analyse some of the decisions that made this form of dent in the perception of our Temple of Justice

A. RE VIEWING THE REVIEW

One such instance has been the court's decision in the *Sabrimala Review case*[182]. While in the original case, the court interpreted the constitution in a much transformative sense and lifted the ban on menstruating women from entering the Sabrimala Temple. [183]The decision was welcomed by many of the legal luminaries as well as constitutional courts of different countries. Like all good things, it didn't last long. A review petition was filed which made Supreme court giving a constitutionally surprising decision.According to the settled jurisprudence of the Supreme Court, a review is to be granted in rare circumstances. In *Union of India v Sandur Manganese and Iron Ores Ltd*.[184], the Supreme Court had restated the position of law in the following words :

[180]5 U.S. 137

[181]https://indianexpress.com/article/opinion/columns/the-morning-after-citizenship-amendment-bill-6162497/

[182]Kantaru Rajeevaru vs Indian Young Lawyers Association, W.P. (C) No.373 of 2006

[183] Indian Young Lawyers Assn. v. State of Kerala , 2018 SCC OnLine SC 1690

[184] (2013) 8 SCC 337

"*A review could only be allowed in cases of "discovery of new and important ... evidence", an "error on the face of the record", or another "sufficient reason" that had to be analogous to the first two*."

However in **Kantaru Rajeevaru v Indian Young Lawyers' Association**[185], the case concerning the review of Court's 2018 judgment in the Sabarimala case, the court attempted widening the ambit of review jurisdiction and subsequently affirmed it in a recent order. In the original review judgment, Chief Justice begins the order by observing:

"*Ordinarily, review petitions ought to proceed on the principle predicated in Order XLVII in Part IV of the Supreme Court Rules, 2013. However, along with review petitions several fresh writ petitions have been filed as a fall out of the judgment under review. All these petitions were heard together in the open Court*."[186]

This is problematic in itself because this constitutes hearing together of two different petitions. While one set of petitions had sought review of the impugned judgment using the grounds set out in Art 137, the second set comprised of fresh writ petitions that assailed the correctness of the same judgment.Hearing them together in an open Court is problematic not only because of the scope of arguments being completely different, but also because of the forum within which these cases have to be heard is different too.A review is as far practicably as possible heard by the same judges who delivered the original judgment.[187]

Since the Sabarimala judgment [188]was heard by a bench of five judges, therefore the review would also be heard by the same five judges. On the other hand,a fresh petition, would have to go through a different process. It would in the first instance come up before a division bench of the Supreme Court, where the onus would be on the petitioner to make out an initial case for having the petition admitted. If the petitioner turns successful, again the petitioner would then have to satisfy the division bench hearing the matter that there exists a prima facie mistake in the earlier judgment, hence the same is required to be considered by a larger bench.

The division bench would then refer the matter in question to a five-judge constitution bench, where the entire process would again be repeated. If the petitioner was successful in these stages then the matter would finally go before a seven-judge bench for reconsideration. These processes are fundamentally important as they preserve a crucial pillar of the justice system i.e.

[185] W.P. (C) No.373 of 2006
[186] W.P. (C) No.373 of 2006
[187] P. N. Eswara Iyervs The Registrar, 1980 SCR (2) 889
[188] Indian Young Lawyers Assn. v. State of Kerala , 2018 SCC OnLine SC 1690

the sanctity and finality of judgments of the Supreme Court. It is because the Supreme Court has been vested with the power of spring cleaning the cases.

The problems associated with the order in the **Kantaru Rajeevaru v Indian Young Lawyers' Association**[189]are as follows :

Mixing up Review and Reference :The first problem with the order as clarified above is that it mixes up two fundamentally different things. Perhaps, in no sense can this be called a "review" at all. The primary condition to seek a review is to point out an error on the part of the judgement.The Court fails to point out the chief ingredient "an error on the face of the record" in the original judgment that was under review. Even if this is a judgment about the referral, then how come the petitioners short-circuited the entire existing process for these cases and land up directly before a five-judge bench in proceedings that everyone understood at the time to be proceedings in review.

The Court and the Anticipatory referral ? : If we go by the substance of this order itself, the Court noted that issues surrounding the entry of women into various religious spaces have arisen in respect of any pending cases before this Court, which involves mosques, Parsi fire temples, the legality of female genital mutilation. It is time that this Court should evolve a judicial policy befitting to its plenary powers to do substantial and complete justice and for an authoritative enunciation of the constitutional principles by a larger bench of not less than seven judges.It is essential to adhere to judicial discipline and propriety when more than one petition is pending on the same, similar or overlapping issues in the same court for which all cases must proceed together. [190]

With due respect, this is lofty and compromises the procedural aspect . This appears to be something wholly new altogether, which perhaps would need a new name - "Anticipatory referral." It goes like this chronologically- Supreme Court of India is yet to hear some cases having overlapping issues, so before it hears those very cases, a larger bench will decide those issues. However unless these different cases are heard simultaneously, by five-judge panels of the Court which then throw up contradictory rulings, it has nothing to do with "judicial discipline and propriety" Let us take an example. Sabarimala was decided in 2018. Let's

[189] W.P. (C) No.373 of 2006
[190]W.P. (C) No.373 of 2006

assume the Female Genital case[191] is to be heard next. To an extent that legal questions that have arisen in the latter, resolved in the former, the bench will be bound to follow them

Thereafter, the Court noted that "while deciding the questions delineated above, the larger bench may also consider it appropriate to decide all issues, including the question as to whether the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 govern the temple in question at all. Whether the aforesaid consideration will require grant of a fresh opportunity to all interested parties may also have to be considered."[192]

As can be seen ,this wrenches apart the very spirit of constitutional law. It would not be appropriate for the "larger bench" to reconsider this question that was settled in Sabarimala unless if it was proven to another bench that a mistake had been made warranting reconsideration. The Court does not even minutely attempt to show a mistake that has been made, or might have been made.

The judgment then frames certain issues that could arise in the pending cases, pertaining to an interplay between various constitutional articles. An apparent conflict is pointed out between Shirur Mutt [193]and DawoodiBohra[194], on the issue of "essential religious practices", which needs to be resolved by a larger bench.

The Court finally ends by noting that review petition and writ petitions would be kept pending "until these questions are answered." Therefore it is not the judgment of Sabarimala[195] that has been referred by the court for reconsideration, but certain framed "questions" that are common to Sabarimala case and pending cases – without any finding that Sabarimala had got them wrong.

DISSENT BY JUSTICE CHANDRACHUD AND JUSTICE ROHINTON NARIMAN

The incoherence and inconsistency of this majority judgment was highlighted in the dissent authored by Justice Nariman, writing for himself and Justice Chandrachud J.

In paragraph 2, Nariman J. observes:

"*What a future constitution bench or larger bench, if constituted by the learned Chief Justice of India, may or may not do when considering the other issues pending before this Court is, strictly speaking, not before this Court at all. The only thing that is before this Court is the review petitions and the writ petitions that have now been filed in relation to the judgment in Indian Young Lawyers Association and Ors. v. State of Kerala, dated 28 September, 2018. As*

[191]WP (C) 286/2017
[192]Kantaru Rajeevaruvs Indian Young Lawyers Association, W.P. (C) No.373 of 2006
[193] The Commissioner, Hindu v. Sri Lakshmindra, 1954 SCR 1005
[194]Saifuddin v. The State Of Bombay , 1962 SCR Supl. (2) 496
[195] Indian Young Lawyers Assn. v. State of Kerala , 2018 SCC OnLine SC 1690

and when the other matters are heard, the bench hearing those matters may well refer to our judgment in Indian Young Lawyers Association and Ors. v. State of Kerala, dated 28 September, 2018, and may either apply such judgment, distinguish such judgment, or refer an issue/issues which arise from the said judgment for determination by a larger bench. All this is for future Constitution benches or larger benches to do. Consequently, if and when the issues that have been set out in the learned Chief Justice's judgment arise in future, they can appropriately be dealt with by the bench/benches which hear the petitions concerning Muslims, Parsis and DawoodiBohras. What is before us is only the narrow question as to whether grounds for review and grounds for filing of the writ petitions have been made out qua the judgment in Indian Young Lawyers Association and Ors. v. State of Kerala."

Nariman J. then actually goes on to write a judgment applying the standards required in a review and observes that no grounds for review are made. Nariman J. points out that the arguments that the protests followed the original judgment don't constitute a ground for the Supreme Court to retrace the steps.

Of course one can disagree with the original Sabrimala judgment but that would not give the power to Supreme Court to overstep the review jurisdiction and violate al procedural norms. The bench led by CJI exhibited a disregard for a well-reasoned judgment of a five-judge bench and invented a new method for petitioners to challenge judgments that they don't like This would have profound and very dangerous consequences for rule of law.

The constitution five-judge review bench led by CJI, despite being unable to point out any error appearing in the original Sabrimala judgment "referred" various "questions of law" to a larger bench on the ground that these questions might have arisen in future cases before this Court.The new CJIBobdethen established a bench consisting of nine judges following this " referral-in-review" order. There was opposition from both the side of the bar and the bench since the order seemed curious. The CJI led bench framed a preliminary question of law that "Whether Reference can be made in review petition"[196]. The court framed various questions which were to come up before this 9 judge bench if the 9 judge bench answers the Primary question in affirmative

The court heard the matter at length and eventually concluded that *"* For reasons to follow Reference can be made in a review petition.*"* [197]

[196]Kantaru Rajeevaruvs Indian Young Lawyers Association, W.P. (C) No.373 of 2006
[197]Kantaru Rajeevaruvs Indian Young Lawyers Association, W.P. (C) No.373 of 2006

The arguments made before this bench hold great significance. Eminent Jurist Senior Advocate Fali S Nariman a review petition is usually for correction and the Court cannot exercise its inherent power to unsettle a question that has already been settled. Senior Advocate RakeshDwivedi made a reference to Ram Chandra Singh v.Savitri Devi[198]and pointed out that the Inherent powers of the court cannot be used to further expand the scope of the review.

WHY THIS IS PROBELMATIC?

1. This is problematic because the procedure that was supposed to be followed wasn't followed per se. Moreover through this order., the court has done more harm to the review jurisprudence and rule of law in general. Court has passed an unreasoned order and held that reference can be made in a review petition. This would mean no difference between a review petition and a reference.
2. Subsequently in a later judgment Shah Faesal v Union of India[199], while deciding the question as to whether the challenge to the alteration of Article 370 required to be referred to a bench of seven judges, a Constitution Bench of the Supreme Court observed about the underlying importance of precedent in the following words :

"*When a decision is rendered by this Court, it acquires a reliance interest and the society organizes itself based on the present legal order. When substantial judicial time and resources are spent on references, the same should not be made in a casual or cavalier manner. It is only when a proposition is contradicted by a subsequent judgment of the same Bench, or it is shown that the proposition laid down has become unworkable or contrary to a well¬ established principle, that a reference will be made to a larger Bench.*"[200]

The above observations are in clear contradiction of Supreme Court's order in the Sabrimala Review Case. Hence using its inherent power ,the court has unsettled a settled convention by giving an unreasoned order.

[198]2004 12(SCC) 713
[199]WRIT PETITION (CIVIL) NO. 1099 OF 2019
[200] Shah Faesel v. Union of India ,WRIT PETITION (CIVIL) NO. 1099 OF 2019

THE COURT AND THE SUPREME SETTLEMENT

- **ANIRUDH KAUSHAL**

"Different parts of the Constitution will act and react on each other and the court will have to decide questions arising from such a situation...discharging its duties as perhaps no other court has so far been called upon to do."

- *Kania* ,**Chief Justice of India.**

A HISTORICAL INTRODUCTION

Once upon a time it was really unnecessary to look beyond constitutions. Each represented highest expression of the individual will of a political community, sovereign to the extent it could defend that sovereignty among the community of nations. A state was "conceived of as itself the sole source of legality, *the fons et origo* of all those laws which condition its own actions and determine the legal relations of those subject to its authority.[201]

"A Day of Fulfilment", read the headline of one of the leading newspapers on 26th January 1950, adding further, Today India recovers her soul after centuries of serfdom and resumes her ancient name.[202]The Constitution of India came into effect on 26 January 1950, the day the nation became a sovereign, democratic republic, free from shackles of British colonial rule, and now celebrated as Republic Day. The 299 member Constituent Assembly met in 11 sessions from December 1946 to November 1949 to deliberate on several provisions. The members were indirectly elected by the provincial legislative assemblies and a proportion was nominated by the princely states.

The CA appointed a number of committees to deal with different aspects of constitutional design, and these committees drew heavily on the Government of India Act 1935 as the basis on which the draft of the Constitution was prepared. The initial draft was prepared by the visionary BN Rau after consultation with the Constitutions of the United States of America, Japan, Ireland and Germany. Therafter, the CA then appointed the Drafting Committee which worked on Rau's draft and produced a draft constitution that was debated by the CA at the second reading stage. There were 8600 amendments in total, of which 2 474 amendments were moved. Fifty- three thousand visitors were admitted to visitor's gallery during the period when

[201]WESTEL W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 30 (1924)
[202]Hindustan Times (Delhi, 26th January 1950).

the Constitution was being debated. The eyes were on the makers , the visitors were to see the visionaries create a masterpiece. The final Constitution – the longest in the world – had 395 articles including eight schedules instead of the 243 articles and 13 schedules of Rau's original draft.

The constitution was to be perceived as the basic law of the land, with all the subsequent legislations deriving legitimacy from it. In a manner, the people of India had declared the Constitution of India as a grundnorm. The major question was who was to act as the protector of this realm. The answer was to be found in the grundnorm itself. In the Indian conxtext the task is primarily vested with the Judiciary .The Indian Judiciary is regarded as the custodian of the constitution. The constitution has entrusted the primary responsibility of protecting its subjects on the Hon'ble Supreme Court of India. The role of Supreme Court was aptly described in the Constituent Assembly.

"*It is the right and privilege of the highest Court of the land to interpret the Constitutional law, however, at the same time; it is also the duty of the Parliament to see that objects aimed at in the Constitution are fulfilled or not by the judgement based on such interpretation. If the object is not achieved because judgement comes in the way, it is the provisions of the Constitution here and there.*"[203]

The Constitution makers gave the power to amend our Constitution in the hands of the Parliament by adopting the middle route: making it neither too rigid nor too flexible with the purpose that the Parliament will amend it so as to cope up with the changing needs and demands of "We the people".

The Parliament in the exercise of constituent power under Article 368 of the Indian Constitution can amend any provisions of the Constitution and this power empowers the Parliament to amend even Article 368 itself. The question thus arose, is not there any limitation on the amending powers of the Parliament? But the question was by using Art 368 , can the parliament diffuse the very foundations of this grundnorm .The answer was yes , no ,maybe . Accordingly the court answered it in affirmative at times , while on various occasions the answer was in negative. It was a "Supreme Settlement" that settled this question and evolved a middle path "The Basic Structure". The answer had to be settled by the Hon'ble Supreme Court for that would have marked the true essence of the doctrine of separation of powers. The court found itself to serve the purpose of keeping a check on the powers of the executive and the legislature.

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2.1. THE EMERGENCE OF THE INDIAN CONSTITUTIONALISM

The Constitution is a fundamental document. It is a document which defines the position and power of the three organs of the State--the executive, the judiciary and the legislature. It also defines the powers of the executive and the powers of the legislature as against the citizens, as we have done in our Chapter dealing with Fundamental Rights. In fact, the purpose of a Constitution is not merely to create the organs of the State but to limit their authority, because if no limitation was imposed upon the authority of the organs, there will be complete tyranny and complete oppression. The legislature may be free to frame any law; the executive may be, free to take any decision; and the Supreme Court may be free to give any interpretation of the law[204].

One way of enforcing constitutionalism is though the instrument of Judicial Review. The courts have been given the ultimate power to test the validity of any legislation by the grundnorm .Survival of the legislation depends on whether the legislation fits into the basic structure of the grundnorm. The basic idea of Judicial Review was stemmed from the precedence of the English Legal System. However, till then the principles of Parliamentary Supremacy prevailed , ultimately setting the pattern of the Constitutional law. Henceforth, judges were to be guided by the Blackstonian principle 'that the power of parliament is absolute and without control'. Tracing the journey of the Doctrine of Basic structure would mean analysing the journey of Indian Legal System from Constitution towards Constitutionalism.

Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law[205].The *Doctrine of Basic Structure of Constitution*[206] is a judge- made doctrine to put limitations on the amending powers of Parliament so that the *basic structure of the basic law of the land"* cannot be amended in exercise of parliament's constituent power under the Constitution. The journey of evolution of this doctrine from the theory of implied limitations to its present form today has been tumultuous, with attempts to save it and greater attempts to obliterate it, because this doctrine single-handedly empowers the higher judiciary to keep a check on parliament and restrain it from stepping into a treacherous realm of arbitrariness by misusing Art 368 of the Indian Constitution. Art 368 under Part XX deals with the amendment of the Constitution and provides for three kinds of amendments i.e., amendment by simple

[204]Granville Austin, The Indian Constitution : Cornerstone of a Nation , 186 (1972)
[205]CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21-22
[206] A.G. Noorani, "Behind the Basic Structure Doctrine- On India's debt to a German Jurist, Professor Dietrich Conrad" 18 (9) Frontline (April 28- May 11, 2001).

majority; amendment by special majority and amendment by and ratification special majority by the States.

However, the journey towards this settlement involved a clear tussle between the two organs. This battle turned bitter as both the organs tried to establish their supremacy. The parliament was amending the constitution, construing itself to be the constituent assembly. On the other hand, the courts used to nullify the constitutional amendments. The battle started with *Shankari Prasad vs. Union of India*[207]and ended with *Keshavanand Bharati*[208], but the war was still not over. The Constitution emerged victorious. The phase marks a tilt towards constitutionalism. Indian Constitutionalism emerged as a result of the long-drawn tussle between the legislature and the Indian judiciary. While the judiciary advocated for the constitution to be the touchstone of the Indian jurisprudence, the parliament, on the other hand, insisted that the sole authority was vested in the Parliament.

Professor Harding, an eminent and much celebrated political scientist, also explained constitutionalism on the same lines, "*Arguably the most important aspect of constitutionalism for modern nations, especially those that have had histories of autocracy, is in the placing of limits on the power of government. In the view of many this is the central point of constitutionalism: the limited government."*[209]

2.2. Doctrine of Basic Structure" - The Concept

The Constitution is organic version of a life long vision. To quote Edmund Burke"a Constitution is an ever growing thing and is perpetually continuous as it embodies the spirit of the nation. It has been enriched at the present ,by the past influence and it makes the future richer than the present." [210]Chandrachud, C.J., in the *Minerva Mills*[211]case rightly observed,"The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution".

[207]AIR 1951 SC 455
[208]AIR 1973 SC 1461
[209]Russel Hardin, Constitutionalism in The Oxford Handbook Of Political Economy 289 (Donald A. Wittman& Barry R. Weingast ed., 2008).
[210]https://www.crf-usa.org/bill-of-rights-in-action/bria-23-2-b-edmund-burke-the-father-of-conservatism
[211]Minerva Mills v. Union of India ,AIR 1980 SC 1789

Rule of law and Judicial review were thus held to be basic structure in *Waman Rao*[212], *S.P. Sampath Kumar v. Union of India* [213]*and Sambamurthy*[214] cases. Effective and expeditious access to Justice is part of the basic Structure, according to a ruling in Central Coal Field[215]s case. In *Kihoto Hollohon*[216], the SC declared, "Democracy is a basic feature of the Constitution and election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need of protect and sustain the purity of the electoral process that may take within it the quality, efficiency and adequacy of the machinery for resolution of electoral disputes." [217]

The vision was later reflected in the *SR Bommai*[218] case , where Justice Sawant and Justice Kuldip Singh., observed: "Democracy and Federalism are essential features of our Constitution and are part of its basic structure." On the same note, Secularism was held to be a basic or an essential feature of the Constitution.[219]

In *M. Nagraj v.Union of India*[220]the court went on to observe that the amendment should not destroy the primary Constitutional identity. Doctrine of equality is the essence of democracy accordingly it was held as a Basic Structure of the Constitution

A Constitution is framed for ages to come, but its course cannot always be tranquil.[221]" The amending power could not be exercised in such a manner as to destroy or emasculate the basic or essential features of the Constitution, including the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. On one hand a constitution needs to transform itself to remain a living document. On the other hand, even there have to be certain checks and balances to see that the transformation doesn't result in destruction of core values of the constitution. The constitution needs to be a living document. On the same context even the needs of the state have to be taken into the consideration.

To quote Mishra J. in *Navtej Johar*[222]

[212]Waman Rao v. Union of India, (1981) 2 SCC 362
[213](1987) 1 SCC 124
[214] P. Sambamurthy v. State of Andhra Pradesh (1987) SCC 362.
[215] Central Coal Fields Ltd. V. Jaiswal Coal co. 1980 Supp SCC 471
[216] KihotoHollohon v. Zachilhu,AIR 1993 SC 412
[217]*Supra*
[218] S.R. Bommai v. Union of India AIR 1994 SC 1918
[219]*Supra*
[220] (2006) 8 SCC 212
[221]Rajesh Kumar ,"Indian Constitution: Sixty years of our faith" The Indian Express ,Feb 02 2010
[222]Navtej Singh Johar vs. UOI ,AIR 2018 SC 4321

"Constitutionalism is the modern political equivalent of Rajdharma, the ancient Hindu concept that integrates religion, duty, responsibility and law. The verdict is a cornucopia of textual analysis, ancient and modern history, India's political history, philosophical reasoning, and doctrinal application. It deserves a rich tribute for its transformative constitutionalism."

2.3. THE JOURNEY TOWARDS BASIC STRUCTURE

The judiciary has firmly accepted and strongly recognized the theory of basic structure. However the courts have not exclusively closed the contents of the theory of basic structure or list of the elements constituting basic structure of constitution. Perhaps it fact cannot be disputed that doctrine of basic structure has served the country very well. One certainty that emerged out of this tussle between parliament and judiciary is that all laws are subject to doctrine of judicial review and laws that tend to destroy or alter the basic structure would be declared unconstitutional.

2.3.1. The *Shankari Prasad Case*[223]

After coming into force of the Constitution of India, the problem of validity of the Constitutional amendments arose early on the issue of R*ight to property.* Since the originally enacted Constitution included provisions relating to right to property under Article 19 (1) (f) and further provided for the protection of R*ight to property* under Art 31. The Bihar Land Reform Act, 1950 was declared ultravires by the Patna High Court. [224]

Though the validity of this Act was attacked in High Court on a number of grounds, the Patna High Court held it to be void only on the ground that it violated Art 14 of the Constitution. The basis for Patna High Court's decision was that the Bihar Act had fixed different slabs at which compensation was to be given for land acquired. The compensation rate for those who owned large tracts of land was way lesser than for those who owned smaller tracts. The High Court held the different rates of compensation as violating the **Right to Equality** guaranteed by Article 14 of the Constitution .Against this judgment of the High court , State of Bihar appealed before the Supreme Court[225]. This judgment of Patna High Court proved to be a major setback to the nationwide agenda of agrarian reforms.

[223]Shankari Prasad vs. Union of India, AIR 1951 SC 455
[224]Sir Kameshwar Singh vs Province of Bihar., AIR 1951 Pat 246
[225]The State Of Bihar vs Maharajadhiraja Sir Kameshwar , 1952 1 SCR 889

2.3.2. Reaction By Parliament

On this Nehru Government reacted very fastly and even while an appeal against the Patna High Court's order was filed in the Supreme Court, it decided to intervene by way of a constitutional amendment. Invoking the provisions of Art 379, the president issued an order, by which the Constituent Assembly got accorded the status of two Houses of Parliament until elections were to be held to Lok Sabha and the Rajya Sabha, constituted after elected State Assemblies was brought into place. In other words, the constituent assembly acquired the status of Parliament. In *Kameshwar Prasad Singh vs. State of Bihar*[226] ,the unconstitutionality of **Bihar Land Reforms Act, 1950**was primarily related to the law being subject to Art 13(2). The decision of the High Court was lamented by Pandit Nehru, by saying that "It is impossible to hand up urgent social changes because the Constitution comes in the way, somehow, we have found that the magnificent Constitution that we have framed was kidnapped and purloined by the lawyers". [227]Different interpretations were made by some other High Courts. The UP High Court had upheld a similar legislation. Such conflicting views interpreted by different Courts led the Parliament to bring the Constitution (First Amendment) Act, 1951 which introduced new Articles in the Constitution by the saving clause *i.e.,* Art 31-A and Art 31-B. It was clearly declared in Art 31-A that "any law providing for compulsory acquisition of property aimed at development of the state will not be unconstitutional merely because it is in conflict with Articles 14 and 19".

On the other hand Article 31-B introduced a new Schedule in Constitution ; the Ninth Schedule.[228] The ninth schedule was meant to promote the concept of parliamentary supremacy ,laying down that any law included in ninth schedule would be immune from challenge in any court of law. While discussing the debates in the Parliament prior to enactment of the First Amendment Act threw light on factors that led to adoption of the Ninth Schedule concept. Pandit Nehru setting the tone of the debate in Parliament on May 18, 1951 said

"…Are we to wait for this confusion and doubt gradually to resolve itself, while powerful agrarian movements grow up? If there is agrarian trouble and insecurity of land tenure nobody knows what is to happen."[229]

[226]The State Of Bihar vs Maharajadhiraja Sir Kameshwar , 1952 1 SCR 889
[227] B. Shiva Rao, ed., The Framing of India's Constitution: Select Documents IV, 427-8
[228]The Constitution (First Amendment) Act, 1951
[229]B. Shiva Rao, The Framing of India's Constitution: Select Documents IV, 427-8

This marked an interesting innovation in the area of the Constitutional Amendment. It marked the initiation of a new technique of by-passing judicial review. Any Act incorporated in the Schedule becomes fully protected against any challenge in any Court of law and any Fundamental Rights. The Schedule was not envisaged by our founding fathers at all. In fact, it owes its birth to ideological battles in the nascent republic between the progressive executive and legislature on the one hand and the conservative judiciary on the other.

The First Constitutional Amendment Act was challenged before the SC in *Shankari Prasad vs. Union of India*[230]with the primary issue being whether the Constitution (First Amendment)Act, 1951 passed by the provisional Parliament is valid?

The amendments were challenged on the ground that the word "law" under Art 13(2) also includes the "law of the amendment of the Constitution" and hence the Art 31-A and Art 31-B are invalid because they violate the fundamental rights. To this issue that the definition of the word "law" contained under Art13 (3) did not expressly refer to the "*Constitutional amendments*", the Court held that although amendment is superior to ordinary legislation and hence it will not be hit by article 13(2). The word law' under Art 13(2) ordinarily includes the Constitutional amendment, but it must be taken to mean the exercise of ordinary legislative power. Hence, amendments made in exercise of the constituent power of the Parliament are not subject to Art 13(2) and such power extends to include the amendment of the fundamental rights as well. The court also observed-

"We are of the opinion that in the context of Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368."[231]

Thus, the Court used the literal interpretation to resolve the conflict and went on to uphold the validity of the First Amendment Act,1951.

The court also held that Art 368 empowers the Indian Parliament to amend the Constitution without any limitation. The Court did not agree with the petitioner's view that Fundamental Rights are inviolable. This judgment sets the trend for various other constitutional amendments to follow. To sum up this case, the Hon'ble SC kept the law of amendment beyond the scope of Art 13(2) and thereby enabled the parliament to amend any parts of the constitution.

[230]AIR 1951 SC 455

[231] Supra

It is believed that the SC construed Parliament to be the Constituent assembly and hence all the powers vested in the makers of constitution were now given to the parliament. This bonhomie between judiciary and the legislature did not last long as the court again deflected to be a people's court rendering positive decisions in *State of West Bengal v. Mrs Bela Banerjee*[232] where the primary issue was *whether the compensation provided under the West Bengal Land Development and Planning Act, 1948, was in compliance with Art 31(2)?*

For under the State Act, it fixed the market value as prevailed on December 31, 1946, as compensation without any reference to the value of the land at the time of acquisition. The Calcutta High Court's decision that Sec 8 of this Act was ultra vires was then affirmed by the Supreme Court which held that Entry 42 of List III of the Schedule Seven conferred on the Legislature the power of laying down the principles governing the determination of the amount to be given to the owner of property acquired under Article 31(2). However such principles must ensure that what is determined as payable is "a just equivalent of what the owner has been deprived of".[233]

To quote Patanjali Sastri, C.Justice.,

"While it is true that the Legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is just equivalent of what the owner has been deprived of. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court."[234]

The Chief Justice made clear that the ambit of legislative power included taking into consideration all those elements that go to make up the true value of the appropriated property. The above held view was further reiterated by the Supreme Court in State of Madras v. Namasivaya Mudaliar[235]vis-a -vis Article 31(2).

2.3.3. **Ball in Court's court : The *Sajjan Singh Case*[236]**

[232]AIR 1954 SC 170
[233] Supra
[234] Supra
[235]1964 SCR (6) 936
[236]Sajjan Singh vs State Of Rajasthan ,1965 SCR (1) 933

After the decision in *Shankari Prasad*[237]case, the Constitution (4th, Fourth Amendment) Act, 1955 was passed which amended some Articles in Part III i.e. Fundamental Rights Part, but the same was never challenged. The Constitution (Seventeenth Amendment) Act, 1964 went on to introduce a number of laws in the Ninth Schedule. This was done so as to keep them away from the judicial review. This amendment adversely affected the Right to Property. The same however was challenged before a 5 judge bench of the Supreme Court. The court had to decide :.

(1) Whether the amendment of the Constitution insofar as it purported to abridge the fundamental rights was within the prohibition under Art 13?

The majority of the judges, in this case, reiterated the same logic as was held in the Shankari Prasad case and held that the law of amendment is a superior law and hence not subject to Article 13(2). It also held that the Shankar Prasad case was purely and rightly decided. The court affirmed that power given to parliament under Art 368 could be exercised over each and every provision of the Constitution. The majority of the judges refused to accept that Fundamental Rights were "eternal, inviolate, and beyond the reach of Art 368."

Justice Hidayatullah and Justice Mudholkar dissented from the majority view.

Hidayatullah *J.* expressed his concern as-
"The Constitution gives so many assurances in Part III that it would be difficult to think that they were the plaything of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other part and even on a less firm ground than one on which the articles mentioned in the proviso stand. As at present advised, I can only say that the power to make amendment ought not ordinarily to be a means of escape from absolute Constitutional restrictions."[238]
One of the primary arguments, in this case, was with regards to the diminishing scope of judicial review as under the ninth schedule, many statues had been immunized from the attack before a court and on these grounds, the amendment should be struck down. The Court again

[237] AIR 1951 SC 455
[238]1965 SCR (1) 933

rejected this argument and held by the majority that the ―pith and substance of this amendment was to amend the Fundamental Rights, not to restrict the scope of Art 226. The minority view however on this point was very different.

Justice Hidayatullah observed-"I would require stronger reasons than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the states".[239]

Justice Mudholkar went on to observe that Constitutional amendments should be excluded from the definition of law under Art 13 .Continuing his dissent he observed that "every Constitution has certain basic principles which could not be changed."

Justice Mudholkar here concurred with opinion of the Chief Justice Gajendragadkar and observed "it is also a matter for consideration whether making a change in the basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368."[240]

The dissents given by Hidyatullah J. and Mudholkar J . hold great significance as these dissents turned into judgments in IC Golaknath[241]and Keshavanand Bharati[242]respectively . Hidyatullah J. referring to the question as to parliament taking away Art 32 observed

*"*Can the legislature take away this shield ? Perhaps by adopting a literal construction of Art. 368 one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions*."*

This one sentence epitomizes the advent of the constitutional law. Constitutional law, therefore ,belongs more to the field of philosophy than the law because the whole object of a constitution is that it is a living document and is a living document it has to respond to the felt needs of the time. Hence, words have no choice ,but to yield to the principle.

[239] Supra
[240] Supra
[241]I.C. Golaknath vs. State of Punjab .1967 SCR (2) 762
[242]His Holiness KesavanandaBharatiSripadagalvaru v. State of Kerala, AIR 1973 SC 1461

2.3.4. **The *I. C. Golakhnath* Case [243]**

The strong opinions of the minority in the *Sajjan Singh*[244] case prompted the then *Chief* Justice Subba Rao to constitute a larger Bench of 11 judges to revisit the Constitutional validity of First, Fourth ,Seventeenth Constitutional Amendment Acts in view of certain doubts expressed by Hidayatullah and Mudholkar *JJ.* The Seventeenth Amendment made three significant changes to constitutional property clause. Firstly, it inserted a proviso in Article 31A(1) enabling the State to acquire land over and above the prescribed land ceilings in each State at less than market value compensation.

Secondly, the definition of 'estate' was amended in Article 31A(2)(a) to include lands under the Ryotwari settlement. Finally, the Amendment added 44 laws to the Ninth Schedule thereby shielding them from judicial review on grounds of Art 14, 19, and 31. The Seventeenth Constitutional Amendment that introduced was challenged in the I. C. Golakhnath case. By a majority of 6:5, the court held that the parliament had no power to amend the fundamental rights.

Subbarao C.J., authored the leading majority judgment for himself, Sikri J., Shelat J, Shah J, and Vaidyalingam JJ.) whereas Hidayatullah J. delivered a concurring judgment. The two judgments took the opposite views only to reach the same conclusion as to the source of the amending power.

Subbarao, C.J. held that Article 368 contained only the procedure for an amendment and the power to amend is located in the residuary power of legislation. Since legislative power was subject to provisions of the constitution, Art13(2) therefore constituted a bar to an amendment abridging fundamental rights. [245]The majority judgment thus overruled Shankari Prasad Case and held that there was barely any distinction between legislative and constituent power. The majority took the position that the Fundamental Rights occupy "transcendental " position ,so that no authority including the parliament had any authority to amend these rights. CJ went on to compare the fundamental rights with natural rights and characterised them as "the primordial rights necessary for the development of human personality"

Chief Justice Subba Rao then referred to the marginal note of Art 368 and put forth the position that Art 368 merely lay down the amending procedure. It does not confer upon the Parliament the power to amend the Constitution. The constituent power of the Parliament arises from

[243]I.C. Golaknath vs. State of Punjab .1967 SCR (2) 762
[244]Sajjan Singh vs State Of Rajasthan ,1965 SCR (1) 933
[245] Ibid 42.

provisions like Arts. 245, 246, and 248 which gives the Parliament, the power to make laws. Moreover, legislative power and constituent power of the parliament are the same, hence the amendment of the Constitution must be deemed to be "law" as used under Article 13.

Justice Hidayatullah, however, held that the power of amendment was not located in the residuary power of legislation. As per him, Art 368 provided a procedure which, when complied with in proper manner, resulted in an amendment of the Constitution. It was a sui generis legislative power. Since the Constitutional amendment was also a law, Art13(2) barred any amendment which abridged or took away fundamental rights. [246]

However, as can be seen, the majority shrank from practical consequences of this judgment. The judgment of the Court gave more rise to the already going tussle between the Judiciary and the Legislature. The judges in majority overruled the views of their predecessors in the Sajjan Singh case[247]. Since there were numerous attacks on Fundamental Rights, the Court was worried about the consequences of giving the Parliament an absolute power. The judges were worried that the absolute supremacy of parliament might lead the country to lead towards a totalitarian regime.

[246] I.C. Golaknath vs. State of Punjab .1967 SCR (2) 762
[247] Ibid

JUDICIAL CORRECTION : NAVTEJ JOHAR VS UOI

- ANIRUDH KAUSHAL

"Supreme court is right , not because it is infallible but because it is final "

- **Justice Robert H Jackson**

It all started with **Justice K.S. Puttaswamy v Union of India**[248] when the Supreme Court of India added life to a dead debate. The court went on to declare the right to privacy as a fundamental right enshrined under Art 21 and Art 19 of the Indian Constitution. But this was not the end. In a surprising manner, five out of nine judges also took upon themselves to comment upon an entirely unconnected proceeding. These judges went on to describe the judgment of the Supreme court in Suresh Kumar Kaushal v Naz Foundation[249], as wrongly decided. In Suresh Kumar Koushal, the Supreme Court upheld the constitutionality of Section 377 of the Indian Penal Code which criminalized "carnal intercourse against the order of nature". This was done by overruling the 2009 decision of the Delhi High Court judgment in the Naz Foundation case[250]. Not only this Justice Chandrachud described it as one of the " two discordant notes" in constitutional jurisprudence, the other one being the Emergency-era judgment by the court in the ADM Jabalpur case[251].

The privacy judgment had thus made it very clear that Koushal was living on a borrowed time. The time came to an end when the Constitution Bench of the Supreme Court formally overruled the same in the Navtej Johar v Union of India[252]. The court went on to formally overrule Koushal and restored the Naz Foundation judgment.

Thus the court unanimously held that LGTB+ community was entitled to equal rights under Articles 14, 15, 19, 21. There were four concurring judgments in the Navtej Johar case. All the judgments concurred on the view - that Section 377 violated equal protection of laws enshrined under Article 14, non-discrimination on grounds of sex enshrined under Article 15(1), freedom of expression under Article 19(1)(a) and right to life and personal liberty protected under Article 21.

[248](2017) 10 SCC 1
[249](2014) 1 SCC 1
[250]Naz Foundation vs NCT of Delhi, 160 DLT 277 (2009)
[251]ADM Jabalpur v. Shivkant Shukla AIR 1976 SC 1207
[252] AIR 2018 SC 4321

Let us see the creative approach adopted by different judges of the bench

1. **The Chief Justice 's and his Just Approach- Of Primacy and Choice**

Chief Justice Mishra wrote for himself and Khanwilkar J. At the heart of his judgement lies the very idea of choice. It takes into consideration the long-standing debate as to whether sexual orientation be considered as natural and immutable.This argument has always been tempting, because if sexual orientation is "natural", and something beyond "an individual's power to alter", then the act of criminalizing becomes ipso facto irrational. Our criminal law is based upon the idea of holding people to account for acts that they are responsible for.

How then can you criminalize something that is inherent, and which cannot be controlled?

The 'born this way' approach, however can be criticized as it tends to limits the origin and the expression :If it is the biology that determines our expression, then there won't be any reason to think about different worlds. Because everything gets decided , the moment we are born. The arrangement of sexual relations is the key social building block of society's reproduction. Hence the importance of gay marriage. Yet we have a surprisingly limited way of engaging this conversation; indeed, biological determinism helps us avoid the issue altogether. A host of social issues are pressing down upon us, and we cannot effectively address them if we deny the reality of the human condition, including sexuality, and thereby close off discussions before they begin.[253]

Thereafter,in the next paragraph 16, the learned Chief Justice Mishra observes: "When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to sub serve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay."[254]

Additionally, the argument of dignity also gets due consideration as :Dignity while being expressive of the choice is averse any dent from any creation. When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented[255].

[253]https://aeon.co/essays/why-should-gay-rights-depend-on-being-born-this-way
[254]Navtej Johar v. Union of India, AIR 2018 SC 4321
[255] Ibid

Thus, this finding is the very reason to hold the section as unconstitutional. Individual choice gets disrespected by the it is irrational as well as "manifestly arbitrary". It is thus violative of Art 19, Art 21 and Art 14 as well .

B. Justice Nariman and the Presumption of Constitutionality

Justice Nariman shares the vision of a transformative constitution. He used the technique of "Manifest Arbitrariness " to hold that Section 377 violates dignity. Nariman J, however, uses a different route to arrive at the conclusion that Section 377 violates the dignity of an individual. He uses the 2017 Mental Healthcare Act, which expressly prohibits any discrimination based on grounds of sexual orientation. He combines this with more scientific evidence and notes that the natural/unnatural distinction that is at the heart of Section 377 has no rational basis, and consequently, violates Article 14 (paragraph 78). Nariman J 's opinion is important for one more significant aspect. He holds that pre-constitutional laws do not enjoy a presumption of constitutionality.

He observes "The presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws – it can only enact laws which do not fall within List II of Schedule VII of the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code."[256]

This cannot be said to an incorrect opinion but nonetheless it is an incomplete argument since he fails to tackle an important objection. The objection is that Parliament's failure to repeal a pre-constitutional law indicates an implicit acceptance. This view however ,if taken in the literal sense would have far-reaching consequences. Otherwise too, this would mean that someone challenging The Indian Penal Code of 1908 arguing that there is no presumption of constitutionality? If we dig a little deeper into his thoughts, he is correct for the following reason. Pre constitutional laws, those of which affect fundamental rights should not enjoy any presumption of constitutionality. This is because such laws not only affect fundamental rights, but they also impose a classic double burden upon the individuals that they impact. At first,

[256]NavtejJohar v. Union of India, AIR 2018 SC 4321

these laws were passed by a nondemocratic colonial regime and the individuals had no say in framing of these and secondly, now since these laws exist, the onus is on individuals to mobilize and convince parliament so as to repeal them. This burden seems unacceptable and therefore it is mandated that the presumption of constitutionality should be withheld from those colonial laws that affect fundamental rights.

C. Justice Chandrachud and "The Indirect Discrimination Approach"

The most complex , yet interesting arguments are those put forward by Chandrachud J who uses a combined reading of Articles 15 (non-discrimination) , Article 15(1) and Article 14 (equality before law) to declare Section 377 as unconstitutional. In Chandrachud J.'s opinion, this argument receives detailed treatment.

In Para 27 as he points out : "Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights."[257]

This seems an important rebuke, not just for the Koushal[258], but also to the general dominant strand of equality thinking by the Supreme Court, It adds a new dimension to the already persisting classification test under Article 14.

Thus Article 14 has within its domain the substantive content on which, when read together with liberty as well as dignity, the edifice of the Indian Constitution has been built. This is the genesis for the quest of ensuring fair treatment of an individual in whatever aspect of human endeavor and of human existence.

As per him, the idea rests on some form of "substantive content" of equality. The whole heart of Chandrachud J's judgment is this concept along with Article 15(1) claim. He notes that historically, Indian courts have interpreted the statement "The State shall not discriminate on grounds … only of sex" in a quite formalistic manner, and this has led to courts upholding laws which in their very language – use a differently worded ground.

[257]Navtej Johar v. Union of India, AIR 2018 SC 4321

[258]Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1

For instance, in Suresh Koushal[259], the Court held that since Section 377 only criminalized "carnal intercourse against the order of nature", there was no discrimination against any of the identities. .However this effect of law must rather be understood by taking into prime account "the broader social context within which law is embedded." This means it should take into consideration "the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context." .Chandrachud J. shreds more light into progressive gender equality judgments such as Anuj Garg[260]and concludes that:

"A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex."[261]

Words such as "direct or indirect" find place in the context. This phraseology becomes very crucial because this is the first time that the Court goes into recognizing the concept of indirect discrimination. Such has been the progressive vision that the court considers that even facially neutral laws can have one or the other form of disproportionate impact upon various other segments of the population chart. Now the primary question was to analyse Section 377 within our constitutional framework?

Chandrachud J. first records the experiences of LGBT+ community being subjected to shadow of criminality, and then goes on to note the experiences of the community. Section 377 criminalizes behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles. [262]The question becomes how the answer he gave is

" If individuals as well as society hold strong beliefs about gender roles – that men are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially submissive, caretakers that are attracted to men – it is unlikely that such persons or society at large will accept that the idea that two men or two women could maintain a relationship".

[259]Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1
[260]Anuj Garg v. Hotel Association of India , (2008) 3 SCC 1
[261]NavtejJohar v. Union of India, AIR 2018 SC 4321
[262] Ibid

Thus, in this manner, Chandrachud J. draws together facially neutral Section 377 yet indirectly discriminating, along with the effects test and the prohibition of "sex" discrimination enshrined under Article 15(1) in this case about "sexual orientation" and then retorts the prime importance of giving a social context to the question. The chronology of the argument goes like this

1	Article 15(1) of the Constitution prohibits sex discrimination.
2	Discrimination based on grounds of sex is premised upon various stereotypes regarding appropriate gender roles, and the existing concept of binary between "man" and "woman".
3	These stereotypes about gender roles thus constitute the very base for criminalising same sex relations.
4	Section 377 no doubt is neutrally worded, but it's effect is primarily discriminately towards the LGBT community. This amounts to indirect discrimination on grounds of sexual orientation.
5	Now that the basis of this indirect discrimination lies in gender role stereotypes, S. 377 violates Article 15(1) of the Constitution.

Hence ,Statutes like Section 377 give people ammunition to say this is what a man is by giving them a law which says this is what a man is not. Thus, laws that affect non-heterosexuals rest upon a normative stereotype: "the bald conviction that certain behavior-for example, sex with women-is appropriate for members of one sex, but not for members of the other sex.[263]

It won't be an exaggeration to say that this view represents the most advanced and transformative interpretation of Article 15(1) and non-discrimination, to date.The view is full constitutive transformation coupled with morality.

Chandrachud J. does not stop here. He then goes on to examine Section 377 vis a vis Article 19(1)(a), focusing on the sexual privacy of the LGBT community. He notes that the only shortcoming of the Delhi High Court judgment in NAZ [264]would the restriction of this right to private spaces .Chandrachud J. then critiques this facile public binary, and notes thatthe right to sexual privacy,isfounded on the right to free autonomy of an individual and this must capture the rights of the persons of the LGBT community to navigate any public place without any state interference.

[263]NavtejJohar v. Union of India, AIR 2018 SC 4321
[264] 160 DLT 277 (2009)

Thereafter he goes on to discuss the right to privacy and autonomy (paragraph 65), and declares that Article 21 also protects a right to intimacy ,and the right to health including mental health. He observes that harm to others is the only adequate ground for decriminalization.

A. Justice Malhotra and a Truer Vision of Equality

Justice Indu Malhotra penned a brief yet concurring judgment, that discusses Articles 14, 15, 19(1)(a) and 21. Her judgment takes "immutability" as the sole basis for Article 14/15 violation. She took into consideration the artificial dichotomy created by Section 377.The natural or innate sexual orientation of a person cannot be a ground for discrimination[265]. Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.[266]

Malhotra J. argues that when legislation discriminates solely on the basis of an "intrinsic trait", it ipso facto fails Article 14 "; This means that it cannot qualify as a reasonable classification within the amit of Article 14. Moreover, there is nothing about such discrimination that makes it "unintelligible differentia", or precludes from having a "rational nexus" with any possible goal or means to achieve. Thereafter, Malhotra J. advances a radical reading as she argues that the very concept of equality enshrined under Article 14 rules out various kinds of classifications at the threshold. As per her, such legislation based primarily on an "intrinsic trait" fails that very threshold inquiry.

Analysing this front, we see that Malhotra J. opens up a transformative reading of Article 14. She uses and then reaffirms the judgement in DipakSibal, [267] where the Court had held that in addition to intelligible differentia and a rational nexus, what more Article 14 required was a legitimate state purpose.

However, neither DipakSibal[268]nor any subsequent judgment of the court ever clarified what all State purposes can be termed as illegitimate. In Malhotra J.'s judgement, the answer seems embedded. Thus ,whatevermay be the differentia and whatever may be the nexus, the State cannot be permitted altogether, under Article 14, to discriminate or disadvantage any group on the basis of an "intrinsic trait".

Hence Malhotra J.'s transformative reading of Article 14 provides an overarching theme to the judgment.

[265]NavtejJohar v. Union of India, AIR 2018 SC 4321
[266]NavtejJohar v. Union of India, AIR 2018 SC 4321
[267]Deepak Sibal v. Punjab University , 1989 SCR (1) 689
[268]Deepak Sibal v. Punjab University , 1989 SCR (1) 689

Constitutional morality and Transformative constitutionalism.: The aspects of Constitutional morality and the transformative reading of the provisions are visible in the judgements of all the judges. Like Mishra J. warns us that Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time and any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality.[269]

Chandrachud J notes that the Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. [270]

Even Nariman J. asks not to forget that Section 377 was the product of the Victorian era, with its attendant puritanical moral values. Victorian morality thus ,must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. [271]

Thus ,the wheel seems to have turned full circle. The Delhi High Court, in Naz Foundation[272], had first introduced us to the phrase of "constitutional morality", and then linked it to Objectives Resolution [273]wherein it was intended that the qualities of inclusiveness and pluralism lie at the heart of the Constitution. Nine years later, the Supreme court has reaffirmed that this vision of constitutional morality lies at the heart of the decriminalization of same-sex relations. What can be concluded here on is that when equality is viewed through the lens of constitutional morality it gets defined by the values of pluralism and total inclusiveness? This would result in different forms of life and different ways of being would get equal respect, equal concern, and equal respect under the transformative Indian Constitution.

What lies ahead? This was, after all, a limited case: it was a constitutional challenge to Section 377 of the IPC. But as the judges themselves acknowledge, there is much work to be done ahead. As the Chief Justice notes, in his judgment:

"Equality does not only imply recognition of individual dignity but also includes within its sphere ensuring of equal opportunity to advance and develop their human potential and social,

[269]NavtejJohar v. Union of India, AIR 2018 SC 4321
[270] Ibid.
[271] Ibid.
[272]160 DLT 277 (2009)
[273]Tara Chand. History of the Freedom Movement in India. vol, 2 at 105-07,467-71

economic and legal interests of every individual and the process of transformative constitutionalism is dedicated to this purpose".

Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution[274]. This, clearly, indicates at a future beyond mere decriminalisation. It indicates towards civil rights, a guarantee against horizontal discrimination in the domains of housing, education, and access to services (under Article 15(2)), a potential right to affirmative action, and of course – eventually – equal marriage.

The interpretations of the judges have indeed opened a new horizon for understanding and interpreting Article 14.The Supreme Court has thus relied upon *National Legal Services Authority v. Union of India*[275]and reiterated that denying any person gender identity which is intrinsic to an individual's personality would be violative of one's right to dignity .

The Court has then relied upon K.S. Puttaswamy v. Union of India[276] to hold that denying the community its intrinsic right to privacy merely on the ground that they are a minor , would defeat the purpose of the constitution.Thereafter, the CJI led bench also relied on *ShafinJahan v. Asokan K.M*[277]. and *Shakti Vahini v. Union of India*[278] and affirmed that an individual's right to "choose a life partner of choice" is a facet of individual liberty.

Justice has been served as a is a subset of morality yet it needs to be seen whether the observations about transformative constitutionalism percolate in the cases to come .Moreover it has to be seem whether the court would delve more such principles while determing the power of state and individual rights. This has been one of the cases where the Supreme Court agreed that it indeed committed a grievous error in *Koushal v Naz Foundation*[279]. Perhaps "*Civilization* has *been brutal*." The brutal days have gone and the transformative ones are here .This judgement has all been all about constitution and liberation

Emergence of Constitutional Morality:

One of the central themes in this judgement has been Constitutional Morality as per which the aim of our Constitution is to transform society rather than entrenching and preserving the existing values of majority. Which means , a majority of people may be heterosexuals, the prevalent "social morality" might even consider sexual intercourse only between a man and

[274]National Legal Services Authority v. Union of India, (2014) 5 SCC 438
[275](2014) 5 SCC 438
[276]Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1
[277]C A NO. 366 OF 2018
[278]2018) 7 SCC 192
[279] (2014) 1 SCC 1

woman, but it will be the "constitutional morality" that will prevail .Ambedkar himself had said that "our people have yet to learn the sentiment of "constitutional morality" .

As Mishra J ends by citing Justice Jackson from *West Virginia State Board of Education v. Barnette*,[280], and observes that "Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality."

Not only this , this judgement is full of words that sympathizes with the core discrimantion suffered by the community. Justice Chandrachud ends by observing :

"Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution."

Manifest Arbitrariness:

All the five judges found that Section 377 was "manifestly arbitrary" and hence unconstitutional. This was on the basis of following reasons :

1.	Section 377 fails to distinguish between consensual intercourses and non-consensual ones among competent adults.
2.	It fails to describe how such a sexual intercourse is harmful to society
3.	Inflicts a grave stigma on members of LGBTQI community
4.	Modern scientific studies show that LGBT community members are not suffering from any form of mental disorders
5.	Section 377 inflicts a disproportionate punishment : life imprisonment
6.	It discriminates solely on basis of sexual orientation over this a person has "no choice"

The aftermath of NavtejJohar :"Manifest arbitrariness" as a new ground for striking down laws

The judgment thus provides a new test to the jurisprudence of Article 14. Now any law can be tested on the grounds of manifest arbitrariness. The old sprang into the new as the traditional "rational classification standard" under Article 14 was way too deferential towards the State. Moreover it was incapable of addressing inequalities. Thereafter, arbitrariness was introduced in the EP Royyapa case to mitigate these shortcomings of classification standard, but that has itself ended up being rather arbitrary. There has always been a long tussle as to whether the

[280]319 U.S. 624 (1943

arbitrariness standard is limited only for invalidation of executive action or whether it can be applied to statutes as well.?

While in the ShayaraBano v.Union of India [281],case popularly known as the Triple Talaq judgment, only two judges out of the five judges on the bench had held that "manifest arbitrariness" could be applied by courts to invalidate statutes. However , In the NavtejJohar[282]all five judges partially strike down S. 377 on grounds of manifest arbitrariness.Recently, the **Supreme Court** in a judgment titled *BCCI v. Kochi Cricket Pvt. Ltd*[283]. Applied the doctrine of manifest arbitrariness to struck down the amendments in the Arbitration Act, 1996

Thus, as can be seen from the above decisions of the Supreme Court in recent times, the court has not only interpreted the constitution in a transformative manner, it has also interpreted new safeguards to protect the citizens from the judicial manipulation of the state. The court has gone beyond the version of the constitution argued by the state and has upheld the spirit and the vision put to the constitution by the makers. This has only advanced the concept of " Salus populi supremal exesto" – Welfare of people is the supreme law.

[281](2017) 9 SCC 1
[282]Navtej Johar v. Union of India, AIR 2018 SC 4321
[283]AIR 2018 SC 1549

RIGHTS OF INFANTS: WITH SPECIAL REFERENCE TO INDIA

- JNANDEEP BORA

INTRODUCTION: -

Infancy is the stage of life which is marked by innocence. This stage of life is also marked by dependency in life. Dependency in the sense that, in the stage of infancy of a child he/she is directly dependent on his/her near and dear ones. As a result, an infant's overall grooming and development depends on how he/she is being groomed especially by his/her family members. Therefore, an infant must get all the avenues and opportunities, so that, in the long run he/ she becomes a capable and efficient citizen of our country. The proverb 'as you sow, so shall you reap' is very much relevant with respect to infants.This is in the sense that, the approach and attitude that we show towards our infants will become a direct corollary of how we, on being the senior citizens of the society will get respect and love from these infants of today when they will be grown up man/woman of the society in the future.

Right to be cared and nurtured: -

It is the birth right of every infant to be cared and nurtured especially from his/her family members and the surrounding environment. In this regard, in the specific context of our country, India and its patriarchal society it can be said that, as far as caring and nurturing of an infant is concerned it should be marked by a gender-neutral approach. What is meant by a gender-neutral approach is that every infant irrespective of his/her gender should get equal treatment from his/her near and dear ones. In this regard, there should not be any gender discrimination as being male or female while caring or nurturing them. Therefore, every infant whether male or female should get equal care and protection especially, from their family in particular and the surrounding environment in general. All these efforts of ours of the present time will certainly have its repercussions as far as breaking the shackles of gender disparity in the long run. Further it would not be an exaggeration to comment in this regard that, this certainly may be our pathway to a society with gender parity.

***Right to be loved*: -**

Every infant has the right to be loved by their near and dear ones. As it is rightly said that, 'love begets love and hate begets hate'. The same yardstick also applies in the case

of infants. The more love an infant gets from his fellow beings the more affectionate does he/she becomes. On the contrary, the more hatred being shown to him/her the more diabolic does his /her life becomes in the coming future. In this regard, let for every infant brightness of love and affection in their life prevail over the darkness or the negative aspects of life like hatred as sometimes shown towards them. In the long run, the shining side of love will certainly will have a positive impact in his/her life by making his/her life itself worth living. Love as a feeling of life must be made an all-encompassing phenomenon of an infant's life. As love knows no bounds so does, the life of such infants will be boundless of worldly pleasures in such a scenario. Let, positivity of life via the medium of love, as shown to them be prevail over the anarchic and divisive feeling of hatred. In this regard, let the serene mind of we the Indians prevail over our wicked minds.

Right to good health: -

Right to good health can also be considered as a basic human right of an infant. Being born as a human being he/she has all the right to lead a healthy life. Therefore, he/she should get all the nutrients so that, he/she can exist healthy. At the same time, being healthy in this regard means the prevalent of all the ingredients of nutrition in a balanced way. This fact is especially relevant in the case of infants of our country as about one-third of them are stunted and wasted and as a whole are victims of malnutrition Moreover, in this regard, the government of our country must promote a mass awareness in the nook and corner of the country especially among the below poverty line families regarding need for good health among the infants. Then only our dream of a healthy India will be a reality. Thus, it can be rightly said that, good health among the infants, in the long run, has the potential to promote a coherent society especially, among the generation-next of the country.

Right of lactation: -

Mother's milk forms the very nectar of an infant's life. Mother's milk has no substitute in an infant's life especially, if he /she is less then six months old. Therefore, for the first six months of the life of an infant his/her mother's milk may be considered as the very part and parcel of his/her life. Moreover, in this regard, it can be said that he/she as an infant will get all the nutrients in his/her mother's milk provided his/her mother get a balanced diet. Therefore, a balanced diet for an infant's mother helps her infant to get all the nutrients in his/her mother's milk. In this way, a healthy mother is the basic pre-requisite to give birth to a healthy infant and as far as his/her lactation is concerned. In such a scenario, it may be said

that, the health department of our country in particular must promote the required awareness from the pre-natal stage of an infantlife itself about the need for breast feeding in the country.All these efforts of ours will help the infants of our country in not being devoid of the very nectar of their life in the form of mother's milk.

Right of immunisation: -

Immunisation against deadly and fatal diseases is as important in an infant's life as is lactation. Immunisation helps an infant to protect himself/herself from various diseases. Lack of immunisation has thus the potential even to make the infant disease prone. This may be due to the fact that lack of immunisation may in the long run itself make the immune system of the infant weak and thereby having a negative impact in his/her all round development. Thus, immunisation of an infant has almost the same role as that of lactation. So, no parents especially in the context of our country India should keep their infants without immunisation. The government of our country should create more awareness with regards to immunisation of the infants so that no infant is left out of the immunisation process. The "Mission Indradhanush" scheme of the present NDA government is a very comprehensive immunisation scheme in our country and thus it may be considered as a right step in the right direction as far as the immunisation of the infants are considered.

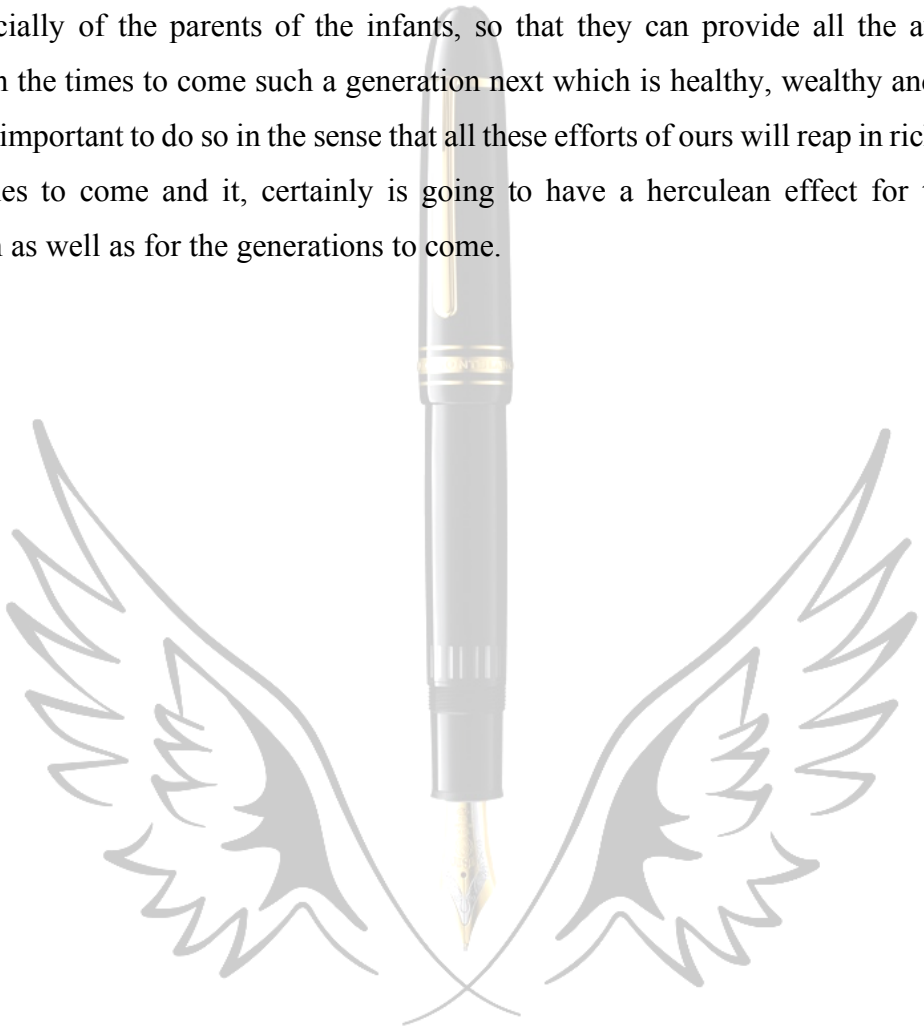
Right to be protected: -

The life of an infant is not only about health and nutrition but also, about the right to be protected from the anti-social elements of the society which too has become an important part of his/her life. This is more important in todays scenario. We often find in the media the instances of selling of infants by the anti-social elements of the society in lieu of hefty sum of money for their own personal gain. Therefore, parents as well as their care givers much deter themselves form such activities. Such activities are firstly anti-social and secondly and most importantly against humanity. Therefore, the right to be protected from such elements of the society forms the part and parcel as a right of an infant. As the stage of infancy is marked by innocence so, let this innocence of the infants does not turn into business of the anti-social elements. Let, we protect the infants of our country as a gift of god and thereby help him/her in his/her holistic and all-round development.

CONCLUSION: -

All in all, it can be said that like other stages of life, the stage of infancy is also marked by its own challenges. As a stage of life, infancy at the same time is a very delicate and sensitive

stage of life. Therefore, a careful and cautious approach towards these infants must be the order of the day while treating and looking after them. As sensitive are the lives of these infants, so sensitive should be the approach of the care-givers of these infants. As a whole it is our bounden duty especially of the parents of the infants, so that they can provide all the avenues and promote in the times to come such a generation next which is healthy, wealthy and wise. It is also more important to do so in the sense that all these efforts of ours will reap in rich dividends in the times to come and it, certainly is going to have a herculean effect for the coming generation as well as for the generations to come.



FEMALE GENITAL MUTILATION IN INDIA: THE PENULTIMATE VIOLATION OF HUMAN RIGHTS

- APOORVA AGARWAL AND SAACHI SHUKLA

INTRODUCTION

The ancient Hindu law giver Manu observed in the legal text of Manusmriti, "Women are supposed to be under the custody of father till she is a child, her husband when married and son in old age and under no circumstance she should be allowed to assert herself independently."[284] This pervasive notion of gender discrimination and gender abuse remains prominent even during the contemporary world due to the presence of conventional patriarchal norms that govern the Indian society. Women have been subjugated to a secondary position by the societal norms to such an extent that they lack basic fundamental functions of life. One of such inhuman treatment meted out to women and children in various parts of the globe is Female Genital Mutilation (hereinafter referred as FGM) or Female Genital Cutting, also addressed as Female Circumcision.

MEANING OF FGM/C

In an interagency statement given by the World Health Organisation (WHO) in 2008, Female Genital Mutilation/Cutting (FGM/C) is defined as the procedure that involves "partial or total removal of the external female genitalia or other injuries to the female genital organs for non-medical purposes."[285] Consequently, FGM/C has been categorised into four types based on severity and extent of cutting:[286]

- Type I: Clitoridectomy i.e. partial or absolute removal of the clitoral glans.
- Type II: Excision i.e. partial or absolute removal of the clitoris and labia minora.
- Type III: Infibulation i.e. narrowing of the vaginal orifice by removing partial or all of the labia minora and/or the labia majora.

[284] Soha Kala, *"By Burning Manusmriti, We Are Burning Discrimination": 10 Shocking Verses About Women from the Ancient Text*, (Aug. 6, 2017), https://www.google.com/amp/s/www.newsgram.com/10-shocking-verses-about-women-from-manusmriti/amp/

[285] WHO, *Female Genital Mutilation*, World Health Organization, (Feb. 3, 2020), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

[286] World Health Organization, *Eliminating female genital mutilation: an interagency statement UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008: https://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf

- Type IV: All other types of harmful non-medical procedures to the female genitalia, for instance, pricking and piercing the clitoris, cauterization of the labia or clitoris and adding corrosive substances into the vagina, etc.

According to the WHO, an estimated 100-140 million girls around the globe have been subjected to this barbaric practice of FGM/C.[287] A recent study of 2018 highlighted that an estimate 75% of daughters have been subjected to female circumcision, some of which were even below seven years of age.[288]

INTERNATIONAL RESPONSE TO FGM/C

While Sudan has recently banned and criminalised Female Genital Mutilation in April 2020,[289] this practice is still prevalent in many parts of African countries, certain ethnic groups in Asia (India, Indonesia, Malaysia, Pakistan and Sri Lanka), the Middle East (Oman, the United Arab Emirates, Yemen, Iraq, Palestine and Israel), and South America (Columbia, Ecuador and Peru). The United Nations General Assembly on December 21, 2012 recognised FGM/C as the penultimate violation of human rights of girls and women. Subsequently, at least 59 countries passed statutory laws prohibiting the practice of female circumcision as per United Nations Population Fund (UNFPA) estimates, including countries like United Kingdom, United States of America, Australia, Egypt, Kenya, New Zealand and Nigeria recently passed a law banning FGM.

FEMALE GENITAL MUTILATION IN INDIA

Female circumcision is an absolute expression of gender abuse and a means to control sexuality of women and preserve her virginity till marriage. This pervasive practice is prevalent in many parts of India, namely Maharashtra, Madhya Pradesh, Rajasthan, Gujarat, and Kerala (also referred to as 'sunnathkalyanam'[290] among Christians). FGM/C is extensively practiced by the

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[287] Suraiya Nazeer, *Female Genital Mutilation: Secret Practice in India*, International Journal of Scientific and Research Publications, Volume 7, Issue 7, (Jul. 2017), http://www.ijsrp.org/research-paper-0717/ijsrp-p6739.pdf

[288] Lakshmi Anantnarayan, Shabana Diler, Natasha Menon, *The Clitoral Hood A Contested Site Khafd or Female Genital Mutilation/Cutting in India*, WeSpeakOut and Nari Samata Manch, (2018), https://www.wespeakout.org/site/assets/files/1439/fgmc_study_results_jan_2018.pdf

[289] Masooma Ranalvi, *If Sudan can ban female genital mutilation, why can't India?*, Scroll.in, (May 21, 2020, 12:30 PM), https://scroll.in/article/962307/if-sudan-can-ban-female-genital-mutilation-why-cant-india

[290] Abhiraj Das and Nihal Deo, *Female Genital Mutilation: When Will India Take Concrete Steps?*, THE CRIMINAL LAW BLOG, National Law University, Jodhpur, (Jun. 1, 2020), https://criminallawstudiesnluj.wordpress.com/2020/06/01/female-genital-mutilation-when-will-india-take-concrete-steps/

Dawoodi-Bohra community of Shia Muslims. The Bohra community addresses the practice of FGM as "Khafz" or "Khatna" and performs a traditional nicking of clitoral hood. The procedure is conducted by untrained midwives or older women to scar minor girls of the community by using razor blades, knives or pair of scissors. The victims of this practice complained that the perpetrators often adopt extreme unhygienic methods to perform the circumcision such as the application of 'abeer' or 'kapurkanchi' powder mixed with the ashes of silk threads to put over the clitoris for cooling effect and adhesive value.[291]

REASON FOR PERFORMING FGM/C

The reasons mainly associated for practising female circumcision or 'Khatna' include purity and piety which is identified with the clitoral glans believed to be an "unwanted lump of flesh and a source of sin" by the Bohra community.[292] According to their belief, this clitoral head makes a woman 'stray' out of their marriage or may even bring shame to the community and hence needs to be removed. This vicious practice is performed to curb sexual desires in women which can be triggered by the stimulation of erotogenic clitoral glans. Therefore, the Dawoodi Bohra sect performs the circumcision on girls before or right after she attains puberty in order to reduce her libido, preserve virginity and protect family honour.

For long, Female Genital Mutilation or Khatna remained the darkest secret of the society, a subject never to be discussed but followed as a tradition wherein the women were made to believe that the circumcision is necessary to ensure acceptance in their community. However, victims of this barbaric practice raised their voice fearlessly to save other young girls from being cut in such tender age.

IMPACT OF FGM/C PRACTICE

- Health complications arising from FGM/C-

As per the WHO, unlike the male circumcision, the brutal practice of Female Genital Mutilation or Khafz has no known health benefits.[293] Contrarily, circumcision of female genitalia has several health complications among young girls and women. The short term effect of FGM/C includes excruciating pain since no anaesthesia is used, severe bleeding, urinary problems, infections in the genital area followed by high fever and nervous shock for days

[291] SUPRA note 4, at 2
[292] Harinder Baweja, *India's Dark Secret*, Hindustan Times, https://www.hindustantimes.com/static/fgm-indias-dark-secret/
[293] WHO, *Female genital mutilation*, World Health Organization, (Feb. 3, 2020), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

altogether. In some cases, haemorrhage and infections also led to immediate death of the girl child depending upon the severity of the cutting. The long term health hazards of female circumcision reported by the victims includes potential risk of HIV/AIDS transmission due to usage of unsterilized instruments, anaemia, formation of cyst, painful sexual intercourse or even sexual dysfunction, difficulties in menstruation, high possibility of childbirth complications wherein women require a Caesarean section and suffer post-partum haemorrhage. Furthermore, women who have undergone the process of infibulation suffer from prolonged vaginal destruction during copulation and again at the time of childbirth. The constant cuts and infections during intercourse and birthing process change into tears and fears of death for the victims of FGM/C.

- Psychological consequences of FGM/C-

Female circumcision is a barbaric local tradition which gives a lifetime of psychological trauma and scar to its victims. The event has a long lasting impact on the minor girls and women who were the victims at the hand of such mindless tradition. FGM/C is performed on the young girls without consent and without too much deliberation. This form of child abuse is deeply ingrained in the Bohra community to the extent that the family of the minor girl is completely shunned by the community and has to withstand any backlash. The debilitating psychological consequences of FGM/C predominantly include; Post-Traumatic Stress Disorder (PTSD), depression, anxiety, horrid nightmares, low self-esteem and loss of trust and confidence.[294] It often leads to sexual dysfunction which causes marital conflicts or even divorce. This grave form of abuse on young minds and bodies is so traumatic that the victims often resort to completely blocking out the horrific memory so as to 'erase' the trigger to past experience.

EXISTING LEGAL FRAMEWORK AND RELEVANT CASE LAWS

The legal framework plays an essential role in bringing about social change. The practice of FGM/C is archaic, ancient and abusive on young minds and bodies. The traditional practice is not easy to slay rather slaying young girls is considered suitable. There is no specific enactment which protects the rights of the FGM victims in India. However, the statutory provisions of Sections 319 to 326 of the Indian Penal Code (IPC) address varying degrees of hurt and grievous hurt and the perpetrators conducting female circumcision can be prosecuted for the same. The police personnel are obligated to register a complaint particularly under Section 326

[294] Lawyers Collective Women's Right Initiative and Speak Out on FGM, *Female Genital Mutilation Guide To Eliminating The FGM Practice In India*, Lawyers Collective,(Jul. 2017), http://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf

of the IPC.[295] Additionally, Section 3 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) read with Explanation I of Section 375 IPC categorically ensures protection against FGM.[296] However, FGM/C is not only 'any bodily injury' but also involves severe psychological impact, bodily integrity and invasion of privacy of the victim.

Furthermore, the practice of FGM/C cannot be justified as a 'religious practice'. The Dawoodi Bohra community have argued that women of their community undergo circumcision due to religious purposes which are protected by Articles 25 and 26 of the Indian Constitution. However, such practice cannot be protected under Article 25 and clearly violates Articles 14, 15 and 21 of the Indian Constitution. The FGM/C practice solely targets young girls with the aim of curbing their sexual desires from being violated by other men. Such practice, in the garb of religion, not only runs contrary to gender justice and affects these young girls and women psychologically but also violates their basic fundamental rights to physical autonomy, privacy and right to life.

A similar issue was raised in the case of *Sunita Tiwari v. Union of India*[297] in the Supreme Court. A Public Interest Litigation was filed demanding to safeguard the interest of girl child against the practice of Khatna which does not have any reference in the Quran and is performed without any medical assistance within the Dawoodi Bohra community. As a response to the PIL, the Apex Court issued a notice to the Centre seeking a complete ban on the practice of FGM or Khatna and demanded it to be declared as a cognizable, non-compoundable and non-bailable offence. However, the matter will be presented before a nine- Judge bench to decide on the issue of religious rights of Bohra community and freedom of women.

In another case of *The Durgah Committee, Ajmer and Another v. Syed Hussain Ali and others*,[298] the Constitution-bench cautioned that religious practices which spring from superstitious beliefs may be considered extraneous and unessential accretions to religion itself. Furthermore, Articles 25 and 26 are not applicable when found to be pernicious and violative of human rights, dignity and social equality.[299] The Supreme Court also observed through Shirur-Mutt case[300] and subsequent judgments[301] that Article 25 and 26 guarantee fundamental right to religion except when it is violative of public order, health and morality and other

[295] Rasheeda Bhagat, *Ban this barbarous practice!*, Hindu Business Line, (Jul. 29, 2014), http://www.stopfgmmideast.org/india-ban-this-barbarous-practice/
[296] SUPRA note 11, at 4
[297] Sunita Tiwari v. Union of India W.P. (C) No.286/2017
[298] The Durgah Committee, Ajmer v. Syed Hussain Ali AIR 1961 SC 1402
[299] N. Adithayan v. The Travancore Devaswom Board & Ors (2002) INSC 426
[300] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 AIR 282
[301] Indian Young Lawyers Association and Ors v. The State of Kerala and Ors 2018 SCC OnLine SC 1690

Constitutional mandates. Moreover, Article 21 read with Article 51A (e) imposes a duty on citizens of India 'to renounce practices derogatory to women's dignity'.[302]

CONCLUSION

February 6 is observed as the International Day of Zero Tolerance for Female Genital Mutilation by the United Nations in order to spread awareness about this conservative practice which has been described as a 'catastrophic abuse of human rights'.[303] It is pertinent to spread awareness to the women of the society to question the traditional practice and not follow it ignorantly, scarring the minds of young girls and women for a lifetime. It becomes imperative for India to recognise and frame laws prohibiting the practice of FGM/C under the veil of religion and morality. India must take concrete steps to address this grave issue by mobilizing public opinion, educating young girls about the ill-effects of FGM/C and violations of basic fundamental rights concerning their own bodies. The perpetrators of this crime should be penalised under a comprehensive legislation which attempts to criminalize both the practice as well as the propagators. The specific law should not only address prosecution but also prevention, education, awareness building, relief and rehabilitation mechanisms. It becomes necessary to expose Female Genital Mutilation/ Cutting as a harmful criminal act and not promoted as an acceptable religious practice. Therefore, in order to curb this deep-rooted form of gender discrimination, gender abuse and gross violation of human rights, it is essential to address the pressing issue of Female Genital Mutilation to create a life of dignity and save the future of girl child.

[302] XV Endowment Lecture On '*Protection Of Women Against Atrocities: Legal Remedies And Judicial Response*', Presidential Address By Hon'ble Chief Justice, (Nov. 07,2013), http://www.hcmadras.tn.nic.in/07112013mba.pdf

[303] Sumanti Sen, 4.1 Million Girls At Risk Of Female Genital Mutilation, A Practice That Scars Women For Life, The Logical Indian, (Feb. 7, 2020, 4:21 PM), https://thelogicalindian.com/story-feed/awareness/zero-tolerance-fgm-19636?infinitescroll=1

HUMAN TRAFFICKING- THE MODERN SLAVERY

- PRATEEKSHA SINGH

INTRODUCTION

A crime when any human is forcefully involved in any kind of sexual acts or is forced to get involved in any unwanted activity.[304] Trafficking includes transferring a person into a situation of manipulation or abuse. It can be forced labour, marriage, prostitution, or organ removal etc. [305]

Any act of transferring, transportation, receipt of person by threat of use of any force, coercion, abduction, fraud etc. for exploitation (prostitution of others) sexual exploitation, forced labour, slavery or organ removal comes under human trafficking.[306] In case of a minor indulged into sex trafficking or any other kind, use of force, coercion or fraud doesn't count.

No one is safe from the risk of human trafficking. Migrants, lesbians, gays, Bisexual, transgender, queers, intersex, asexual and gender non-confirming individuals, those who are isolated from the support network and survivors of violence and shock or pain and anyone is at a increased risk of falling victim to human trafficking.

The traffickers mostly choose their targets from the poor sector of the society and the vulnerable people. They use the trick of falsely promising them with jobs, education to children and such things which could benefit and bring stability in the lives of those people. The most common victims are the women and children from the poor sector. Often women are promised with the fake marriage proposals and children with the education facilities.[307]

According to reports, in 2016, around 40.3 million people were forcefully involved in human trafficking, 24.9 million people were forced to work as labours and around 15.4 million were indulged in forced marriage.[308]

Human trafficking is a global issue which goes under recognized. More than 70% of the women and children get involved in human trafficking and 90% of them are forced to work in sex industry.

[304] http://www.endslaverynow.org/learn/slavery-today/sex-trafficking
[305] https://www.dosomething.org/us/facts/11-facts-about-human-trafficking
[306] https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html
[307] https://www.highspeedtraining.co.uk/hub/methods-of-human-trafficking/
[308] https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm

According to the reports of International Labour Organization, around 25 million people are victim of human trafficking mainly indulged into forced labour and sex trafficking. About 30% of the victims are men and boys which are forced to work as labours. The estimates of global and domestic human trafficking are critically questioned, as the data is difficult to collect and difficult to analyse.[309]

According to the U.S. Department of this sector, the forced trafficking sector which is often called as involuntary servitude sector, is the biggest sector in the world. This sector includes many other forms also such as Domestic Servitude, Industrial work, Hotel Services, Construction, forced marriage, organ removal, the exploitation and ill-treatment of children for begging, women indulged in prostitutions, Strip Club Dancing etc.[310]

Generally, women and children are the easiest targets to be used for trafficking. They are often used for sex exploitation and men are often used as forced labours. One of every five people trafficked is a child. Children are also involved in child pornography and forced begging. The U.S. government for the protection of the victims introduced a three Ps policy which says: Prevent Trafficking, Protect Victims and Prosecute Traffickers.[311]

According to reports, by 2012, 134 nations had enacted laws criminalizing human trafficking.

TYPES OF HUMAN TRAFFICKING

The human trafficking not only includes women as prostitutes, it is of various types. Some of them are:

i. Sex Trafficking
ii. Forced Labour Trafficking
iii. Debt Trafficking
iv. Child trafficking
v. Organ trafficking

SEX TRAFFICKING

Sex trafficking is the form of human trafficking which not only involves women and children to be forced into sex industry, child pornography, and prostitution but also involve men in this sector. Though, the traffickers don't choose their targets by their genders or age. The traffickers

[309] https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2019/09/human-trafficking#:~:text=Background,labor%20and%20sex%20trafficking%201.
[310] https://sf-hrc.org/what-human-trafficking
[311] https://www.crs.org/stories/stop-human-trafficking

use different methods to force these women and children into these businesses and these sectors. To the women they promise fake marriages, they marry the women and then leave them to these industries and sectors. To the children, they promise their families to provide their children with education and other basic facilities. The traffickers also kidnap and use force and coercion on the people. Amongst the total people trafficked, almost 90% of the women and children are forced into this sector. The women are forcefully indulged into the prostitution business and the children into the child pornography and labours and begging.

Sex trafficking not only includes the selling of the men and women, but also holds a major part in forced marriage. The traffickers majorly targets the adolescent and teenage girls, and force them into child marriage and forced marriage. The traffickers mostly pick the females from the vulnerable and the poor sector of the society. The reason being lack of awareness, it is easy for the traffickers to target them and manipulate them. Sometimes, even parents sell their daughters in the need of money and often considers them as a burden for the family.

According to Global Slavery Index, India is one amongst the ten countries which top in this sector of trafficking. Sex trafficking is a serious and critical health issue to the society. The victims of sex trafficking are merely physically abused and mentally tortured. The victims suffer mental trauma, stress disorders and depression.[312]

According to a study by National Crime Records Bureau (NCRB), the cities of Mumbai and Kolkata experience the highest crime rates in terms of human trafficking and sex trafficking.[313]

FORCED LABOUR

Forced labour is a form of human trafficking which involves the work performed obligatorily or unwillingly and under any threat or any penalty. This mainly includes indentured servitude, contract slavery and domestic servitude. It also includes many other forms such as Industrial work, Hotel Services, Construction, forced marriage, organ removal, the exploitation and mistreatment of children for begging, women indulged in prostitutions etc.

The sector not only includes men and boys, but also includes women and girls. In fact, the proportionate includes around 56% of the women and girls and approx. 44% of men and boys. The victims face a lot of stress due to these threats and torture. They are often blackmailed, fully in debt or sometimes kidnapped, being fraud. The sector not only involves people who are trafficked. Sometimes this sectors involves the work of people who actually don't have any

[312] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/
[313] https://economictimes.indiatimes.com/news/politics-and-nation/mumbai-kolkata-see-highest-women-child-trafficking-cases-ncrb-study/articleshow/74053964.cms

other choice than doing work as a forced labour and working unwillingly. The workers are also often blackmailed by their owners of not paying their salaries and wages which eventually forces the workers to work forcefully for the sake of their livelihood.

The forced labour human trafficking does not end here. It further also has its forms. Forced labour can be imposed by state or the armed forces i.e. to compulsorily and mandatorily get involve in the public sector activities irrespective of their other works.

Forced labour also includes Forced Commercial Sexual Exploitation (CSE) where people irrespective of their genders, are forced into prostitution and other commercial sex related practices.

Forced labour, too includes Forced labour for Economic Exploitation (EE) where the victims get involved forcefully by private agents and enterprises in sectors other than the sex related activities. This sector mainly includes the forced labour in agricultural, industrial services and some illegal activities.

Forced labour includes mainly the victims from the vulnerable and the poor segment of the society. The reason why they are chosen as the victim is that they are the people who are easy to manipulate to work. The traffickers and private agents easily manipulate them into working by fake promising them with the facilities and providing them with their basic necessities. Often, for money, females and children are sold to these agents.

DEBT TRAFFICKING

Debt trafficking not only includes the people who are in debt as victims but the people indulged into forced labour can too be a victim of the same. The victims are often manipulated and tricked into working for less amount of money or sometimes even for no money.

Debt slavery is not actually slavery but it is a practice similar to it. In many areas, it is not considered as a crime, instead it is considered to a part of tradition, culture and economy. It is not the actual form of human trafficking as it mainly includes the people who are unable to repay their debts as victims. Sometimes, the victims are forced to work more than the work they are actually required to do in order to repay their debt. They are forced to work and if they refuse they are often threatened that their families would suffer if they don't work.

CHILD TRAFFICKING

A major part of human trafficking is child trafficking. Child trafficking is not based on any gender. The children are trafficked through various methods. The well-off kids are kidnapped and for the poor ones the traffickers manipulate their families of providing education and other

basic facilities to their children. The children, for money are sold outsides the boundaries of the country, they are often forced into child pornography, they are forced to work as servants, forced in begging.

The major part of child trafficking involves the abduction of the teenage girls, who are later on forced in child marriage and sold in the sex industry and outside the boundaries of the country. They are also used for organ trafficking.

ORGAN TRAFFIKING

Organ trafficking is one of the common trafficking amongst the human trafficking. It is not restricted to any age or gender, the victim can be of any age or any gender. Though, the traffickers mainly target the healthy individuals and often belong to the poor sector of the society. The organs are then sold outside the boundaries of the country.

Organ trafficking is an illegal activity which takes place even in many hospitals too. One of the most common method of it is when an individual comes for any treatment, during the treatment an organ is taken without their consent and later on trafficked outside boundaries.

REASONS

Poverty and Unemployment- Poverty, it is one of the main reason and cause for human trafficking. It, however, opens a way for the traffickers to get easy target. The traffickers usually target the people who belong to the poor and vulnerable sector of the society. They are the people who are easy to target and can be manipulated by fake promises. The traffickers manipulate them by giving fake job opportunities, facilities, education etc. The people in need easily fall into the baits of the traffickers and become the victim of human trafficking.

Unemployment, another cause which helps the traffickers to easily target the people from the unemployed sector. The traffickers give fake job offers and other employment related job opportunities to target the people from this sector.

Lack of Awareness-In the poor and vulnerable sectors, there not much awareness about human trafficking. The traffickers make use of this opportunity and manipulate the people belonging to this sector. They make fake promises and emotionally manipulate the people into supporting them for future. They put up fake job offers to the young ones, education to children and often fake marriage proposals for the females of the house. The family members mostly agrees to the offers made because sometimes they are in need of the money and often considers the females of the house as a burden.

Child Marriage and Cultural Practice - In the poor and vulnerable sector of the society, girls are often treated as a burden of the house. The parents, short of money often marries them at a very young age and later on their husband forces them into prostitution or in the sex industry or force them to work as forced labours.

This practise is also, in some areas, considers as a tradition and cultural belief. The parents sell their daughters, who later on are forced to work as sex workers or as forced labours such as maids or at construction sites etc. They are also paid no money or very less amount of money for their work.

In the landmark judgement of **Kamaljit vs State of NCT of Delhi 2006,** the court in its order stated that Govt. of India's Action Plan of 1998 to fight trafficking and commercial sexual misuse and ill treatment of women and children had not provided the preferred results and more rigorous methods were the crying need of the day. The court stated that penal statutes of other countries allocated with 'organised crime' in delivering goods and services, including gambling, prostitution, loan sharking, narcotics, racketing and other unlawful activities. In December, 2002 India became a countersigner to "UN Convention against Trans-National Organised Crime", which includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons specifically Women and Children. By becoming the participant in the Convention, a global instrument which advocates international and nation al action against **organised crime**, the Government of India has given a clear mandate to confront evils of trafficking of women and children. The court specified that Interpol defined organised crime as "any enterprise or group of enterprises engaged in continuing illegal activity which has its primary activities that bring together a client-public relationship which demands a range of good and services which are illegal." The court while hearing this appeal stated that investigation shows that the accused had a wide network of persons, financial transactions and telephone numbers. Also he had several cases of ITPA already pending on him. The court took cognizance of the same and ordered that MCOCA in this case was valid.[314]

THE STORY OF KARLA

According to a report of CNN, a girl named Karla Jacinto, was raped around 43,200 times. She was raped in all the seven days of the week and a total of 30 men used t rape her and sexually

[314] https://nlrd.org/landmark-rulings-of-the-courts-in-india-on-combatting-human-trafficking-trafficking/#:~:text=While%20denying%20the%20release%20of,of%20the%20Constitution%20of%20India.

abuse her on a daily basis. Her story highlights the dark and brutal side of the Mexico City and Unites States- Human Trafficking.

Human Trafficking is such a trading business in Mexico that there stands no boundaries and no borders. In the central cities like Atlanta and New York, it is practised so casually. In the poor and smaller communities, the reputation of it is unknown to the people, so no one falls suspicious of the people coming from there. They fall for the great offers the traffickers make and go with them.

Karla, was a girl who belonged to dysfunctional family and she was abused from childhood. At the age of 5 years she was sexually harassed by a relative. At 12, she became a victim of human trafficking. One day, she was sitting near a subway station in the Mexico City waiting for her friends. A man with candy came to her and started talking to her and how he was sexually harassed when he was a boy. Soon, the conversation became comfortable and they exchanged phone numbers. A week later, Karla received a call from that man, she got excited. He asked her to go with him on a trip to nearby Puebla and showed up with this car the following day. She agreed and as she was impressed with him and with his car, she went with him.

They lived together for three months. During the time, she was treated very well. The man bought her everything, new clothes, shoes, flowers and everything that was beautiful. She used to get a lot of attention from him. After sometime, he left her by herself for a week in the apartment. His cousins used to come with a new girl every week. One day she finally asked him about everything going on, he answered her that they were pimps-

A few days later, he started teaching everything to Karla about the prostitution business and how to ask for more money from the customers. She was sent to different places, streets and even homes for prostitution. Soon, around 30 men per day started to sexually abuse her.

One day, her trafficker beat her and brutally abused her and accused her of falling in love with one of the customers. Soon, at hotel known for prostitution, a police operation was held out. She thought she would get rescued but it turned out to be uglier. The police got them in a room and clicked and video graphed them into compromising positions and threatened them of sending those to their families.

At 15, Karla gave birth to a girl child. The traffickers, then used the child to get his all the demands and wishes fulfilled by her. Karla, after almost a year got to see her child. At 16 years

of age, in 2008, she was finally rescued during an anti-trafficking operation in Mexico. She was kept in shelter for almost a year. She then became a lawyer and lived a normal life.[315] 3

THE CASE STUDY OF INDIA

Sujata Pal of Kutai, south 24 Paragnas, was found to be a human trafficking agent, and was involved in a gang. The gang mainly transported and targeted the women and children belonging to the poor sector of the society. They used to trick them with the offers of providing jobs in cities. The gang had trafficked many women and minor girls from Pune's sex industry. They used to pick minor girls from the village areas and kept them in rented houses in Tiljala and Jadavpur of Kolkata for transferring later. Sujata, too, sometimes used to accompany the girls to Pune. The case came into the limelight when Sujata was caught by the Tiljala police. However, she escaped from the hands of the police and again got united with her gang. But after few weeks, she was killed by the gang members as she had revealed a few names to the police. Later, police caught some of them and also recued some minor girls from their traps. But still the main association couldn't be traced as it was outside the bar which allows them to trade without any interruption.

From the studies, it has been found that in West Bengal, the primary targets for the traffickers are the poor Muslims, Hindu Scheduled Castes (SC) and Scheduled Tribe (ST) Communities. This also affects the work groups of landless households, agricultural labourers, low paid informal sector workers, and seasonal workers etc.

LAWS PROTECTING HUMAN TRAFFICKING

The constitution of India prohibits human trafficking in Article 23.

Article 23 of the constitution states that -Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.[316]

[315] https://edition.cnn.com/2015/11/10/americas/freedom-project-mexico-trafficking-survivor/index.html
[316] https://indiankanoon.org/doc/1071750/

The Suppression of Immoral Traffic Act 1956 (SITA), amended as the Immoral Traffic (Prevention) Act (ITPA) in 1978 and later in 1986, was in response to the ratification of the International Convention on Suppression of Immoral Traffic and Exploitation of Prostitution of Others in 1950. The amended law stressing prevention rather than suppression of human trafficking took into consideration the international conventions and protocols and provided severe penalties for different types of exploitative conditions. The ITPA toughened penalties for trafficking in children, particularly by focusing on traffickers, pimps, landlords, and brothel operators, while protecting underage girls as victims.

The Indian Penal Code also states the punishments for the crime of human trafficking.

Section 366A of the IPC states procuration of minor girls which includes kidnapping, abducting or inducing a woman to compel her marriage, etc.

Section 366 B of the IPC states the punishment for Importation of girl from foreign country.

Section 367 of the IPC states the punishment for Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

Section 372 of the IPC states the punishment for Selling minor for purposes of prostitution, etc.

Section 373 of the IPC states the punishment for Buying minor for purposes of prostitution, etc.

Section 376 of the IPC states the punishment for rape.

Section 374 of the IPC states the punishment for the Unlawful compulsory labour[317]

The Child Marriage Restraint act,1929; Bonded labour Abolition Act, 1976; Child Labour Act, 1986; Juvenile Justice Act, 2000; Offences Against Children Act, 2005; Goa Children's Act, 2003 are some of the acts which states and mentions about the punishment for the crimes being a part of human trafficking.

The Indian government, however, has made different laws against human trafficking. But the fact that the number of cases of human trafficking is increasing day by day and is on peak. The government still needs to tighten up the laws more and the officials needs to focus more on the human trafficking in order to lower the crime rate of human trafficking.

STRATEGIES FOR PREVENTION

Human trafficking is a socio-legal problem and it is a symptom of a much deeper cruelty in our society. Therefore, there cannot be any prompt cure or solution for such an issue. The problems

[317] Indian Penal Code, 1860

in identifying and determining trafficking cases make the task of anticipation and prevention much more challenging. However, several measures can be taken in this way and effective enactments of the steps will surely bring some progressive results. As the problem is multi-dimensional, its solution also lies in following a multi-dimensional 'cosmopolitan'43 approach for prevention. Due to the varying nature of migration and movement in the current world, human trafficking cannot be battled by certain national governments alone. However, international cooperation and efforts, national governments should pursue the following short-term and long-term measures to combat trafficking:

1. There is an urgent need of developing the programme and policies which concern the manifest and the newest aspects of human trafficking in the context of situations and realities in each nation, to do away with the root causes of the vulnerabilities of women and children in particular. A region-specific vulnerability mapping of the source, demand and transit areas of trafficking will be very useful in this direction.

2. The victims that are rescued should be provided with protection so they don't fall for the human trafficking trap again. Anti-trafficking measures should not be given a perspective of the national security of a country, and henceforth issues like migration or repatriation should be prospectively viewed both from the legal and human rights perspective. More specifically, the human rights of a victim should be protected while directing quick rescue operations. This should not exclude the authority to take rigorous and quick actions against the real traffickers and exploiters.

3. Reintegration of a trafficked victim into her natal family / community is a difficult task. Hence it is very important to sensitise the rural society in accepting the victim with due respect and dignity. The laws cannot be positively enforced unless the mind-set of the society about the trafficking victims alters. The society, women's bodies, NGOs and the media should play a proactive role to support the brave victims who dare to complain against the culprits and identify the traffickers in court.

4. Governments should introduce schemes with proper financial support in order to help the victims to resume a normal, healthy and fulfilling life by arranging for their education and professional training. It is essential to create alternative income opportunities for the prevention of re-trafficking.

5. The age-old practice of child marriage and dowry particularly should be checked more dynamically both legally and socially. These patriarchal institutions not only destabilise the status of a girl child, they also create an environment to perpetuate gender inequality. It is important is the need of the time to challenge the structural inequality of a patriarchal society.
6. Lack of literacy and awareness amongst the economically weaker sections of society is another cause of trafficking. There is, consequently, urgent need to strengthen basic competences of women and children through awareness, better health and compulsory education up to secondary stage. Concurrently, sustained and vigorous campaigning is necessary to sensitise media and make people, particularly the poor, remain aware about the traffickers.[318]

IMPACT ON THE VICTIM

The Physical Effects

Sex trafficking is a complex problem because the victims experience physical and psychological harm. The traffickers use physical violence to dominate and control their victims. Some of the strategies include starvation, beatings, rape, and gang rape and many more. Victims also experience violence and harm from some of the people who are purchasing the sex acts. Common injuries include broken bones, concussions, burns, and brain trauma. Victims can also experience gynaecologic health problems that stem from forced commercial sex acts. They might suffer from sexually transmitted diseases, menstrual pain and irregularities, miscarriages, and forced abortions, among other problems.[319]

The Psychological Effects

The psychological impact of victimization may be more severe than the physical violence. Victims who have been rescued from sexual slavery, typically present with various psychological symptoms and mental illnesses, include Post-Traumatic Stress Disorder (PTSD), depression, anxiety issues, panic attacks, suicidal ideation and many more. The victimisation of such crime leaves the victim mentally disturbed which induces such suicidal thoughts and mental traumas.

[318] http://atina.org.rs/en/prevention-human-trafficking-and-exploitation
[319] https://sexualexploitatio.weebly.com/effects-of-human-trafficking.html

CONCLUSION

Human trafficking globally is one of the most Human-trafficking is one of the worst criminal activity that has speeded over the planet. It is one of the terrible act that has made the lives of millions as worse as the hell. This kind of modern slave trade has washed away the humanity among those who are being involved. The moral values, ethos and sense of belongings as a member of same human race has been curbed by the individual interest and pleasure. The victimization of poor and vulnerable masses has excluded them from the human race and commoditised them like animals and vegetables in the market. Their right and access to justice has no significant meaning and worth for them. The procedures, process, means, methods as well as the rate of involvement is increasing in this crime each day due to lack of resources, highest demand in the market, very few income options and impotent legal watch system.

It is, thus, imperative to have a careful watch and monitoring mechanism as well as strong interventions and commitment through which we can attempt to clean out this crime across the globe.

In order to get the laws enforced effectively, firstly the society needs to change their culture of considering the victims as impure and as a burden when they return home after suffering. The families and the society need to accept them with full dignity and shall not accuse them or blame them of anything.

For a successful and effective environment for these victims, we, as a society need to at upon it by entering to it and protecting not just our family members but each and every citizen of the world.

"Dare to enter the darkness to bring another into the light."

—Tony Kirwan,

Destiny Rescue Founder & International President

HUMAN RIGHTS & GROUND WATER MANAGEMENT

- YASHWANTH A.S.

INTRODUCTION:

Modern technologies allow using the subsurface for a range of newer activities, which may contaminate groundwater. Among them are the storage of hazardous waste such as nuclear waste, nuclear testing, the injection of fluids for soluble mineral extraction, the storage and recovery of heat and hydrocarbons, carbon capture and sequestration (CCS), hydraulic fracturing ('fracking'), and the injection of residual geothermal fluids.

These activities pose new challenges, and to a large extent require specialized laws and regulations which overall still need to catch up with technological developments. Their regulation is beyond the scope of this paper, while their impacts on groundwater make groundwater protection rules, particularly with respect to groundwater quality, ever more relevant.

Until a few years ago water laws made no mention of the human right to water. Indeed, the right to water itself—an implicit element of the right to an adequate standard of living recognized most prominently in the 1966 International Covenant on Economic, Social and Cultural Rights—received very little attention. This situation changed when the United Nations Committee on Economic, Social and Cultural Rights General adopted General Comment No. 15 in 2002.

The latter marked the beginning of a quickly developing debate on the right to water, which resulted, inter alia, in the recognition of the right to water in United Nations General Assembly and Human Rights Council resolutions, numerous constitutions and an increasing number of water laws.

Economic and scientific rationality puts its trust in a production model that ignores environmental limitations, pursues continuous growth and allows inequalities and the degradation of waters, regardless of the consequences to the environment, society and future generations. The degradation of water resources is characterized by a "depreciation process in the quantity or quality of water resources caused by human action, through the modification of climate or environmental factors, pollution or unsustainable use".

Local reserves become exhausted or insufficient to meet demand and, as consequence, new freshwater sources or hydrographic transposition between basins are required. The poor are

more vulnerable to this process since their lack of capital and technique limits their capacity to act on the political level and to confront environmental changes. Their livelihood depends directly on environmental resources, so the degradation of water means the disintegration of the material conditions of their existence.

The degradation of water sources puts at risk the achievements toward reaching the goal of universal access to safe water and reinforces the need to invest in sanitation. Most of the Brazilian hydrographic regions present critical areas in regard to qualitative and/or quantitative aspects, likewise the rivers in the state basins. The deterioration of surface waters and climate change tend to increase the extraction of groundwater.

The recognition of the human right to water contributes to confronting the water crisis because it prioritizes the use of a sensitive resource with a high quality to meet human vital needs which are the ones related to human survival, personal hygiene, health or alimentation.

FROM THE WATER CRISIS TO THE IDEAL OF THE HUMAN RIGHT TO WATER:

The social construction of the water crisis idea was strengthened by the perception of water as a scarce resource and therefore unable to meet the multiple demands and capable of generating conflicts. The lack of adequate sanitation, industrial and agricultural pollution, rapid urbanization, unequal water distribution, climate change, population growth and consumption have contributed to this perception, since they are the main causes of water degradation. Despite this, these behaviours are encouraged by the irresponsibility of governments, the lack of democracy in decision-making processes and the free market logic. Besides the environmental damage, this posture causes social problems such as poverty and inequality in access to resources.

Those instruments are not binding and they have different interpretations or significances in regard to this right. However, they converge in the sense that their recognition may: a) stimulate governmental actions to ensure universal access to safe water; b) contribute to transforming access to water into an obligation that must be met by States; and c) support water management to achieve this right. Furthermore, the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses has affirmed the need to pay special regard to the requirements of vital human needs.

The recognition of the human right to water contributes to confronting the water crisis because it prioritizes the use of a sensitive resource with a high quality to meet human vital needs which are the ones related to human survival, personal hygiene, health or alimentation. Besides that, it attributes responsibilities to States, which should improve water management in order to

guarantee the universal access to safe water, especially for poor people. Unfortunately, the application of water management instruments from national and state policies has failed to include aquifers and lacks transparency in groundwater use.

RECOGNIZING THE IMPORTANCE OF HUMAN RIGHTS:

In water resources legislation drinking and domestic uses have to take priority over other uses. Whereas such priority has traditionally been accorded to drinking water needs in the allocation of water to different uses, framing a water law in human rights terms adds a new dimension by elevating drinking water needs to requirements as of right instead of policy choice, i.e., to entitlements. Due to the generally superior quality of groundwater compared to surface water groundwater is often ideally suited to the satisfaction of the right to water. Human rights considerations also play a role in the protection of water resources from contamination, the regulation of abstraction to prevent dropping water tables and drying up of wells and many other issues.

With respect to the regulation of the water industry, these include appropriate pricing policies, freedom from arbitrary or unjustified disconnections from the supply network, and non-discriminatory access to sufficient and continuous water supply. In many countries, the quantities and uses of water protected by the right to water fall into the category of permit-free de minimise uses, the protection of which therefore may not be compromised unless access to a different source of water is guaranteed. The human right to water requires a look at all water laws, policies, and strategies through a human rights lens and to measure them against human rights criteria, particularly with respect to non-discrimination.

GROUNDWATER AS A PUBLIC GOOD:

As much as access to water is deemed a human right, water as a resource is by now overwhelmingly regarded as a public good.

Historically, the opposite was the case for groundwater. Being a “hidden resource” it was often treated as a private good accessible to owners of land and out of the purview of public regulation. Water rights were essentially a subsidiary component of land tenure rights, i.e., the right to use groundwater was conferred on the owner of the overlying land. In many non-western systems, groundwater could not be privately owned. In Islamic law groundwater is considered a public good, but the ownership of a well entails ownership of a certain amount of adjacent land called *harim* or forbidden area. It varies in size according to different schools.

Customary regimes in many parts of the world view groundwater resources as belonging to the community and reject the concept of individual rights over water.

Better understanding of the characteristics and nature of groundwater and increasing pressure on the resource have instilled a predominant trend to vest ownership and control over all water resources in the state or to recognize the state's superior right to the management of water resources. The state becomes the guardian or trustee of groundwater resources. The right to access and use of groundwater is independent of the regime of the overlying land.

Any user who wants to abstract groundwater must apply for a permit (also styled license, authorization, or concession) in order to obtain a "right to use". The separation between ownership and usufructuary rights is one of the cornerstones of modern formal water rights regimes and allows the government to manage and protect groundwater resources in the interest of the public.

RIGHT TO WATER IN INDIA: THE LEGAL CONTEXT:

The section on fundamental rights in the Constitution of India does not explicitly provide for a fundamental right to water. However, the scope of the fundamental right to life as enshrined under Article 21 of the Constitution of India has been expanded dramatically in the last couple of decades through judicial interpretations. As a result, the fundamental right to water is a part of the fundamental right to life under Article 21 of the Constitution.

As per Article 141 of the Constitution, law declared by the Supreme Court is the law of the land and all other courts in the country are bound by it. Thus the fundamental right to water has become the law of the land and therefore, the government as well as other courts are bound to respect, enforce and implement it. In fact, various High Courts have followed the Supreme Court and recognised the fundamental right to water and the corresponding duties of the government.

A specific statute for the realisation of the right to water is yet to come. Nevertheless, a number of statutes recognise the right to water and most of them, in fact, recognise right to water in the narrow context sought to be addressed through the concerned law.

However, an explicit recognition of the fundamental right to water in the Constitution, through an amendment (as done in the case of the fundamental right to education Article 21A) is necessary, in order to bring more clarity and consistency, as well as to ensure effective implementation.

INTERNATIONAL LAW AND POLICY CONTEXT:

The human right to water is well recognised under international law particularly under international human rights law. A number of core International human rights treaties such as the Convention of Rights of the Child, 1989 (Article 24); Convention on Elimination of All Forms of Discrimination against Women, 1979 (Article 14); and the Convention of the Rights of Persons with Disability, 2006 (Article 28) explicitly mention the right to water.

The recognition of the right to water under human rights treaties has been complemented by a number of soft law instruments. Most importantly, the 'General Comment 15' (United Nations 2003), adopted by the Committee on Economic, Social and Cultural Rights, seeks to define the right to water as inclusive of an "entitlement of safe, sufficient, physically accessible, equal and affordable water for drinking and domestic purpose, that ensures a minimum standard of living to all". It further explains that the right to water consists of freedoms and entitlements. The term 'freedom' signifies the right to be free from interference and the term 'entitlement' signifies the right to a system of water supply and management that provides equal opportunity for people to enjoy the right to water.

In addition to 'General Comment 15', the right to water has been further endorsed by the UN General Assembly. The repeated recognition of the right to water, in a number of binding and non-binding instruments, shows the acceptance of the right to water as a principle of customary International Law, and led to the development of a legal regime for the human right to water at the International level.

UNIVERSALITY:

The right to water, being a fundamental human right, signifies a universal right. This means every individual is entitled to it. In principle, factors such as caste, class and gender cannot be a reason to deny water to anyone. To put it differently, the principle of non-discrimination is a non-negotiable norm to be followed and ensured by the government vis-a-vis the right to water. Equality of rights is one of the cornerstones of the rights enshrined under the Constitution. Therefore, there cannot be a situation wherein water supply provisioning exists for some people and does not exist for some others, on the ground that they do not have proper rights over the land or house. This is relevant in the context of fixing of quantity and quality norms. This is also relevant in the context of determining the norms regarding access to water.

Even though the National Water Policy, 2012, shies away from recognising the right to water explicitly, it has recognised the priority of water for basic needs in the context of water allocation. Thus, 'Safe Water for Drinking and Sanitation' is regarded as high priority, followed by water for other basic domestic needs (including needs of animals). It needs to be

noted that the priority of water for basic needs was a part of the National Water Policy, 1987 and the National Water Policy, 2002. Nevertheless, this cannot be considered as sufficient from a right to water point of view.

This clearly shows the intention of the government -not to link the ongoing water supply programmes and schemes to the concept of the fundamental right to water.

In other words, the fundamental human right to water cannot be changed through water policies or water supply programme guidelines. This aspect of the right to water should be a non-negotiable guiding norm in the water allocation decision-making process.

WATER FOR BASIC NEEDS:

In terms of water, basic needs include drinking, bathing, hygiene (including water for menstrual hygiene management), cooking and other domestic uses. Additionally, basic needs may also include the needs of livestock. However, other than drinking water needs, what exactly constitutes 'basic needs' is not obvious. This is one of the factors that makes it difficult to arrive at a consensus about the exact amount of water required to satisfy basic needs.

Basic water requirements, suggested by various International agencies such as the World Health Organisation (WHO), US Agency for International Development, and the World Bank range from 20 to 50 lpcd. However, greater amounts of water are also likely to significantly improve health and quality of life (CESR, 2003). There is also the fear that suggesting a particular level of water provision can provide an excuse for governments to 'lock' the water provision at that level (UNESCO-WWAP, 2003). Further, any discussion on the quantity of water required for basic needs, gets complicated by the question of, whether one should have a universal standard, and how differences in requirement due to culture, climate, and technology should be taken into account.

ACCESS TO GROUNDWATER VERSUS THE RIGHT TO GROUNDWATER:

The hidden nature of groundwater and its relationship with soil and property rights makes it difficult to exclude users, to control the extraction or to visualize the impacts. Surface water runs through a visible bed and its access presupposes proximity with the water course. On the other hand, an aquifer is accessible to all land owners wherever it extends. For this reason it can be classified as a common pool resource. This term is applied to natural resources whose characteristics "make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use"; while the use by one of those beneficiaries causes the decrease of the quantity available for the others.

The clandestine exploitation of groundwater ignores its possible effects on the local water availability and also violates the rights of legal users and it hampers the sustainability of water management policies since it is difficult to predict its impacts on public supply, or on licensed or exempted users. The idea of the human right to water does not support this irregular appropriation, let alone the use without control, especially in a context of water crisis. On the contrary, this right implies the strengthening and transparency of management as a way to ensure quality and quantity of water to supply human needs.

Despite this legal transformation, reality shows that in practice groundwater has been used as if it were a private resource which can be freely pumped by landowners. After more than 18 years of Federal Law 9.433/1997, the number of illegal wells is higher than licensed ones and continues to increase due to the drought, the savings on the water bill or the autonomy of having an exclusive source.

The lack of actions to restrict this silent expansion may be an indication that there is a social acceptance or tolerance of illegal pumping. On one hand, Public Administration has accepted that it cannot control this expansion; on the other hand, society does not see pumping groundwater as a problem but a natural consequence, given the need to supply water demand or cut costs.

CONCLUSION:

Water is vital to livelihoods and to the prospects of rural and per-urban residents escaping poverty. The human right to water is fundamental to the right to life, health, and food, and as the Vienna Declaration of Human Rights proclaimed "human rights are universal, indivisible and interdependent and interrelated." We conclude that the human right to water should not be limited to safe and clean drinking water and a more progressive interpretation of existing international law, focusing on the human right to water (in general), may be a more effective way to address a comprehensive range of socio-economic rights in rural and per-urban areas.

This more open interpretation also provides states with more options for the provision of water services when taking concrete actions to respect, fulfil, and protect the human right to water. We present the domestic-plus, irrigation-plus, and MUS approaches to the delivery of water services as important options to help progressively realize a broad range of water-related human rights.

The right to water for basic needs while less controversial than the right to water for livelihood or ecosystem needs, or socio-cultural needs, nevertheless involves a number of dimensions, not all of which are straightforward or involve an easy consensus. The current context of

reforms in the water sector, which has implications for many of these dimensions, is a further complicating factor.

The propositions put forward in the tentative 'model of water provision for basic needs' can be used as a starting point to come up with more specific norms in particular, concrete settings. But, in general, a basic rule of thumb seems to be that guidelines or norms of water provision and/or policy changes in the realm of water (be it about pricing, reducing leakages, participation, or others) need to be evaluated against the framework of a right to water, or more specifically, with respect to the question: Would putting in place a particular policy ensure that, access to water for basic needs improves, for at least some people (if not all), and in particular, for marginalised groups in society?

However, with the increasing number of actors who decide to use groundwater illegally, the impacts on aquifers, ecosystems, licensed users and society grow. The sum of groundwater extraction leads to significant damages to water dynamics, such as overexploitation, salt intrusion and contamination of the aquifer whose consequences can be seen in wells that do not produce water as it used to be, go dry or are lost. In these cases groundwater extraction becomes more expensive since it requires a new or a deeper well and stronger pump systems.

One more factor is worth emphasising in the context of availability of finances. In contrast to the current trend of making each sector and sub-sector self-sufficient in terms of finances, the possibility of financing a particular use of water (in this case, water for basic needs) from other water or non-water arenas, i.e. through a cross-subsidy, must be kept open. Finally, it might be worth having an explicit legal provision to the effect that no government authority can cite 'lack of availability of finances' and/ or other constraints as reasons for non-provision of water as a basic need. This would mean that the provision of lifeline water is non-negotiable. In fact, there is already judicial support for such a provision in the Indian context; for instance, some judicial judgements hold that the state cannot claim insufficient funds as a reason to not carry out its duties (Upadhyay and Upadhyay, 2002)13. However, such a legal provision should be laid down more explicitly.

M.C. MEHTA v. UOI

[1987 AIR 1086, 1987 SCR (1) 819, AIR 2004 SC 4016]

- **RISHU KUMARI**

BACKGROUND

The case of M C Mehta v. Union of India is perhaps a well known landmark judgment in the field of environmental context. Apex court in this case attempted to reestablish the faith of general society in the machinery of justice by correcting the mistake done a year ago in Bhopal Gas tragedy case. This tragedy affected the health of several individuals and at the same time causing environmental pollution. Under Part IVA (Article 51A- Fundamental Duties)[320] of Indian constitution, casts a duty on each resident of India to ensure and improve the natural environment including forests, rivers and to have compassion for living creatures.

Further, under Part IV (Article 48A- Directive Principles of State Policies)[321] of Indian Constitution, specifies that the State will attempt to ensure and improve the environment and to safeguard the wildlife of the nation.

-There are various environment protection legislation existed even pre- Independence of India. In 1972, the National Council for Environmental Policy and planning was made after Stockholm conference within the Department of Science and Technology to build up an administrative body to take care of environment-related problems.

FACT OF THE CASE

This case began in the outcome of an oleum gas leak from Shriram Food & Fertilizers Ltd at Delhi. On 4th and 6th December 1985, a significant leakage of oil gas occurred from one of the units of Shriram Food & Fertilizers limited which resulted into the death of an advocate and affected the health of many others.

This incident took place just after one year from the Bhopal gas tragedy in which several individual including the workmen and public were affected.

This case is based upon the principle of Absolute Liability.

On 6th December, 1985 by the District Magistrate, Delhi U/S 133(1) of Cr.P.C, directed Shriram hat within 2 days Shriram should stop carrying on the control of assembling and

[320] Constitution Of India 1949

[321] *Ibid.*

preparing dangerous chemicals and gases and within 7 days to expel such chemicals and gases from Delhi.

M.C Mehta filed a PIL under Articles 21 and 32 of the constitution of India and looked for closure and relocation of the Shriram caustic chlorine and sulphuric Acid plant and also claim compensation for the losses caused and argued that the shut establishment ought not to be permitted to restart.

ISSUES

1. What is the scope and ambit of the jurisdiction of Supreme Court under Article 32?

-In the case of **Bandhua Mukti Morcha v. Union Of India**[322], Bhagwati, J. held that the scope and ambit of Article 32 of the Indian constitution doesn't only give power on this court to give a order or writ for enforcement of the fundamental rights yet it likewise lays a constitutional obligation on this court to secure the fundamental rights of the citizen and for that reason this court has all incidental and subordinate powers including the ability to make and receive new remedies and fashion new methodologies intended to uphold the fundamental rights. The court can enhanced new techniques and procedures to make sure about the enforcement of the fundamental rights, especially on account of poor people and hindered who are denied their basic human rights and to whom freedom have no significance.

- It was also held that it would not be right to dismiss a letter addressed to an individual justice of the court only on the ground that it is not routed to the court or to the chief justice and his companion judges. The court called attention to that letters would usually be tended to by poor and hindered people who may not have a clue about the best possible type of address. Hence, in this way held letters addressed to individual justice of the court ought not be dismissed only in light of the fact that they fail to adjust to the preferred type of address.

Under Article 32(1), the Apex court is allowed to devise any method proper for the specific purpose of the proceeding, specifically, implementation of a fundamental right and under Article 32(1) can give order or writ is important in a given case, including all incidental or subordinate power important to make sure about enforcement of the fundamental right.

In the case of **Rudul Shah v. State of Bihar**[323] it was held that the power of the court to give such remedial relief may include the ability to grant compensation for proper situations where encroachment of the fundamental right is gross and patent, that is, indisputable and ex facie

[322] 1984 SCR (2) 67
[323] 1983 SCR (3) 508

glaring and either such encroachment ought to be for a huge scope affecting the fundamental rights of a larger number of individual or it ought to seem unjustifiable or unduly brutal or oppressive by virtue of their inability or socially or financially burdened situation to require the people and persons affected by such encroachment to start and seek action in the civil courts.

-And thus, it was held that the court has jurisdiction to hear this case and if the court discovers fit, at that point it would grant compensation to the persons who have claimed that there fundamental rights have been infringed.

2. Article 12 is subjected to the discipline of Article 21, so does Shriram fall under the boundation of Article 12?

This was the main issue to the case. According to the article 12 of the Indian constitution, the state includes the Government and parliament i.e. the Executive and legislature of each state and all local and other authorities within the territory of India.

Petitioner considers that Article 21 was available and Shriram runs the industry that can be carried out by itself instead of government embarkment, the industry was allowed to run under the control and rules and regulations of the government. The control of the government was associated to the aspect of the industry as it vitally impacts the public at large. However, under the statutory law the regulation of activities of private industries in under the power exercised by police. Such regulation does not create any conversion and so it would not suit to extend it under the boundation of article 12.

After a broad discussion, the court stated that Shriram was to be sure working under the shadow of the administration. Likewise, it opposed that when other industries will be introduced for development authentically it would be a constituent of risk. Since the advancement was irreplaceable to the country, the private substances couldn't be held under the moving toward threat of being set apart as an open element which could discourage them from opening new private undertakings. Since this issue required a great deal of time and deliberation, the court in the long run didn't take a decision.

3. Does the rule in Ryland v. Fletcher apply or not?

- Does the rule in Ryland v. Fletcher apply or is there any other principle on which the liability can be determined. The rule in Ryland v. Fletcher was developed in the year 1866 gives that an individual who for his own purpose brings on to his property and gathers and keeps there anything which cause harm if it get away must keep it at his risk and, if he fails to do as such, is prima facie obligated for the harm which is the natural consequences of its break.

The rule of strict liability will be applicable here and it is no defence that the thing escape without that individual's willful act, act or neglect.

This rule set out a principal that if an individual who brings on to his territory and gathers and keeps there anything liable to do harm and such things get away and harms another, he is at risk to compensate for the harm caused.

This rule is applicable only to non-natural user of the land and if any harm caused due to an act of God, and an act of an unknown person, and where there is statutory authority then this rule will not apply.

The court introduced absolute liability. An industry involved with dangerous activities which represent a likely threat to wellbeing and security of the people working and living close owes an absolute and non-delegable duty to the community to guarantee that no mischief results to anybody. Such industry must lead its exercises with best expectations of wellbeing and if any mischief results, the industry must be absolutely liable to compensate for such damage. It ought to be no response to industry to state that it has taken all reasonable care and that damage happened without negligence on its part.

Since the people mischief would not be in position to separate the procedure of activity from the dangerous preparation of the substance that caused the damage, the industry must be held absolutely liable for causing such damage as a part of the social cost of carrying on the dangerous activity.

This principle is manageable on the ground that the industry alone has the asset to find and guard against risk and to give notice against expected dangerous.

JUDGEMENT

Since the court in the end chose to not arbitrate whether article 21 is accessible against Shriram or not, no special machinery was defined to decide on the compensation to be gotten by the individuals who affirmed that they were victims of the oleum gas tragedy. But the Supreme Court directed to Delhi Legal Aid and Advice Board to take up the cases of every one of the individuals who claimed to have suffered on amount of oleum gas leakage and to file cases on their behalf for claiming compensation against Shriram in the appropriate court.

Such activities guaranteeing remuneration were to be filed by the Delhi Legal Aid and Advice Board inside two months from the date of the judgment and the Delhi Administration was directed to give the necessary funds to the Delhi Legal Aid and Advice Board for filing of such actions.

DEVELOPMENT OF LEGISLATION AFTER MC MEHTA CASE

There are following acts which were created to handle the issue of environment pollution after the oleum gas leakage.

1. **The National Green Tribunal Act, 2010**

-This act enables creation of a special tribunal for fast disposal of cases pertaining to environmental preservation.

- This act envisages foundation of NGT so as to manage every single environmental laws regarding water and air pollution, the Forest Conservation Act, the Environment protection Act as have been set out in schedule 1 of the NGT Act.

2. **The Environment (protection) Act, 1986**

-This act came into force after the Bhopal Gas Tragedy case in 1984.

- This act provides for the protection and improvement of environment.

-This act enables the center to just accept every single such measure because it deems important by setting guidelines for emission and releases of pollution in the environment by any individual carrying on an industry or action and directing the area of industries; management of dangerous debris, and protection of general wellbeing .

-A sunshade legislation which consciously carries a structure with collaboration of State and central authorities entrenched under the Water Act 1974 along with the air act.

3. **The Hazardous waste Management Regulation**

-Municipal solid wastes (managing and holding) rules 2000 provides with the directives concerned with the hazardous management of solid wastes. Following are discussed below:

. Municipal solid wastes (Management and Handling) Rules, 2000

. Biomedical waste (Management and Handling) Rules, 1988

4. **The Water (prevention and control of pollution) Act, 1974**

-This act aims to take care of healthiness of the water of the country and to advance cleanliness of streams and river.

- It prompted the muse of Central Pollution Control Board(CPCB) at the centre level and State Pollution Control Board(SPCB)

- It also prohibits the discharge of effluents into the water bodies beyond a particular level.

5. **The Air (prevention and control of pollution) Act, 1981**

-This Act provides for the control and prevention of air pollution.

- It empowers the state government, to pronounce any area or areas inside the state as air pollution control territory or zones after consultation with the SPCBs.

- This act provides for the establishing or operating any industrial plant within the pollution control zone requires assent from SPCBs.

There are some policies also which were made to accomplish the aim of environmental preservation. Some of them are:

. National Environment policy, 2004

. National Environment policy, 2006

. Marine fishing policy, 2004

.11th five year plan (2007-2012)

. National wetland conservation programmed

DOCTRINE OF ABSOLUTE LIABILITY

Absolute liability is the fundamental principle of law which is based upon a legal maxim that "sic utere tuo ut alienum non laedas" means Enjoy your own property in such a manner as not to injure another persons.

For instance, if an industry is engaged in some hazardous activity and if that activity is capable of causing damage then the industry officials will be held absolutely liable and they have to pay compensation to the aggrieved parties. It ought to be no response to industry to state that it has taken all reasonable care and that damage happened without negligence on its part.

ANALYSIS

The hazardous industries which are engaged in some hazardous process may affect the health of human life as well as our environment unless some special care is taken to the withdrawal of the raw material or by product. After the oleum gas leakage in 1995, the Supreme Court felt that the doctrine of strict liability which was adopted in Ryland v. Fletcher case would not suffice the changing need of the liability guideline in India. That's why the Apex court felt the need of adopting the principle of Absolute liability. Before this case, Bhopal gas tragedy was happened in 1994 in which the principle of strict liability was applicable where the respondent could take the plea of defenses, however this decision of the Supreme Court the principle of absolute liability came up.

There are some principles that came up after this case:

i. Principle of Absolute Liability
ii. Principle of polluters pays
iii. Principle of Precautionary measures
iv. Principle of highest safety standards

CONCLUSION

The developing countries like India suffer from the major issue of environmental pollution. The case M.C Mehta V. Union of India is one the famous landmark judgment by the court in the environmental Indian context.

Dangerous industry endeavors engaged in risky procedure which may cause severe impact on the wellbeing of the individuals and the environment except if care is taken to the leakage of the crude material or by product. In our global market economy, this hazardous industry are playing a vital role in the financial development but at the same time causing severe impact to human life and causing environmental pollution.

CHILD RIGHTS

- MANISHA

ABSTRACT

Rights of Victim are derived from Article 21 of the Constitution of India. The necessity of the right of victim was felt by the courts when it was found that the victim, otherwise called as the initiator of the litigation, is losing confidence on and interest in the process of adjudication. The author analyses the right of victim in respect of child in various legal aspects in India.

INTRODUCTION

"One of the most neglected subjects in the study of crime is its victims."[324]

The crime is inevitable in every human society and has been in existence since time immemorial. Directly or indirectly, repercussion of every crime is on the 'victim'. There cannot be a victimless crime thus both being interdependent. Conversely, crime has basically two elements; criminal (crime doer) and victim (sufferer). 'Victim' has its roots in the early religious notions of suffering, sacrifice and death. In India, however, the rights of victims are still often overlooked. Unlike the accused, victims in India have virtually no rights in criminal proceedings, supposedly conducted on their behalf by state agencies. When state agencies fail to successfully prosecute offenders, as is often times the case, victims are left to either suffer injustice silently or seek personal retribution by taking the law into their own hands.[325]

India has largely ignored the protection of victims' rights, irrespective of whether the perpetrator is the state or a private individual.

DEFINITIONS OF VICTIM

A person who is actually and directly affected by an act or omission that is incompatible with the European Convention on Human Rights, or a person who is at risk of being directly affected.[326]

'Victim' is a person harmed by a crime, tort, or other wrong.[327]

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[324] Schafer, Stephen in his book – *"Victimology – The Victim and his Criminal",* (1977) Apprentice Hall Company, at 3.

[325] N.R. MadhavaMenon, Victim's rights and criminal justice reforms, The Hindu, Mar. 27, 2006, available at http://www.thehindu.com/2006/03/27/stories/2006032703131000.htm

[326] Elizabeth A. Martin, "Oxford Law Dictionary",Fifth edition (2003), p. 526

[327] Black Law Dictionary, 4th Edition.

'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 includes guardians and legal heir of the victim.[328]

The victim means "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" is already of wide enough import to include at least some legal heirs within its ambit.[329]

DEFINITION OF CHILD[330]

• The Juvenile Justice (Care And Protection Of Children) Act, 2015 (JJ Act)

• National Policy for Children, 2013

• Protection of Children from Sexual Offences Act (2012)

The definition of child is given under these statutes. It means in general, a child means every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier.

A child is also defined as anyone under 18 years of age .

CONSTITUTIONAL AND OTHER LEGAL RIGHTS FOR CHILD VICTIMS

(A) *Constitutional rights*

The rights of children are protected by the fundamental rights and freedoms and also have been covered under the Directive Principles of State Policy. The framers of the Constitution were aware of the fact that the development of the nation can be achieved by the development of the children, and it is necessary to protect the children from exploitation as well. Following are the provisions of the Indian Constitution relating to children. Some of them are general provisions and are applicable to all including children and certain other provisions are directly applicable to children.[331]

1. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.[332]

[328] Code of Criminal Procedure,1973

[329] Ram Phal v. Stateand Others .decided on May 28, 2015, available at https://indiankanoon.org/doc/121117145

[330] https://www.ecoi.net/en/file/local/1150604/5228_1476691412_protection-of-children-in-india-booklet-english.pdf

[331] Kumaravelu CHOCKALINGAM : FEMALE AND CHILD VICTIMS:Indian Situation Journal

[332] Article 14 of the Constitution of India, 1950

2. Article 15(3) provides that nothing in this article shall prevent the State from making any special provision for women and children.[333]
3. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.[334]
4. Article 21A provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.[335]
5. Article 23(1) provides that traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.[336]
6. Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.[337]
7. Article 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.[338]
8. Article 39(e) provides that the State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.[339]
9. Article 39(f) provides that the State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[340]
10. Article 45 provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.[341]

[333] Article 15 of the Constitution of India, 1950
[334] Article 21 of the Constitution of India, 1950
[335] Article 21 A of the Constitution of India, 1950
[336] Article 23 of the Constitution of India, 1950
[337] Article 24 of the Constitution of India, 1950
[338] Article 29 of the Constitution of India, 1950
[339] Article 39 of the Constitution of India, 1950
[340] Ibid.
[341] Article 45 of the Constitution of India, 1950

11. Article 47 provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.[342]
12. Article 51A(k) provides that it shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.[343]

(B) *Protection of Children under Other Legislations*

Apart from the Constitution, there are a number of legislations which deal with the protection of children. The following are some of them:

1. **The Guardian and Wards Act 1890**

This Act deals with the qualifications, appointment & removal of guardians of children by the courts & is applicable to all children irrespective of their religion.

2. **The Child Marriage Restraint Act 1929**

This Act as amended in 1979 restraints the solemnization of child marriages by laying down the minimum age for both boys & girls. This law is applicable to all communities irrespective of their religion.

3. **The Child Labour (Prohibition and Regulation),Act 1986.**

This Act prohibits the engagement of children in certain employment & regulates the conditions of work of children in certain other employment.

4. **The National Commission for Protection of Child Rights (NCPCR):**

This Commission was set up in March 2007 and its mandate is to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India. The National Commission for Protection of Child Rights has been taking up various issues brought forth in the area of child abuse. After inquiry, the national commission can recommend initiation of proceedings for prosecution or

[342] Article 47 of the Constitution of India, 1950
[343] Article 51 of the Constitution of India, 1950

any other action the commission may deem fit. Under the POCSO Act, the National Commission for Protection of Child Rights and the State Commissions for Protection of Child Rights have been vested with the responsibilities of: a) Monitoring the implementation of the provisions of the POCSO Act 2012, as per the prescribed Rules. b) Conduct inquiries into matters relating to an offence under the Act c) Reporting the activities undertaken under the POCSO Act 2012, in its Annual Report The Commissions must monitor the designation of Special Courts, appointment of Public Prosecutors, formulation of guidelines for use of NGOs, professionals and experts to be associated with the pre-trial and trial stage, dissemination of information 256 about the Act through media to promote awareness among general public, children, parents and guardians.

5. **Section 357 Cr.PC: Order to pay compensation**

(1) In case of Conviction, fine is part of Sentence to Accused

When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) ***Expenses in Prosecution****:* In covering the expenses properly incurred in the prosecution;

(b) ***Compensation to Victim*****:** In case of the payment to any person of compensation forany loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) ***Compensation in case of Death***: When any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, the fine imposed may be used in paying compensation to the persons who are covered for relief under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death.

(d) ***Compensation of Victim in other Offense*****:** When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) Payment of Compensation subject to Appeal

If the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) Sentences without Fine

When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

i) **Right to statutory recognition** - Section 2(wa)[344] of the Code of Criminal Procedure defines the term 'victim'. This definition includes a guardian or legal heir of the victim as a victim and confers them the right equivalent to victim.

ii) **Right to choose advocate** - Proviso to section 24(8)[345] of the Code of criminal procedure. By insertion of this section, the victim is able to engage his advocate of his choice to assist the public prosecutor.

The High Court or Court of Session or appellate court, when exercising its powers of revision may also make an order under aforesaid section. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section. After insertion of the Code of Criminal procedure (Amendment) Act, 2008 and Criminal law (Amendment) Act 2013, a radical and impactful change is found in the Indian criminal justice system by introducing and redefining the rights of victim of violent crimes in the following manner-

- a. Proviso to section 26(a)[346] of the code of criminal procedure provides that offence under section 376 and 376 (A) to 376 (E) of the Indian penal code shall be tried as far as practicable by a court presided over by a woman.[347]

[344] Ins. by Act 5 of 2009, sec.2 (w.e.f. 31-12-2009)
[345] Ins. by Act 5 of 2009, sec.3 (w.e.f. 31-12-2009)
[346] Ins. by Act 5 of 2009, sec.4 (w.e.f. 31-12-2009)
[347] Subs. by the Criminal Law (Amendment) Act, 2013, sec. 11, for "offence under section 376 and sections 376A to 376D of the Indian Penal Code (45 of 1860)" (w.e.f. 3-2-2013).

 b. In the second proviso of Section 157 of the Code of criminal procedure, it is inserted that the statement of the rape victim will be recorded at the residence of the victim or in a place of her choice or as far as practicable by the woman

iii) Special rights (women and child victim) –

Police officer in the presence of her parent or guardian or near relative or a social

a) Section 173(1A)[348] of the Code of criminal procedure is made for stipulating a specific time of three months for the investigating agency to complete the investigation if the allegation relates to the offence of rape of a child worker of the nearby locality.

b) Section 357A[349] of the Code of criminal procedure was incorporated in order to provide for the state government to prepare in coordination with the central government a scheme called "Victim compensation scheme" for the purpose of compensation to the victim or his dependents who suffered loss or injury as a result of the crime.

c) Section 357 B and Section 357 C of the Code of criminal procedure[350]. Section 357 B provides that compensation payable to a victim shall be in addition to the payment of fine under section 326 A or section 326 B of the Indian Penal Code[351]. Insertion of this corresponding provision is meant to give effect to the abovementioned provisions of the Indian Penal Code, 1860, wherein fine is a necessary component of the sentence to be awarded to a victim of the said offence.

iv) Right to compensation –

Similarly, section 357 C imposes positive and mandatory duty upon all hospitals run by either the central government or the state government, or local bodies or any other person, to provide immediate first aid or medical treatment to victims of the offences defined under sections 326 A, 376, 376A, 376B, 376C, 376D, 376E, as soon as the victim reaches there. In addition, a duty has been imposed upon the hospital to immediately inform the police of such incident.

JUDICIAL PERSPECTIVE IN INDIA

[348] Ins. by Act 5 of 2009, sec.16(a) (w.e.f. 31-12-2009).
[349] Ins. by Act 5 of 2009, sec.28 (w.e.f. 31-12-2009)
[350] Ins. by the Criminal Law (Amendment) Act, 2013, sec. 23 (w.e.f. 3-2-2013)
[351] Ins. By the Criminal Law (Amendment) Act, 2013, sec. 5 (w.e.f. 3-2-2013).

Right of the victim was derived from the article 21 of the Indian Constitution[352]. The necessity of the right of victim was felt by the courts when it was found that the victim, otherwise called as the initiator of the litigation, is losing confidence on and interest in the process of adjudication. The judiciary has played a vital role by giving various relevant directives in order to give relief to victims of crime. They are –

I. ***Delhi Domestic Working Women's Forum v. Union of India[353]***

Supreme Court laid following guidelines for the assistance of rape victims –

(1) "The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary. It is necessary, having regard to the Directive Principles contained under Article 38(1) of the

[352] Article 21 of the Constitution of India, 1950
[353] (1995) 1 SCC 14

Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

(7) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."[354]

II. ***Khatri v. Bihar***[355]

It was held that "when a court trying the writ petition proceeds to inquire into the violation of any right to life or personal liberty, while in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioners under Article 21 has been violated and the State is liable to pay compensation to them for such violation."[356]

III. Rudal Shah v. State of Bihar[357]

The Supreme Court ordered compensation to be paid by the state to a person who had to undergo wrongful incarceration for several years. It held:

"The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation."[358]

[354] Ibid.
[355] AIR 1981 SC 928.
[356] Ibid.
[357] AIR 1983 SC 1086
[358] Ibid.

IV. ***Nilabati Behera v. State of Orissa***[359]

It was held that "this Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings."[360]

CONCLUSION AND SUGGESTIONS

Indisputably, nothing in this world be it any amount of money, rehabilitation or condolences can in any way restore the dignity, confidence and faith that the victim loses due to the crime. Undoubtedly compensation can't bring peace to the life of people who have lost their near dear ones, their self-esteem, dignity or property in any form, in the violent crime but the compensation can in some way help the victim to start the life afresh. The trauma of the crime might remain but the compensation to such victims, to some extent can provide some relief from the anxiety & the tension in monetary terms. Secondly, granting of compensation also serves the deterrent purpose of punishment and restores the faith of the victim in the Judicial System. Further, considering the grave nature of violent crimes viz. Rape, Murder, Mass Murder, Arson, Riots etc., it is the need of the hour that the term violent crime be defined under the Indian Law and special rights in way of separate & fast track trials, compensation to the victims of such crimes etc. be considered seriously. As a way of suggestion the Central Government and the respective State Governments may consider it appropriate to formulate Schemes for Compensation of Victims of Violent crimes on the lines of existing scheme for compensation in cases of "Hit & Run" cases under the Motor Vehicles Act, 1988, which includes compensation schemes as well as provision for tribunals adjudicating the claims54. Depending upon the veracity and nature of the Violent Crime the appropriate Government may formulate the suitable guidelines.

[359] AIR 1993 SC 1960.
[360] Ibid.

MAINTENANCE LAWS IN INDIA

- **MANISHA**

1. INTRODUCTION

"The society that provides respect and dignity to women flourishes with nobility and prosperity. And a society that does not put women on such a high pedestal has to face miseries and failures regardless of how so much noble deeds they perform otherwise."

- *Manusmriti*

Indian Constitution promises to administer social, economic and political justice to the citizens of India. Considering the existing socio-economic set up of India, the Constitution makers imposed the mandatory duty on the State to protect the interests of the needy parents, spouse and children, who are subject to the vulnerable conditions. Article 15(3) of the Indian Constitution provides that the State can make special provisions relating to the protection of women and children in India. This provision is so wide that the State cannot be restricted from taking any positive measures in order to provide the maintenance rights to women and children living in the families. Further, right to life or personal liberty under Article 21 of the Indian Constitution includes an individual's right to get maintenance from other individual under certain circumstances. Within the ambit of same fundamental right to life, Parents who are unable to maintain themselves too have right to receive maintenance from their children and State. Since the State is a *parenspatriae* of all Indian citizens, State may make a law to bind the sons and daughters to give maintenance to their parents. It cannot be considered as a violation of the individual rights of the sons and daughters, for the idea of giving maintenance to the needy parents satisfies the constitutional requirement of principle of harmonious construction. More specifically, Article 44 of the Indian Constitution demands the State to bring uniform civil code in all personal laws in India. However, personal laws relating to maintenance of parents, spouse and children enacted under the constitutional obligation are not uniform in nature in India. Bringing Uniform Civil Code in Personal laws is being considered as an attack on one's freedom of religion. The Supreme Court of India has clarified the fact that the social morality, including religious practices, cannot govern the constitutional morality. Protection of women, children and parents is a part of the constitutional morality. It means that a religious practice cannot violate the spirit of Articles 15(3), 21 and 44 of the Indian

Constitution. In the present research, the author argues that the uniformity in the maintenance laws is the constitutional requirement, and needs to be implemented in order to protect the interests of parents, spouse and children. Moreover, the researcher suggests that the State should establish strong infrastructure, including shelter homes, adequate compensation, schooling, and other basic institutions, to protect the victims of any domestic abuse.

2. MAINTENANCE UNDER HINDU LAW

This chapter entails the provisions regarding maintenance of dependents under Hindu law and an in depth study with the help of judicial pronouncements. This chapter declare the existing laws under Hindu law and the development is done till now in the Hindu law.

2.1 Hindu law on Maintenance of Wife

The law of land as to maintenance is provided under Hindu Marriage Act,1955 and Hindu Adoption and Maintenance Act,1956. The Hindu Marriage Act,1955 provides maintenance only as an ancillary relief to the parties with a view to provide them economic assistance pending or at the disposal of a matrimonial dispute. However, the right of a married woman to reside separately and claim maintenance even if she is not seeking divorce or any other major matrimonial relief has also been recognized in Hindu law alone.[361]

2.1.1 *Maintenance under Hindu Marriage Act,1955.*

Marriage under Hindu law is a sacrament, a religious ceremony which results in sacred and holy union f man and woman by which such woman by acquiring the status of wife of that man are completely transplanted into the house hold of her husband and takes a new birth as a partner of her husband. The Hindu wife is enjoyed to share life, live, joy, and sorrow, troubles of her husband.[362]Under section 24 Hindu Marriage Act, 1955 any spouse can file an application for interim maintenance. Under this any spouse can get the order to get the maintenance till the proceedings are going on who does not have the means to even proceed with the proceedings. This type of maintenance can be enjoyed till the final order of the Magistrate. Whereas under section 25 of the Hindu Marriage Act 1955 on the application of either spouse, the court may pass an order for maintenance and permanent alimony at the time of the passing of decree. Under this section the court may order to give the gross sum or monthly sum for a term not exceeding the life of the applicant. Maintenance granted under

[361]PriyaGupta,"*Maintenance laws for Hindus",*shree ram law house,Chandigarh, 2018.
[362]*Ibid.*

section 25 is called as permanent maintenance and maintenance granted under section 24 is called interim maintenance.[363]

2.1.1.1Interim Maintenance (Section 24) Maintenance pendent elite and expenses of proceedings.

Where in any proceeding under this Act it appears to the court that either the wife or husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses for the proceeding. It may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioners own income and the income of the respondent it may seem to the court to be reasonable. Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or husband, as the case may be.[364]Under section 24 an order for maintenance may be made by court for maintenance *pendentelite*(Interim or temporary) and expenses of the proceedings. The claim may be made either by the husband or by wife. Only requirement is that the claimant should establish that he/she has no independent income sufficient for his/her maintenance and support. In fixing interim maintenance, applicant's conduct (e.g. accusation of adultery) is immaterial. Income of the respondent is material.[365]Section 24 does not limit the jurisdiction of court to award the maintenance. Maintenance *pendente lite* and the litigation expenses are payable from the date of the application, and once fixed can be enhanced or reduced depending on the nature of change of circumstances. An order under sec. 24 can be enforced by execution proceeding, or by stay of petition or by striking of the defence. It is an inter locating order and no appealable generally. In *Rita Magov.*v. *P. Mago*[366]the court held that an order for interim maintenance and for the expenses of the proceeding undersection24 can be passed during the pendency of

[363]*Ibid.*
[364]Ins. by Act 49 of 2001. Sec. 8 (w.e.f. 24/09/ 2001).
[365]A. K. Jain, *Hindu Law*, 98 (2003).
[6] *Mango v. P. Mango* AIR 1977 Del. 176.

the proceedings also. Such an order cannot be passed after the conclusion of trial and passing of the decree.

2.1.1.2 Permanent MaintenanceunderSection25 of the Hindu Marriage Act 1955:

Under Section 25 (1) on the application of either spouse, the court may pass an order for permanent alimony and maintenance (a gross sum or monthly or periodical sum) at the time of passing any decree granting the petition or at any time subsequent thereto. In case the court orders a monthly or periodicalsum. Such a sum can be for any term during the life time of applicant. The payment ordered by the court may be secured, if necessary by a charge on the immovable property of the respondent.In granting maintenance under sec 25 of Hindu Marriage Act the court takes into consideration the income and other property of the respondent and applicant, the conduct of the parties and other circumstances of the case (e.g. whether the non- claimant has dependent parents, brother and sister). The usual practice is toward a third of the husband's income to the wife, after taking wife's income (if any) into account. If the claimant has independent and sufficient means of maintenance herself, no amount of maintenance can be granted to her.[367]

In *Ira Das*v.*RameshRanjanMallick*[368]court held that while determining the quantum of permanent alimony the income of the husband and has to be kept in mind. In *Ramesh Chandra Daga*v. *Rameshwari*[369] the Supreme Court held that bigamous marriage may be illegal in law but it cannot be held to be immoral for as to deny maintenance to an affected spouse who is financially weak and economically dependent. As per the apex court's ruling, an illegal wife is entitle to alimony.

2.1.2 The Hindu Adoptions and Maintenance Act,1956

Chapter III of the Hindu Adoptions and Maintenance Act deals with the maintenance of a wife. The provisions in the chapter prescribe the conditions that are to be satisfied to claim maintenance and also contain certain guidelines for the courts in respect of the quantum of maintenance that is to be granted in individual cases and for the alteration of the quantum of maintenance under certain change of circumstances.

2.1.2.1 Section 18 Hindu Adoptions and Maintenance Act 1956: Maintenance of wife[370]–

[367]*Rampal*v.*Nisha* AIR 1994Raj 204.
[368]*Ira Das*v. *Ramesh RanjanMallick* 2003Ori 62.
[369]AIR 2005 SC 422
[370]Hindu Adoption and Maintenance Act 1956, s.18.
It provides: "Section 18 of Hindu adoption and maintenance act 1956, reads as follows-

This Section confers a statutory right on a Hindu wife to live separately without her claim for maintenance during the lifetime of her husband, whether she was married before or after the commencement of the Act. She can live separately and also claim maintenance only when one or more of the seven grounds mentioned in sub-section (2) are satisfied and also subject to the conditions that she should remain chaste and should not cease to be Hindu by conversion to another religion.[371]The Hindu Adoption and Maintenance Act, 1956 limits its concern over wife until the marriage is a going affair but fails to extent any remedy after divorce. Unlike the husband, the divorced women is in a different status after the dissolution of marriage.[372]In *Rajeshbai*v.*Santhabai*[373]the court had to consider the claim of maintenance of a woman from the estate of her husband even on its finding that the marriage was void. The court rightly held that the words "Wife or Widow" in the context of marriage, succession, or maintenance enactments are of restrictive legal character and imply relationship that results from a recognized legal mode of marriage and would not include a relationship which is not recognized bylaw.

2.1.2.2Quantum of Maintenance

Hindu Adoption and Maintenance Act, 1956 does not speak about the quantum of maintenance. It provides only some guidelinesunderSection23 of the Act of 1956 for fixing the quantum of maintenance. The Activists the court with a wide discretion in the matter of granting maintenance but the discretion is judicial and not arbitrary or capricious. It is to be guided on sound principles of law and to be exercised within the ambit of the provisions of the relevant section having regard to the quantum of maintenance cannot however be a matter

(1)Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall been titled to be maintained by her husband during her lifetime,
(2)A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,
(a)if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;
(b)if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
(c)if he is suffering from a virulent form of leprosy;
(d)if he has any other wife living;
(e)if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
(f)if he has ceased to be a Hindu by conversion to another religion;
(g)if there is any other cause justifying her living separately.
A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion."

[371]Avaliableat:https://shodhganga.inflibnet.ac.in/simple-search(last accessed on 5.12.2019).

[372]*Supra* note at 1.

[373]*Rajeshbai*v. *Santhabai* AIR 1982 Bom. 231.

of mathematical certainty and has to be fixed judiciously after taking the entire factor into account[374].Section25 of the Hindu Adoption and Maintenance Act[375]provides that the amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of the Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.This section of the act simply says that after the grant of maintenance order, if the there is any changes in circumstances of either party the court can alter or modify the quantum of maintenance under the same section.

2.1.3 Domestic Violence Act,2005

The provisions under this act deals with the term domestic violence. It includes physical, sexual, verbal, emotional and economic abuse. The aggrieved party person can claim monetary relief, protection order, residence order, custody order under the provision of this act.[376]Under section 20 of the act the court can grant monetary relief to the woman for the survival of her.[377]Magistrates may issue several kinds of orders under the Act. However, even though monetary relief, compensation, etc. can be ordered.[378]Under Section 20 of the Act, the court can provide monetary relief to the victim which includes expenses incurred, losses suffered, medical expenses, loss to property, maintenance for the victim and her children.[379]Under Section 22 of the Act, the court may issue a Compensation Order for any damages incurred for injuries, including for mental torture and emotional distress caused by the act of domestic violence.[380]To give benefit of Domestic Violation Act, 2005 to live in relationships, both the parties must behave as husband and wife and are recognized as husband and wife in front of the society. They must be of a valid legal age old marriage; they must have voluntarily cohabited for a significance period of time; they must have lived together in shared household; there must have been a domestic relationship between the spouses.[381]In *Suresh* v. *Jaibir*[382], the High Court of Rajasthan stated that the Magistrate might direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief might include, but

[374]*Satynaraynamurthy* v. *Jaggamma*, 1962 AP 439.
[375] Section 25 of Hindu Adoption and Maintenance Act,1956.
[376]*Supra* note 1.
[377]*Ibid*.
[378]Sheelaramnathan,"A life free from non violence, Avaliable at:https://hrln.org/wp-content/uploads/2018/10/a-life-free-from-violence.com (Last accessed on 5.12.2019).
[379]*Ibid.*
[380]*Ibid*.
[381]*Supra* note 1.
[382]*Suresh* v. *jaibir* (2008) P & H HC.

was not limited to the maintenance for the aggrieved person as well as her children[383].The court said, "an order under Section 20 DV Act is not restricted by an order under Section 125 CrPC." As such, the trial court was held to have erred in not appreciating the distinction between the two provisions. In such view of the matter, the High Court did not find infirmity in the order of the Appellate Court. Resultantly, the petition was dismissed.[384]The High Court perused the entire record and held that the trial court passed the order of maintenance after proper analysis of all the relevant material. As for the submission of the husband mentioned above, the Court observed, "Section 23 of the DV Act does not provide a substantive right to parties but is a provision which empowers the trial court to pass an order granting interim maintenance in a petition filed under Section 12 of the DV Act. Merely because the trial court has not exercised the power under Section 23 of the DV Act, when a substantive petition under Section 12 of DV Act was filed and chose to pass an order only when a separate application under Section 23 of the DV Act was filed, does not mean that a Magistrate does not have the power to pass an order with effect from the date of filing of the substantive petition under Section 12." In such view of the matter, the court did not find any merit in the petition which was thus dismissed.[385]In *AradhnaTiwari*v. *Deepak Tiwari*[386], the Madhya Pradesh High Court refused maintenance to wife on the ground of that she refuses to live her husband without any just ground.

2.2 Maintenance for Children

Under Section 26 of the Hindu Marriage Act, 1955, during the proceedings under the Act, the court may pass orders with respect to the custody, maintenance, and education of minor children. Under this Act, *both parents* (father as well as mother or either of them) are liable to maintain the children as ordered by the court. While making such orders, the court takes into account wishes of the children, as far as possible. Such orders and provisions may be altered from time to time. Any application in respect to maintenance and education of minor children during pendency of proceedings under the Act has to be decided within sixty days from the date of service of notice on the respondent, as far as possible.[387]Under section 20(2) of the Hindu Maintenance and Adoption Act, 1956, a legitimate and illegitimate child is entitled to claim maintenance from his or her parents as long as they are minor.[388]Under Section 20 of the

[383]Sheelaramnathan, "A life free from non violence", Avaliable at: (Last accessed on 5.12.2019).
[384]*Shome Nikhil Danani* v. *Tanya BanonDanani*, (2019) SCC, Del. HC 8016.
[385]*GauravManchanda* v. *Namrata Singh*, 2019 SCC, Del 7353
[386]AIR 2015 MP (HC) 23.
[387]https://www.scconline.com/blog/post/2019/01/10/maintenance-children-and-parents/ (Last accessed on 5.12.2019).
[388] The Hindu Adoption and Maintenance Act, 1956, s. 20.

Hindu Adoption and Maintenance Act, 1956, a Hindu male or female is bound to maintain his or her legitimate/illegitimate minor children and aged/infirm parents. Aged or infirm parent (which includes childless stepmother) or unmarried daughter has to be maintained if they are unable to maintain themselves.[389] Under section 20 legitimate or illegitimate children is entitle to claim maintenance only during his/her minority. In *Thulasikumar Anil kumar* v. *Raghvan Nair*,[390] it was held that though the mother as per agreement had undertaken the responsibility to maintain child. But it did not preclude the child from claiming maintenance from her father. Under section 125 of Code of Criminal Procedure 1973,[391]a magistrate may order a person to make monthly allowance for maintenance in a case where any person who despite having sufficient means neglects or refuses to maintain his legitimate or illegitimate minor child who is unable to maintain itself; or legitimate or illegitimate major child (not being a married daughter) unable to maintain itself due to any physical or mental abnormality/injury; or married daughter till she attains majority if her husband is not able to maintain her; or his/her father or mother who are unable to maintain themselves.

This section also makes a provision for maintenance during the pendency of proceedings regarding monthly allowance for maintenance. Also, application for interim maintenance during pending proceedings is to be decided by the Magistrate, as far as possible, within sixty days of the date of service of notice of application to such person. A person who fails to comply with the order of the Magistrate without showing sufficient cause may also be sent to prison. A person may sue for maintenance under section 125 of Criminal Procedure code,1973 even if he has already obtained maintenance order under his or her personal law.[392]In *Ram Chandra Giri* v. *Ram SurajGiri*,[393] the father of a minor son neglected to provide foe his maintenance, as a consequence ,a petition was filed under section 125 of Criminal Procedure Code,1973. Thereupon, the father contended that the son has a good physic and was healthy and hence he had the ability to fend for himself. The court rejected the contention and stated that the concept of potential earning capacity cannot be applied to minor children as that would defeat the very purpose of the legislation. In *Sukhjinder Singh Saini* v. *HarvinderKaur*,[394]in this case held that mere fact that the spouse with whom the child is living is having a source of income, even if sufficient,would in no way absolve the other spouse of his obligation to make his contribution

[389] *Ibid.*
[390] *Supra* note 1
[391] https://www.scconline.com/blog/post/2019/01/10/maintenance-children-and-parents/ (last accessed on8.12.2019).
[392] *Supra*note 1.
[393] *Ram Chandra Giri* v. *Ram SurajGiri* 1980CrLJ 349 (Mad).
[394] *Sukhjinder Singh Saini* v. *HarvinderKaur* AIR 2017 Delhi High Court.

towards the maintenance and welfare of the child. In *Ages lily Irudaya* v. *IrudayaKaniArsan*,[395]the court granted maintenance to unmarried daughter though she attained majority for her educational expenses. In *Prakash Babulal Dangi*v. *State of Maharashtra*, the Supreme Court ordered to husband to pay maintenance under Domestic violation act and section 125 of Criminal code. As per section 20(1) sub clause (b) of domestic violation act, the Magistrate may direct the respondent to pay the aggrieved person as well as her children, if any, in addition to order under section 125 of Criminal Code . Section 36 of Domestic violation act shall be in addition to and not in derogation of any other law.

2.3 Maintenance for Parents

2.3.1 Hindu Adoption and Maintenance Act, 1956.

Hindu Adoption and Maintenance Act, 1956 is the first personal law statute in India, which imposes an obligation on the children to maintain their parents. The obligation to maintain parents is not confined to sons only, even the daughters have an equal obligation/duty to maintain their parents. It is to be kept in mind that parents who are financially unable to maintain themselves from any source, only they are entitled to seek maintenance under this act. According to Section 20 of Hindu Adoption and Maintenance Act, 1956 it is the obligation of children to maintain their aged infirm parents (children here includes legitimate as well as illegitimate). The term 'children' under Hindu Adoption and Maintenance Act, 1956 does not include grandson and granddaughter. The liability to maintain parents is personal and is not dependent on the possession of property (as is the case of proceedings under Maintenance and Welfare of Parents and Senior Citizens Act) and this obligation ceases with the death of the person liable to maintain[396].In *ShamuBai*v.*ShaiMagan*[397]court said in this case that one is required to maintain one's aged parents or infirm parents when they are unable to maintain themselves out of their own earning or property and if they are unable to maintain themselves, they should be treated as aged or infirm parents.

2.4 Maintenance for Husband

Under Hindu Marriage Act,1955 alimony and maintenance can be claimed by either party. Under this act an order for maintenance may be made by the court for maintenance pendent lite and expenses of the proceedings under section 24, and for permanent maintenance and

[395]*Ages lily Irudaya* v. *IrudayaKaniArsan* AIR 2017 Bom. High Court.
[396] Available at :https://blog.ipleaders.in/can-a-parent-claim-maintenance-from-a-child/.
[397]*ShamuBai*v.*ShaiMagan* 1961 Raj 207.

alimony under section 25.In *Rani Sethi* v. *Sunil Sethi*[398], the Delhi High Court ordered wife to pay rupees 20,000/- maintenance to husband under section 24 of Hindu Marriage Act, 1955, the court held that the husband can apply for interim maintenance on that basis that he has no income source to support himself.[399]

3. MAINTENANCE UNDER MUSLIM LAW

The Muslim law imposes s duty on every Muslim to maintain his wife, parents, and children. Marriage makes it the man's responsibility to love his wife and support her. This duty is more moral than legal.

3.1 MAINTENANCE UNDER MUSLIM LAW

3.1.1 *Maintenance for Wife*

Under Muslim law in India, maintenance is known as 'Nafqah'. 'Nafqah' is the amount that a man spends on his family. The right to maintenance of a Muslim woman is absolute and not conditional on whether she can maintain herself or not. Hence all the Muslim women earning or not earning are eligible for the right to maintenance which is contrary to most of the other religious acts where only dependent women are eligible for the maintenance. It is the duty and liability of the husband to provide adequate maintenance to his wife in all the circumstances irrespective of his financial condition. However, a Muslim woman cannot claim maintenance from her husband in the following cases:

- She has not attained puberty.
- She has abandoned her husband and marital duties with sufficient reason.
- Where she elopes with some other man.
- In a case where she disobeys the reasonable commands of her husband[400].

A wife's right to be maintained by the husband has been recognized by all communities in varying degrees. So far as Muslim wives are concerned, a husband is under an obligation to maintain her under the personal law, i.e. the Shariat, the Cr PC 1973, and the Muslim Women (Protection of Rights on Divorce) Act.1986.Under the personal law, a husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him or is otherwise disobedient, unless

[398] *Rani Sethi* v. *Sunil Sethi* 2011 DLT 414.
[399] *Id.* at 1.
[400] Available at https://www.toppr.com/guides/legal-aptitude/family-law-i/maintenance-under-muslim-law/.

the refusal or disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty[401].The Dissolution of Muslim Marriage Act 1939 (DMMA) gives to a Muslim wife grounds to seek dissolution of marriage if the husband neglects or fails to provide for her maintenance for a period of two years. A Muslim husband's duty to maintain his divorced wife extends only up to the period of *iddat*, and thereafter, his liability is over. The period of *iddat* upon divorce is three menstrual courses or three lunar months. In case the wife is pregnant, the period would extend up to the time of delivery, or abortion, even if it is beyond three months. If, however, the wife delivers before that period, *iddat* would terminate with that event. A divorced Muslim wife becomes entitled to her unpaid dower, which becomes payable immediately upon divorce[402].

The husband is under an obligation to maintain his wife in the following circumstances:

1. On account of status arising out of a valid marriage, and
2. On account of a pre-nuptial agreement
3. Under the Code of Criminal Procedure, 1973
4. Maintenance under Muslim Women (Protection of Rights on Divorce) Act. 1986.

The landmark judgment of *Ahmed Khan* v. *Shah Bano Begum* shows the struggle that Muslim women face in maintenance cases. Shah Bano, 62-year-old Muslim women was married to Ahmad Khan who had pronounced *talaq* or divorce against her. Since she could not maintain herself and her 5 children, she had approached the court under section 125 of the Code of Criminal Procedure (Cr.P.C.) which imposes a duty upon the husband to provide for his divorced wife, in case she is unable to provide for herself. Her husband relied on the argument that the issue would fall under the purview of Muslim personal law and as per Muslim personal law, he would only be liable to pay maintenance for the *iddat* period along with the return of the *mehr*. The case, however, was decided in favor of Shah Bano and it was held that Muslims were not excluded from exercising their rights accruing from secular laws. In this case, the Supreme Court attempting to ensure continuing respect for Muslim women's claim to equal treatment, regardless of their membership into a particular religion. However, the Muslim orthodoxy severely condemned it. They saw this case, which had created a breakthrough for Muslim women to address their grievances as an encroachment into the Muslim Shariat Law that they were bound by[403].

[401]A. Fyzee, *Outlines of Muhammedan Law*, 212 (1974).
[402]Available at https://amielegal.com/maintenance-of-wife-under-muslim-law/ (Last accessed on 9.12.2019).
[403]Available at http://lawtimesjournal.in/maintenance-in-muslim-law/ (lat accessed on 9.12.2019).

Muslim Women (Protection of Rights on Divorce) Act,1986

This Act is the result of Shah Bano case the condition of Muslim wives become far better with the enactment of this act. Before this act the husband was only liable to maintain her wife till the iddat period of wife if wife is not pregnant but if wife is pregnant then till the delivery of wife. In terms of Section (3) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife. This includes her maintenance as well. Accordingly, the husband has to make a fair and reasonable provision for the maintenance of the wife beyond the Iddat period as per the terms of Section 3 (1) (a) of the Act. A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can claim maintenance under Section 4 of this act from her relatives who are entitled to her property after her death. This has provided additional rights to Muslim women. The *Shah Ban*o judgement evoke dun precedented debate and controversy on the Muslim women's right to claim maintenance after divorce. It ultimately led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986 (hereinafter referred to as MWA). This Act deals with a divorced Muslim woman's right to be maintained by her husband and other relatives.[404]

This was the case of *Daniel Latifi*v. *Union of India,*[405] The case made Section 3 of the Act the pivotal point due to its restrictive application. In this judgment, the Supreme Court upheld the validity of the Act after coming to a compromise but decided that the secular provision for maintenance would be applied equally to the Muslim community. Sections 3 and 4 were interpreted liberally and it was stated that a divorced Muslim woman is entitled to reasonable and sufficient provision for livelihood along with maintenance. However, this maintenance was held to not be limited to the Iddat period, and a Muslim wife is also eligible to be paid maintenance for a period beyond *iddat* through her life until she has remarried. The case had first analysed the preamble of the Act, the *Shah Bano* case and ultimately upheld the validity of the Act. The court had stated that the 'reasonable' and 'fair' provisions for the future included maintenance extended beyond the *iddat,* but had to be paid by the husband within the *iddat* period in terms of Section 3(1)(a) of the Act. Further, under Section 4 of the Act, the divorced wife may also proceed against her relatives who are liable to maintain her in proportion to the properties which they inherit from her after her death. This includes her children and parents. If none of these relatives has means of maintaining her, the duty would

[404]Supra note 1.
[405]*Daniel Latifi*v. *Union of India* AIR 2001 SC 3958.

shift to the State's Waqf Board, wherein the court may order the Board to pay her such maintenance. The court had held that the Act does not contravene Article 14, 15 and 21 of the Indian Constitution. The judgment stated that the Legislature does not intend to enact unconstitutional laws and that "an appropriate" reading of the Act must be adopted in order to understand that nowhere the Parliament has limited the reasonable and fair provision for maintenance to the *iddat* period and it would extend to the whole life of the divorced wife up until she gets married for the second time[406].

The Supreme Court viewed that a divorced Muslim woman is entitle to apply for maintenance under section 125 of Criminal Code, 1973. The Supreme Court re-emphasized the stand in Shah Bano case[407], wherein a scrupulous rich husband sought to escape the application of section 125 of the code, 1973 on the ground that provision of maintenance to a divorced wife beyond idaat period was contrary to Muslim law. His wife moved a petition under section 125 of Criminal code, 1973 before the court of learned Judicial Magistrate, Indore. Thereupon, the husband divorced her by an irrevocable talaq and pleaded that she ceased to be his wife and hence not entitle to maintenance. The learned court grant maintenance to her sum of rupees 25/- per month as maintenance. In revision, the High Court of Madhya Pradesh enhanced the amount to rupees 179.20 per month where upon, her husband took the matter to Supreme Court but special leave. Supreme Court was with the charge that whether the section 125 of Criminal procedure code is applicable to muslim without interference with their personal laws[408]? The other issue was raised under the case was that whether under Muslim personal law there remains any obligation to provide maintenance to his divorced wife and under what circumstances this duty absolve on the husband after divorce? The Supreme Court by its judgment decided in 1981 upheld the validity of section 125 of Criminal Procedure Code,1973 to Muslim community. It also held that muslin women is entitle to apply for maintenance under the same provision and that mahr is not sum which under the Muslim personal law is payable on divorce. This judgment became highly controversial and created history. The muslim circle reaction to the Shan Bano judgment was quite unfavourable. Their main apprehensions were-

1. They consider it as unfair interference and attempt of the Court to re interprete certain Quranic verses.

[406]ParulSoni, Maintenance in Muslim law, Available at http://lawtimesjournal.in/maintenance-in-muslim-law/ (Last accessed on 9.12.2019).
[407]*Mohammed ahemed khan* v. *Shah bano begum* (1985) SCR (3) 844.
[408]*Supra* note 1.

2. They considered it as the admonition of the state in respect of uniform civil code which according to them amounting to them to a judicial stricture on Muslim personal law on a whole[409].

Meanwhile, Muslim members and the then Law minister, A.K. Sen introduced in the LokSabha the Muslim Women (Protection of Rights on Divorce) Bill, 1986. In discussion two option were proposed to the Government either to amend Section 125-128 of the Criminal Procedure Act,1973 or to pass the bill to supersede the judgment of the Supreme Court in Shah Bano Case. The Rajiv Gandhi Government preferred to pass they bill thus came the Muslim Women(Protection of Right on Divorce) Act, 1986[410]. In *Gulam Rashid Ali v. Kaushar Parveen and others*[411] The court in the case said that even a divorced wide is entitle to maintenance under section 125 of Criminal Procedure Act, 1973 after iddat period Supreme Court in Shan Bano case has observed that petition under section 125 of Criminal Procedure would be maintainable for wife as long as she does not marry and amount of maintenance is to be awarded to her under section 125 cannot be restricted for iddat period. The judgment of Supreme Court in *Daniallatifi v Union of India* case males it clear that even a Muslim divorced woman would be entitle to maintenance from Muslim husband till she remarry.[412]

3.1.2 Maintenance for Children

Prophet Mohammed condemned the treatment of those younger generation and said that it will be the duty of the father to maintain his children. Quran declared that parents are under a duty to maintain their children and of educating them properly. Father is bound to maintain children until they attain the majority. On attaining majority, the father is not bound to maintain children unless they are incapacitated because of disease or physical infirmity[413].Muslim Father is under the obligation to maintain his legitimate child until he attains the puberty age. Under Muslim Law, the father has to maintain his son only until he attains majority. While he has to maintain his daughter until her marriage and till the time she goes to her husband's home. Under the law, the father is not under a duty to maintain the illegitimate child[414].

[409] *Ibid.*
[410] *Ibid.*
[411] *Gulam Rashid Ali v. KausherParveen and others,2010.*
[412] Available at https://www.casemine.com/judgement/in/56090d79e4b0149711179c6c (Last access on 18.12.2019).
[413] *Ibid.*
[414] "Maintenance under Muslim law" Available at:https://www.toppr.com/guides/legal-aptitude/family-law-i/maintenance-under-muslim-law/ (Last accessed on 11.12.2019).

A divorced woman is entitled to be paid the maintenance of her children under section 3(b) of the Muslim (Protection of Rights on Divorce) Act,1986 also[415]. These children apart from personal law can also opt for a criminal law remedy under the Code of Criminal Procedure ,1973.

3.1.3 Maintenance for Parents

The children are bound to maintain their parents when they have means. When there are more than one person to maintain, the liability should be apportioned according to the shares to which such persons would be entitle for inheritance[416].

"Rules of Muslim law, relating to the maintenance of parents may be stated as under:

(1) The children are bound to maintain their parents only if they are in easy circumstances and the parents are poor. In other words, only needy parents are entitled to get maintenance from their children. By easy circumstance is meant a circumstance in which a person need not depend on begging for his livelihood. On the other hand, a person is needy or necessitous if he has to beg for his livelihood.

(2) Sons and daughters, both are equally liable to maintain their parents. There is no difference between a son and a daughter in respect of this liability; their responsibility to maintain the parents is joint and equal. But, if a child is poor and the other is in easy circumstances, the liability lies on the child who is in easy circumstances.

(3) A son, though poor and is in strained circumstances, is bound to maintain his mother, if she is poor. A son, who is poor but is earning something, is bound to support his poor father who earns nothing.

(4) If a child is in a position to support only one of its parents, the mother gets priority over father. But, under the Ithna Asharia Shia law, the child may distribute the maintenance allowance between fathers and mother equally, if both of them are needy.

(5) If the children are unable to support their parents separately, they may be compelled to take their parents with them and to live together.

(6) A son is not bound to maintain his step-mother. Thus, he is not bound to maintain that wife of his father who is not his own mother. Where a father has two or more wives, the maintenance of one should be delivered to him to dispense among all of them.

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[415] Sec 3(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.

[416] *Supra* note 1.

(7) Even if the religion of the parents differs from that of the children the parents are entitled to be maintained, provided they are poor."[417]

4. MAINTENANCEUNDER CHRISTIAN LAW AND PARSILAW

4.1 MAINTENANCEUNDER CHRISTIAN LAW AND PARSILAW

4.1.1 *Maintenance UnderParsiLaw*

The Christian Marriage Act ,1872 was intended to apply to the marriage of all Christians in India including marriages where one of party is a Christian. The marriage has to be solemnized in accordance with the provision of this law. Marriage solemnized otherwise shall be void.[418]

4.1.1.1 Maintenance for wife:

The obligation of maintenance under Christian law is not only a natural obligation but also one of the fulfills humanitarian approach. The law of maintenance as regards Christian in India is found in the provision of Indian Divorce act, 1869.[419]

Section 36 of the Indian divorce act ,1869 – Alimony *pendente lite*- In any suit under this act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection[420](the wife may present a petition for expenses of the proceedings and alimony pending the suit). Such petition shall be served on the statements therein contain, make such order on the husband for[421](payment to the wife of the expenses of the proceedings and alimony pending the suit) as it may deem just.[422]Provided further that the petition for the expenses of the proceedings and alimony pending the suit shall as for as possible, be disposed of within 60 days of service of such petition on the husband.[423]

Section 37 of the Indian divorce act 1869 – power to order permanent alimony[424]- (where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife , the district court may order that the husband shall to the satisfaction of the court , secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life ,as having regard to her fortune if any ,to the ability of the husband , and to the

[417]Ishadsareen "Legal provision regarding maintenance of parents" ,Avaliable at: http://www.shareyouressays.com/knowledge/legal-provisions-regarding-maintenance-of-the-parents-under-muslim-law/117498.(Lastaccesed on 11.12.2019).
[418]*Supra* note 1.
[419]*Ibid.*
[420]Subs. By Act of 49 of 2001,sec 2(a).
[421]Subs. By Act of 49 of 2001,sec 2(b).
[422]proviso omitted by Act of 51 of 2001, sec 21.
[423]Subs. By Act of 49 of 2001,sec 2(c).
[424]Subs. By Act of 51 of 2001,sec 22.

conduct of parties, it thinks reasonable and for that purpose may cause a proper instrument to be executed by all necessary parties. Power to order monthly or weekly payments – in every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable. Provided that if the husband afterwards for any cause becomes unable to make such payments it shall be lawful for the court to discharge or modify the order , or temporarily to suspend the same as to the whole or any part of the money to so ordered to be paid , and again to revive the same order wholly or in part as to the court seems fit.

4.1.1.2 Maintenance of minor children:

As regards the Indian Christians there is no separate law relating to maintenance of children. However the Indian divorce act 1869 includes certain provisions relating to custody and maintenance of the children of those couples who seek judicial separation under that act.[425]Section 41 of the Indian divorce act 1869:Power to make orders as to custody of children in suit for separation – in any suit for obtaining a judicial separation the court may from time to time , before making its decree , make such interim orders , and may make such provision in the decree ,as it deems proper with respect to the custody, maintenance and education of the minor children the marriage of whose parents is the subject of such suit and may if it think fit , direct proceedings to be taken for placing such children under the protection of the said court. Provided that the application with respect to the maintenance and education of the minor children pending the suit shall as for as possible be disposed of within sixty days from the date of service of notice on the respondent).[426]

Section 42 of the Indian divorce act 1869:[427]Power to make such orders after decree – the court after a decree of judicial separation, may upon application by petition for this purpose make , from time to time all such orders and provision ,with respect to the custody ,maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree where still pending.

[425]*Supra*note 1.
[426]Ins.By Act 49 of 2001, sec 3.
[427]*Supra* note 1.

Section 43 of the Indian divorce act 1869:[428]Power to make orders as to custody of children in suits for dissolution or nullity – in any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted, or removed to, a high court, the court may from time to time, before making its decree absolute or its decree, make such interim orders, and may make such provision in the decree absolute or decree, and in any such suit instituted in a district court ,the court may from time to time ,before his decree is confirmed, make such interim orders, and may make such provision and confirmation , as the high court or district court deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit, and may , if it think fit, direct proceedings to be taken for placing such children under the protection of the court. The court hearing an application for judicial separation, may make interim as well as final orders regarding the custody, education and maintenance of the minor children. Similar powers are vested in the courts dealing with suits for dissolution of marriages or for nullity of marriages under the provisions of the Indian divorce act 1869.The children may even be put under the protection of the court. However, this maintenance of the minor child can be awarded only during the matrimonial proceedings. These children can always avail the remedy available under section 125 of the code of criminal procedure 1973.[429]

4.1.1.3 Maintenance of aged parents:

Regarding aged parents under Christian laws, there is no provision for imposing an obligation upon the children to maintain their parents. The parents who want to seek for maintenance can do so only under section 125 of the code of criminal procedure 1973and under the maintenance and welfare of senior citizens (MWPSC) act 2007.

4.1.2 *MAINTENANCE UNDER THE LAW OF PARSIS*

The descendants of the ancient Magi of Persia came as emigrants to India. The threat to the life and religion post the followers of zoster to migrate to this country. Their law rested on tradition and compilation by their learned man. With their arrival in India in 717 AD up to 1865,they had no recognize law to govern their social relations. Their ancient custom having fallen into disuse, the handful of strangers who settled in western India gradually adopted much of the law and usage of the Hindus in matrimonial matters.[430]There existed a state of lawlessness in

[428]Subs.By Act 51 of 2001, sec 25.
[429]*Supra*note 1.
[430]*Peshoten* v. *Mehr* bar ILR 13 Bom 302.

matrimonial matters among the Parsis. They were left without any law governing their social moral duties and obligations. Each man did as seem good in this own eyes. The necessity for special legislation regulating the law of marriage and divorce was felt much by the Parsis and with the efforts of sir Joseph Arnold, a bill was passed as Parsis marriage divorce act,1865.The act was largely fashioned after the matrimonial causes act 1857, of England. The law has been replaced by the Parsi marriage and divorce act, 1936 to keep step with the changed norms in matrimonial behavior. The act has been further amended in 1988 by the parsi marriage and divorce(Amendment) act, 1988.Marriages and divorces among the parsis have been regulated by the Parsi marriage and divorce act, 1936.The act provides for the constitution of matrimonial courts[431] and the appointment of marriage registrars.[432]

The essential requisite for a valid marriage are

1. Parties must not be related with in the prohibited degrees of consanguinity or affinity;
2. Marriage be solemnized in the parsi form of 'ashirvad ceremony' by a priest in the presence of two witnesses;
3. Parties must have attained a minimum age of marriage 21,in the case of male and 18,if female.[433]

The act also provides for registration of marriage. The law also enumerates a large number of grounds for divorce. The 1988 amendment has provided for divorce by mutual consent.[434]It is to be noted that the concept of marriage and divorce in parsy community as its reflected by the parsy marriage and divorce act,1936 shows much similarity to the law governing Hindus the special feature of the code is that it treats the matrimonial home has joint property.[435]

4.1.2.1 Maintenance of wife and husband

The law providing for maintenance among parsis is dealt under the provision of the parsis marriage and divorce act,1936.This law corresponds much to the provisions of the Hindu marriage act,1955 and special marriage act, 1954.[436]Section 39 of parsi marriage and divorce act-alimony Pendente lite – where in any suit under this act, it appears to the court that either the wife or the husband ,as the case may be, as no independent income, sufficient for her or his support and the necessary expenses of the suit ,it may , on the application of wife or the husband, order the defendant to pay the plaintiff, the expenses of the suit, and such weekly or

[431] Parsi Marriage and Divorce Act,1936, sec 18.
[432] Parsi Marriage and Divorce Act,1936,sec 7.
[433]Parsi Marriage and Divorce Act,1936, Requisites to validity of Parsi marriage, sec 4 .
[434] Sec 32 of Parsi Marriage and Divorce Act,1936.
[435] Sec 32- B of Parsi Marriage and Divorce Act,1936.
[436]Supra at 1.

monthly sum, during suit, as, having regard to the plaintiff own income and the income of defendant, it may seem to the court to be reasonable.[437] Provided that the application for the payment of the expenses of the suit and such weekly or monthly sum during the suit, shall, as for as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.[438]

Section 40 of the Parsi marriage and divorce act, 1936[439]– permanent alimony and maintenance –

(1) any court exercising jurisdiction under this act may, at the time passing decree or at any time subsequent there to, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.

(2) The court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub- section(1), it may at the instance of either party , vary, modify, or rescind any such order in such manner as the court may deem just.

(3) The court if it is satisfied that the party in whose favour an order has been made under this section has remarried or , if such party is the wife, that she has not remained chaste, or if such party is the husband that he had sexual intercourse with any woman outside wedlock , it may, at the instance of the other party, vary, modify or just rescind any such order in such manner as the court made deem just.

Alimony Pendent Lite to Wife or Husband

During the pendency of any suit, either the wife or the husband who has no means for his or her support can place a claim as against the other for allowances referred by the statute as alimony. Any payment made during the pendency of the proceeding between the parties is called as Alimony Pendent Lite. The amount awarded may be payable as weekly or monthly sum, the payment could be also for the expenses of the suit. The right of Alimony under this provision is extended not only in the favour of a wife but also of the husband. So, it is amply

[437]Subs. By Act 5 of 1988, sec 13 for sec 39 and 40.
[438]Ins.By Act 49 of 2001, sec 4.
[439] Parsi Marriage and Divorce Act,1936.

clear that in Parsis the gender of the claimant does not matter, it is only the possession of means that are taken into consideration for the award of Alimony.[440]

Permanent Alimony

At the time of the disposal of any suit on an application being made for the purpose, the court can order Permanent Alimony or maintenance. Alimony is normally paid as a gross fund whereas maintenance is paid monthly or periodically. Any such payment if made as maintenance can extend up to the lifetime of the Plaintiff. The court however, ought to take into consideration such facts that are relevant to the passing of an Order as the Defendant's own income and other property, the income and other property of the Plaintiff, the conduct of the parties and the other circumstances of the cases. In case of need, the court can also create a charge on the Properties of the defendants. It must be noted that with the change of circumstances of either party an order that has been made earlier maybe varied, modified or rescinded.

Further, the court is also vested with the power to vary or cancel the order on proof of remarriage on unchastely on the part of one of in whose favor the order has been passed.[441]

4.1.2.2 Maintenance of Minor Children

The provisions contained in the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, relating to the custody, maintenance and education of children were first made under The Parsi Marriage and Divorce Act, 1936. Section 49 of the Act confers the same powers on Parsi Matrimonial Courts as are conferred in this respect on the courts by the law of Civil Marriages and by Hindu Law. The language of the provisions under the three laws is nearly identical. All of them provide adequate safeguards for the interest of children likely to be affected by matrimonial remedies if granted under the relevant law.[442]

Section 49 of Parsi Marriage and Divorce Act,1936 – Custody of Children

In any suit under this Act, the court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of [443](eighteen years)the marriage of whose parents is the subject of such suit, and may, after the final decree upon the application, by petition for this purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to custody, maintenance and education of such children as might

[440] *Supra* note 1.
[441] *Ibid.*
[442] *Ibid.*
[443] Subs. By Act 5 of 1998,sec 20, for "sixteen years".

have been made by such final decree or by interim orders in case the suit for obtaining such decree were still pending.[444] [Provided that the application with respect to education and maintenance of such children during the suit, shall , as far as possible, be disposed off within sixty days from the date of service of notice on the respondent.]

The statutory law applicable to Parsis deal with maintenance of only those children whose parents are seeking any of the matrimonial remedies not otherwise. For other minor children seeking remedy otherwise, there is no specific statute applicable to the Parsis on the lines of the Hindu law. As a result, there is no civil Law Remedy. They are governed by Section 125 of Criminal Procedure Code, 1973 which applies to all Indians alike. It is by nature a Uniform Children's Maintenance statute applicable to all Indians irrespective of all religion in concurrence with the State's duty towards the children as enshrined in the Constitution of India.[445]

4.1.2.3 Maintenance of Aged Parents

As far as aged parents are concerned, like Christians, the Parsis also do not have personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under the Provisions of the Criminal Procedure Code, 1973. Also, the recently enacted act The Maintenance and Welfare of Parents and Senior citizens Act, 2007 has sought to redress this grievance with an emphasis and focus on the senior citizens.[446]

5. Conclusion and Suggestions

5.1 Conclusion

Right to maintenance of wives which generally includes food, clothing and residence and which signifies the dependency of one person upon the other in the matter of material support is a subject of great importance because it affects the whole society in one way or the other. In India women are not governed by any uniform maintenance law but the law of maintenance differs according to the religion of a woman. A Muslim wife is entitled to maintenance during the subsistence of marriage irrespective of the fact that the husband is poor and the wife is rich. If a Muslim husband fails to provide maintenance to his wife for two years, wife can ask for dissolution of marriage. The right of maintenance is available to a Muslim wife who obeys all reasonable orders of her husband and allows him free access to at all lawful times. But a minor

[444] Ins.By Act 49 of 2001, sec 5.
[445] *Supra* note 1.
[446] *Ibid.*

wife with whom cohabitation is not possible or a wife who leaves her husband without any reasonable cause is not entitled to maintenance. A Widow under Muslim law is not entitled to any maintenance because after the death of her husband, his property devolves on his heirs including the widow herself and heirs are in no way bound to maintain the woman as a widow. Under Muslim law a divorced woman is entitled to maintenance during the period of iddat. In 1973 Criminal Procedure Code was amended and it was provided that the expression "wife" includes a divorced wife also. Because this code is applicable to all communities irrespective of their religions hence it was made applicable to a divorced Muslim woman also. Being against the principles of Muslim law, it was opposed by Muslims and some saving clauses were included under section 127 (3) (b) of the Code of 1973, but the judiciary insisted that even a divorced Muslim Woman can claim maintenance under the code of 1973. Accordingly the Supreme Court in BaiTahira and Fuzlunbi cases held that a divorced Muslim woman is entitled to maintenance under section 125 Cr. P.C. if the amount of mehr paid to the divorced woman is not adequate to keep her body and soul together. Ultimately the 169 Supreme Court in the case of Shah Bano held that a divorced Muslim woman is entitled to get maintenance from her husband under section 125 Cr. P. C. if she is unable to maintain herself. This decision was opposed by the Muslims. As result Muslim women (Protection of Right on Divorce) Act, 1986 was passed which changed the effect of the decision of Shah Bano. But section 3 (1)of the Act of 1986 became center of controversy as some High Courts held that a divorced Muslim woman is not entitled to maintenance beyond the iddat period. other High Courts held that a divorced Muslim woman is entitled to be maintained by her, husband even beyond the iddat period, till she remarries or till she dies. The difference of opinion of various High Courts created a lot of confusion. So all the matters were clubbed together and placed before the constitutional bench of the Supreme Court for final adjudication. Ultimately the Supreme Court by its judgment held on 28th Sept 2001 upheld the validity of 1986 Act. And further held that a 'reasonable and fair provision' extending beyond the "iddat" period must be made by the husband within the iddat period in terms of section 3 (1) (a) of 1986 Act. According to Shastric law a husband has personal obligation to maintain his wife. A person was bound even to maintain his unchaste wife provided she live with him. A concubine was also given right to maintenance. Right to maintenance was available even to a wife who lived separately on some lawful grounds. Because among ancient Hindu there was no concept of divorce so, there was no question of maintenance of a divorced Hindu woman. A Hindu widow was entitled to maintenance from the property of husband. For the first time the law of maintenance of a Hindu woman was codified by the Hindu Women's Right to Property and Separate Residence Act. 1946. This Act

was replaced by the Hindu Adoption and Maintenance Act, 1956. Besides this the Hindu Marriage Act, 1955 also deals with the subject of maintenance. According to section 18 (1) of The Hindu Adoption and maintenance Act 1956 a Hindu wife is entitled to live separately without forfeiting her claim to maintenance on any ground mentioned under section 18 (2) of this Act. According to section 18 (3) a Hindu wife is not entitled to maintenance and separate residence from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion. A convert wife looses her right to separate residence and maintenance under 170 section 18 (2) but she does not loose her right to maintenance under section 18 (1) of this Act. A Hindu widow is entitled to be maintained by her father in law subject to the provision of section 19 of this Act. A Hindu widow can claim maintenance under section 22 as one of the dependents of the family. If Hindu remarries, her right to maintenance ceases. According to section 24 of The Hindu Marriage Act. 1955 a wife is entitled to alimony pedentelite only if she has no sufficient means for her support and the necessary expenses of proceeding. According to section 25 of the Act. if a decree is passed for restitution of conjugal rights, judicial separation, divorce or nullity of marriage, a wife can claim permanent alimony from her husband. The amount of alimony can be fixed after having regard to the income and property of the respondent and applicant, conduct of the parties and other circumstances of the case, this amount may be varied, modified or rescinded if there is a change in the circumstances of either party after such order. According to section 25 (3) in case of remarriage or unchastity of a wife and order for alimony can be varied, modified rescinded by the court. Almost similar provision are made under section 36 of Indian Divorce Act, 1869 of the Parsi Marriage and Divorce Act, 1936 (as amended in 1988) and section 36 of the Special Marriage Act, 1954 for the payment of alimony pedentelite and expenses of proceeding. With respect to permanent alimony almost similar provisions are made under section 37of Indian Divorce Act, 1869(Amended in 2001), section 40 of Parsi Marriage and Divorce Act, 1936 (as amended in 1988) and section 37 of the Special Marriage Act, 1954. Section 125 of the Criminal Procedure Code, 1973 is intended to provide a speedier remedy to a wife who is unable to maintain herself and who is neglected to be maintained by her husband whether she is divorced or not. This Act does not speak about the maintenance of widow. Section 127 (3) (b) provides that if a woman has obtained whatever she was entitled for under her personal or customary law, and order passes under section 125 of this Code shall be cancelled. A comparative study of these laws shows that all the laws of maintenance are intended to save a woman from destitution but this goal is not achieved by many laws due to defects therein and other social factors.

Maintenance is a single window arrangement to be made in any particular moment or point of time i.e. for wife it is husband, for children it is father and for infirm aged parents it is their children viz. son or daughter whoever is able to shoulder the responsibility in absence or inability of the other. Of course, legislation or codification of laws sometimes may provide separate liabilities in respective stratum. This strictness is not hypothetical but an entrusted one coupled with compelling brunt of social morals. This indicates that during lifetime of husband maintenance liability exclusively falls upon him and younger or elder brother of the husband need not have to accomplish the same unless supervening impossibility disables him and so on. The so called responsibility brooks no deflection and exerts pressure on the incumbent forewarning the hesitant negligence. The liability of maintenance of children is a forward looking mission of parents for sailing their future expedition centred on safeguarding them from volatile indifference. Children can grab the future ventures if sufficient resource is accumulated at present anticipating the subsequent needs through investment or locked accumulation of assets.

5.2 Suggestions

1. A constructive effort is required by the legislature to make the laws not only effective, speedier and inexpensive but also one that will apply to all without regard to one's caste, creed and religion. Constitution of India mandates the state to endeavour to secure for the citizens a uniform civil code throughout the territory of India. The enactment of a uniform civil code is a part of the process of secularism. Laws relating to marriage, divorce, maintenance, adoption, custody and guardianship affect the women most. A common civil code is hence necessary as all personal laws are discriminatory against woman. No law in India touching upon the personal aspect of family life is uniform. Even the laws that govern individual religious communities are not comprehensive.
2. It is suggested that while granting divorce the court must give due regard to the issue of divorce because the amount of maintenance can sometimes be the sole reason for divorce. Some unscrupulous people have made this sacramental concept as a source of unjust enrichment. They just marry to claim maintenance.
3. We have provisions for maintenance for husband in Hindu law only. Under Hindu law husband can also ask her wife to maintain himself if he is unable and wife is entitle to maintain her husband if she is capable .Husband should also be entitle for the maintenance in all personal laws if he is unable to maintain himself. Right to maintenance should be gender neutral. Sometimes husband is actually unable to

maintain himself in this case wife should be if she is able maintain his husband until he become to take his own responsibility. This also right in term of article 14 on Constitution which says all person are equal for law.

4. The quantum of maintenance is not fixes by legislature it is the discretion of the judge after considering the assets, property, dependents, and salary of the respondent. After considering all these factors judge finally decide the quantum of the maintenance. Because of this practice husband before the case finalised he try to dispose his property and other assets so that he can escape from giving the high amount of maintenance to his wife. There should be some changes regarding to the quantum of maintenance in every personal laws.

EVOLUTION OF FEMALE HINDU INTESTATE SUCCESSION THROUGH THE VIEWS OF SIMONE DE BEAUVOIR'S ON GENDER

- TANYA BATRA

Females have lived in the shadow of men for a long time. But this is not something new. What is, is that even today the male sex is given preference over the female in some if not many aspects. My sole focus will be on the Hindu Intestate Succession and how it has, over time given the females more and more rights to bring it to par with males. To do this I will be analyzing it closely through the lens of French feminist theorist, Simone de Beauvoir, who in her book 'The Second Sex' puts forth the argument that women are seen as the inferior sex of the two and thus subjecting them to oppression from males, being the superior sex, and putting them in an disadvantageous position in an inherently male dominated society.

Under the classical law, women were completely dependent on men and given absolutely no rights. In order to make them slightly more independent, the Hindu Women's Right to Property Act (1937) was passed which bestowed upon them limited interest in property. Widows could not alienate the property they inherited, but simply enjoy it. Their interest in the property was terminable on death or remarriage and the share passed back to the coparcenary pool by survivorship. Post 1937, a widow could step into the shoes of the deceased coparcener, ask for partition as well as hold the share of the deceased coparcener, so that his undivided interest does not devolve by survivorship up until she either dies or remarries.

Under the 1937 Act only, intestate's father's wife (when partition takes place between a father and his sons), intestate's widowed mother (when partition takes place among brothers) and a intestate's paternal grandmother (when partition takes place among grandsons) could claim a share on partition.

The year 1956 saw some substantial change, when the Hindu Succession Act was passed. It converted limited ownership of females to full or absolute ownership. Prior to the commencement of the Hindu Succession Act (1956), there existed a distinction between stridhan and non-stridhan. The passing of the current act abolished this distinction, thus giving the power to women to absolute interest in any and all property she holds, except for any limited interest she receives by will or award, which in turn does not mature into absolute ownership. When a male Hindu dies intestae, his share is devolved through survivorship, unless a Class I female heir exists at the time of such death of intestate, or a male heir claiming through such

Class I female heir (say, son of a pre-deceased daughter), then notional partition applies and such female Hindu (Class I female heir, as above mentioned) gets a share in the property. The 1956 Act gave to females this right, and in a small way, contributed towards bridging the gap between males and females.

In 2005, the Hindu Succession Amendment Act of 2005 was passed, which brought around some major changes in the rights of females with respect to Hindu Intestate Succession. Section 6 under the Amendment Act permitted daughters of a male Hindu coparcener to be coparceners, and therefore eligible to be the Karta of her family. Before 2005, daughters did have the right to be be coparceners. The daughters were given all rights that a son had, making her equally responsible for any liabilities that a son may be subjected to. The marital status of a daughter did not exempt her from inheriting when partition took place.

The 2005 Amendment Act may have brought about multiple changes giving women equal rights, and in doing so bringing down the gender parity between males and females. However, there still exists many aspects where females are seen as the inferior sex as compared to males.

Simone de Beauvoir in 'The Second Sex' brings forward the idea of a 'second sex' which inherently implies women. In a pre-dominantly male society, the position of a woman has always been second to that of a man. Her text argues that the two sexes have not yet achieved genuine equality but is something that should be striven for. If women were to be given equal rights, they could achieve everything that men can. De Beauvoir further states that because women are still seen as the 'second sex', male being the default and them the 'other', giving them equal rights as men will not happen unless and until the notion of 'being inferior to men'[447] is removed. The traditional values of marriage, reproduction and femininity still apply to this day which is why women find it hard to move on. There is so much more she is capable of than being a disciplined wife, a good mother, and one who is responsible when it come to doing her chores. These traditional values make it easier for men to exercise their dominion over women and keep them restricted to these spheres. The mere fact that the male sex thinks that females can only play the limited roles in life is the exact kind of mentality that needs to be removed and replaced with a more liberal way of thinking. The narrow-minded approach is partly what contributed to the unequal treatment of women and led to the unequal distribution of rights between males and females with respect to intestate succession under the Hindu Succession Act. To go back to pre-1937, before the Hindu Women's Right to Property Act was

[447] Beauvoir 2009, p. 151.

passed, the Classical Law prevailed. It gave next to zero rights to women. De Beauvoir's idea of limiting women to specific spheres explains that in the early 1900s in India, the traditional values prevailed and is what induced in most people the idea that women cannot do anything outside the vicinity of marriage, reproduction or domestic work. When a woman tries to step out of these spheres, and go against the wishes and expectation of her family, she is physically and mentally abused, some of whom then develop stigmata[448].

When seen in the light of succession rights, women were seen to be incapable of holding property but more so that women had no need to hold property when her husband can maintain her. Females are from a young age taught to be dependent to males, which brings forth the institution of marriage where they are dependent on their father till before marriage, on her husband during marriage, and on her son in her old age. Making a woman enter the institution of marriage is made to seem her only goal in life, to ensure she is financially stable and dependent on her husband for her entire life, and shift the so called "burden" from her father to her husband. Once a females marries, the next ideal step she is expected to take is reproduction, which de Beauvoir describes as both a gift and curse to women[449].

When the entire society was viewing her as a burden and someone who is to be maintained, there was no one who believed that she could have the same rights as men, and that she too could have interest in property. As women are seen as individuals incapable of owning property, it is the male sex that all the rights are given, the right to own property, most important of all.

Through the Amendment Act, females have gained multiple rights equal to that of men, but they still have not gained the same level equality as them.

The intestate succession in the case of females is dependant on the source from which their property was received. Such source is further divided into three classification, i.e., property inherited from deceased female's mother or father, property inherited from deceased female's husband or father-in-law, and finally property which is not governed by the first two classifications. Such classification, on the basis of source of property, is seen only under Hindu law and solely in the case of females. Males are not subjected to this classification. Such classification puts a limitation on female's succession rules under section 15, sub-section 1. In the case of males, succession only takes place through section 8, therefore not putting any kind

448 Beauvoir 2009, pp. 713, 714–715, 716

449 Beauvoir 2009, pp. 524–533, 534–550.

of limitation in their rules of succession. This classification can therefore be ruled as gender discriminatory.

Section 8[450] of the Hindu Succession Act focuses on the general rules of succession in the case of Hindu males. Under clause (c), agnates of a deceased Hindu male get his property if there is no heir of either class I or class II alive, and under clause (d) the cognates of the deceased inherit the property, if there is no agnate alive.

Under section 3(1)(a)[451], 'one person is said to be the "agnate" of another if the two are related by blood or adoption wholly through males. Cognate, under section 3(1)(c)[452] is defined as, 'one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males', that is to say that a female link is present in the relation. In the order of succession under section 8, agnates form the third entry, whereas cognates form the fourth. Section 9 of Hindu Succession Act states that there exists an order of succession among heirs, where the heirs in class I shall inherit before those under class II, class II over agnates, and so agnates over cognates.

Here there is a clear discrimination between agnates and cognates on the mere fact that cognates are relatives who are not wholly connected through males. This differentiation between agnates and cognates in matters of succession still persists today.

In the case of Mamta v Bansi[453], the Court questions the constitutional validity of section 8 and 15 of the Hindu Succession Act. Section 8 states the general rules of succession in the case of male Hindus, and section 15 states the general rules of succession in the case of female Hindus. Under article 15(1) of the Indian Constitution, the Court cannot discriminate against any citizen on the grounds only of religion, caste sex, place of birth or any of them.

This case involved two suits, one concerning the constitutional validity of section 8, clauses (b), (c), and (d), the other of section section 15(1). Plaintiff in Suit 1 was the paternal aunt of the deceased male Hindu, and the defendant was the maternal aunt of the same. The plaintiff claimed to be a nearer heir of the deceased than the defendant. It is important to note that the paternal aunt of a male Hindu falls under item VII of class II heirs of section 8, whereas the maternal aunt falls under item IX of class II heirs, thus making the plaintiff a nearer heir to the

450 Hindu Succession Act, 1956
451 Hindu Succession Act, 1956
452 Hindu Succession Act, 1956
453 (2012) 6 Bom CR 767

deceased. This distinction is what made the defendant challenge the constitutional validity of section 8. The defendant claimed section 8 to be gender discriminatory, on the basis that the said section gives preference to a deceased's father's relatives over his mother's relatives. On further examination, it is found that section 8 does not make any distinction between the properties on the basis of their source, acquired by the deceased make Hindu, however the same is done under section 15 in the case of a deceased female Hindu. Whether a male Hindu acquires property from his mother, or father, or father-in-law is irrelevant when devolving property, but the same is the foundation of succession in the case of a female Hindu.

The second suit revolved around a deceased female Hindu. The plaintiff (deceased's sister) claimed that any property that the deceased owned was purchased with the help of the deceased's parents, brothers and sisters making them the legal heirs to the property succeeded, under section 15(2)(a). However, the defendant (deceased's brother-in-law) claimed that any property acquired by the deceased should be devolved as per section 15(1)(b) of the Hindu Succession Act, making him the legal heir, as the deceased's pre-deceased husband's heir.

Further it is noted, section 15(1)[454] of the Hindu Succession Act, which lays down the general rules of succession in the case of female Hindu, the heirs of the husband fall under the second entry (when no sons or daughters, or children of any pre-deceased son or daughter, or husband of the deceased are alive), whereas the parents of the deceased fall under the third entry. The deceased's marital ties are given clear preference over her blood ties. Whereas, when a male Hindu dies intestate, his blood relations are given preference over his marital ties as the entries under class I heirs, class II heirs, agnates, and cognates show. The woman is seen to go into the family of his husband, however the opposite is not held to be true, thus a woman is expected to severe all blood ties and form marital ties.

If males and females are survivors of equal footing as said under section 6 of the Hindu Succession Act, then why are they not equal successors under sections 8 and 15? The heirs of a deceased Hindu female's father are given preference over the heirs of the mother under section 15(1) of the Hindu Succession Act. Another clear discrimination solely based on the gender. There is nothing that marks a distinction between males and females, except for the fact that females aren't males, and males being superior, must be put at an advantageous position in society which then establishes their dominion over females.

454 Hindu Succession Act, 1956

The case of Omprakash v Radhacharan[455] brought forth the issue of devolution of self acquired property of a female Hindu dying intestate, and whether it should be according to section 15(1) or 15(2) of the Hindu Succession Act.

The case pertains to Narayani, who died after the death of her husband and issueless, leaving behind self-acquired property, which caused a dispute over the succession of such property.

The problem arose when the deceased's pre-deceased husband's brother (respondent) filed an application, claiming his right over Narayani's property, under section 15(1)(b) of the Hindu Succession Act, which allows a deceased female Hindu's pre-deceased husband's heirs to inherit the property before the deceased's parents. Narayani's mother filed a similar application prior to the respondent, a grant for succession under section 15(2). Section 15(2)[456] under Hindu Succession Act, 1956, lays down the rules of succession in the case of female Hindus when the property acquired by her is either from her parents or her husband and father-in-law. The court ruled in favour of the respondent stating that any self-acquired property of the deceased female must pass through rules of succession under section 15(1), and not under 15(2).

A similar problem like that under Mamta v. Bansi arises, questioning the constitutional validity of section 15(1), which puts the mother and father of the deceased female Hindu as successors of property next in line to the heirs of a female's husband, however the same is not true in the case of a married Hindu male dying intestate, marking yet another example of discrimination against females.

In the progressive world that we live in today, it is hard to imagine that women have yet many miles to go. They may have come a long way in the span of 100 years but they are still not granted the same rights as men, that women rightfully deserve. De Beauvoir's argument of women being viewed as the weaker or inferior sex has played a role too big and prevented women from participating in spheres outside that of marriage, reproduction and domestic work. Limiting women has created a stigma within them that they can never achieve anything more than that. It is important that the people around women support them and push them so that they put themselves out in society more. It is high time women were left to take their own chances and make their own decisions rather than someone else make it for them.

455 (2009) 5 Supreme Court Cases (Civ) 541
456 Hindu Succession Act, 1956

WOMEN RESERVATION BILL: POWERS AND REPRESENTATION

- PRIYANKA SINGH

INTRODUCTION

The women's quota (108th Constitutional Amendment) Bill providing for a one-third women's reservation at the Lok Sabha and State Assemblies has been hanging fire for some time and has now been put in cold storage. Feminist views on the government, democracy, and conceptions of political equality and involvement have demonstrated that without institutional processes to guarantee women's involvement in political structures, women will not be able to cross formidable obstacles to their entrance into active electoral politics.[457] Democratization and representative institutions also provide the framework for political activity, while setting the terminology for citizen participation. Inequalities that describe the idea of political equity as a feature of our social structure are an important component of every democratic agenda. The women's movement's platform encompasses an entire array of issues ranging from the redistribution of resources to the redistribution of time and obligations in the household, to improvements to the electoral process and to parliamentary democracy. The social agenda embedded in the desire for women's political representation and the wider struggle for equality also threatens democratic institutions.

The democratization phase has been opposed by shifting patterns of wealth, caste and gender ties, which follow their different and sometimes conflicting interests. A guarantee of equal status and opportunities was the strongest attraction in a liberal democracy.[458] The major challenge in attaining these objectives was nevertheless the social and political systems and other hegemonic activity in a multicultural and stratified society. The enduring dilemma in a liberal democracy was the relation between the concept of political freedom and actual social and economic differences. The basic values of democracy are constantly being questioned by a cultural and ethnic diverse population (equality, social justice). People's demonstrations were important in the transition of democracy and in portraying democracy itself.[459] The Women's Reservation Act or the Constitution (108th Amendment) Bill, 2008, is a lapsed act in the Indian

[457] 2010_Samdup_Women_Reservation_Slides.pdf, http://oasis.col.org/bitstream/handle/11599/1147/2010_Samdup_Women_Reservation_Slides.pdf?sequence=2&isAllowed=y (last visited Dec 30, 2019).
[458] Policy brief, Strengthen Girls' and Women's Political Participation and Decision-Making Power 8.
[459] The populist challenge to liberal democracy, https://www.brookings.edu/research/the-populist-challenge-toliberal-democracy/ (last visited Dec 30, 2019).

Parliament aiming to change the Indian Constitution by reserving 33 percent of all seats for women in the Lower House of Parliament of India, the Lok Sabha, and in all state legislatures. The seats were to be distributed in turn and would have been determined by drawing lots so that a seat would be retained only once in three successive general elections.

The bill was adopted on 9 March 2010 by Rajya Sabha. Nevertheless, the Lok Sabha never voted on the motion. The bill was repealed in 2014 after the 15th Lok Sabha.[460] The Bill that gives women 33 percent quota will not only empower women but in many respects alter India's social structure. This Legislation is ground-breaking and is in making a quiet change. We have to welcome this as a law. While women continue to be largely outside the national public space following long years of democratic politics. Their existence here, given the natural barriers that encourage men while debarring women, is mostly symbolic and exists. This is because women's roles tend to be relegated to the private sphere consciously and subconsciously, as men are given public roles. It has been established that giving women rights not only helps women but also helps the family and the community.[461]

WHAT IS WOMEN RESERVATION BILL?

For almost a decade now, the Women's Reservation Bill has been a raw electoral nerve. Throughout Congress and outside, it has always sparked heated debates. In order to extend this reservation to parliament and legislative assemblies, there is a long-term plan. Furthermore, in rare cases, women in India receive reservations or preferential education treatments. It has opposed considering this unequal treatment of women in India as sexism against them in education, college and university admissions. A feminist group of India is strongly in favor of giving preference to women to create a level playing field for all its people.[462] The Women's Reservation Act or The Constitution (108th Amendment) Bill, 2008, is a pending action in the Indian Parliament intending to reserve 33 percent of all seats in the lower house of the Indian Parliament, the Lok Sabha, and in all the province's women's legislative assemblies. The seats would be rotating and chosen by drawing lots so that only one vote could be allocated once in three successive general elections. It said that women's seating reservations will stop 15 years following the launch of the reformed rule. The proposal was accepted on 9 March 2010 by

[460] One-Third Reservation in Parliament: Here's Why Indian Women Need This Bill, , https://www.thebetterindia.com/143745/one-third-reservation-parliament-indian-women-bill/ (last visited Dec 30, 2019)

[461] Women leaders stall quota bill - India News, https://www.indiatoday.in/india/story/women-leaders-joinforces-to-stall-quota-bill-71038-2010-04-06 (last visited Dec 30, 2019).

[462] Update on the Women's Reservation Bill, PRSINDIA (2010), http://prsindia.org/theprsblog/updatewomen%E2%80%99s-reservation-bill (last visited Dec 30, 2019).

Rajya Sabha.The Lok Sabha has never acted on the resolution, however. The legislation is pending because it has never gone to the Lok Sabha.[463] After a constitutional amendment in 1993, reservation of 33% for women in Panchayati Raj institutions was made compulsory in 19 states, including Bihar and Odisha, have increased the reservation to 50%, according to the Panchayati Raj Ministry.[464]

HISTORY OF POLITICAL RESERVATION FOR WOMEN

The initial phase of the women's movement coincided with the creation of three women's organizations, the Women's Indian Association 1917, the All India Women's Conference 1927 and the Indian National Women's Council in 1925. In 1910, a number of local and regional women's organizations formed, which eventually fusioned into national organizations.[465] The election campaign started in 1917 with Sarojini Naidu accompanying a female All India delegate to Montague, Indian Secretary of State, who came to address India's parliamentary participation demands. In 1924, a Reforms Enquiry Committee began recording facts and thoughts on whether Indian women still wished to be a member of the legislatures. After the moratorium had been removed in 1927, only a few weeks before the elections the state legislature of the province of Madras opened its membership to women.

The Indian Women's Movement's movement in support of political representation had two phases: first (1917-1928) women's rivalry and qualifications for legislative offices; second (1928-1937) liberalization of the conditions of competition and expanded representation of women in the legislatures. The Simon Commission was boycotted by many women leaders, congress and other nationalist parties when it arrived in India in 1928.[466] Simon's Commission did not recommend that seats be reserved for parliamentarians and left that seats. However, another group in the movement of women came before the Commission arguing for the extension of the women's voting and the reservation of four female seats in legislatures so as to enable women to take part in political matters and to better represent women's role in education and social welfare.

[463] Rajya Sabha passes Women's Reservation Bill | India News - Times of India, https://timesofindia.indiatimes.com/india/Rajya-Sabha-passes-Womens-ReservationBill/articleshow/5663003.cms (last visited Dec 30, 2019).

[464] Women Reservation in Panchayats, https://pib.gov.in/newsite/PrintRelease.aspx?relid=74501 (last visited Dec 30, 2019).

[465] 9LOUISE MICHELE NEWMAN, WHITE WOMEN'S RIGHTS: THE RACIAL ORIGINS OF FEMINISM IN THE UNITED STATES (1999).

[466]Indian National Congress History, Ideology, & Facts,ENCYCLOPEDIA BRITANNICA , https://www.britannica.com/topic/Indian-National-Congress (last visited Dec 30, 2019).

The Commission even rejected the independent electoral system but proposed reserving seats for the oppressed classes. Everett called this group the 'women's uplifting team' that was also embodied at the First Round Table Conference (November 1930-January 1931) which had been boycotted by Congress.[467]Their commitment to increasing women's franchise was compatible with the government's position, as they supported the idea of women's credentials and women's limitations in statutory terms. The British Government nominated two women (Radabhai Subbarayan and Begum Shah Nawaz) to support a woman's qualification and women's seats in legislatures at the first-round table conference boycotted by Congress. The report they produced was in accordance with the memorandum of the British women.[468] On the other side, the report sent on behalf of the three All India Women's organizations called for the principle of equality. Everett suggests it seems like a division between those who identified with Congress and those women who did not partake in political practices emerged within the women's movement. The Report of the Joint Select Committee on Indian Constitutional Reform (1934) brought out women's equality proposals and implemented them with minor changes to the 1935 Government of India Act. Females were allocated the key instrument for the female franchise and 41 community seats. The main tool was the qualifications of the wifehood. With the formal passage of the 1935 Constitution, six million women and 29 million people became eligible to vote. While women were able to vote in any of the seats, seats were reserved for women on a group basis.[469] Just 43 women contested and 14 were elected in free India's first Lok Sabha (1952-57) (out of a total of 489).

The topic of political quotas in favor of women died out or at least remained inactive until the early 1970s when the study of the Committee on the Status of Women in India (CSWI, 1974) again addressed the issue. The All India Panchayat Parishad, at its Sixth National Conference conducted in New Delhi in 1997, also adopted a resolution proposing a greater representation of women and a designated proportion of not less than one-third, to begin with. This resolution was not followed up until 1990 in any of the subsequent sessions.[470] While the Committee voted it down for the constitutional reservation of women's seats in legislatures by a majority, it proposed statutory women's village-level Panchayats due to the lack of women in rural

[467] School of Distance Education, 220
[468] Kumud Sharma, Power vs. Representation: Feminist Dilemmas, Ambivalent State and the Debate on Reservation for Women in India 22
[469]Women_Members_Rajya Sabha.pdf, , https://rajyasabha.nic.in/rsnew/publication_electronic/Women_Members_Rajya%20Sabha.pdf (last visited Dec 30, 2019)
[470] Women's Reservation Bill: What can India learn from other countries? https://www.brookings.edu/blog/upfront/2019/10/18/womens-reservation-bill-what-can-india-learn-from-other-countries/ (last visited Dec 30, 2019).

development programs. It also insisted on the political parties to "adopt a clear policy on the percentage of women candidates to contest elections". With the 1975 announcement of the national emergency, the derailment of constitutional democracy sparked a number of grassroots organizations as a priority of the political process to defend civil liberties and democratic rights and ensure that women and other marginalized communities were more active.

Many of the progressive projects and the grassroots movements opposing government power are part of the democratic process and are grounded in standardized social and economic ties in India. Since the 1980s, several mainstream political parties have started to view women in their party forms and confronted them with women's issues. Awareness of women's votes and the participation of women in the grassroots movement, the pressure of the women's movement and the grassroots dynamics has been increased in the political parties. Organizations, legislative initiatives, and collective executive action required them to comply with certain women's issues.[471] In the Lok Sabha, the Congress party introduced Constitutional (73rd Amendment) Bill 1991 with a number of amendments proposing that the new section IX (definition, the constitution of Panchayat, etc.) and the eleventh Schedule (art 243 G concerning Panchayat functions) be inserted in the constitution. Panchayati Raj was the election question and when Congress took over the government. In December 1992, in order to provide for a third reserve in the case of PRIs, the 73rd and 74th amendment bills were finally adopted and all states ratified it by April 1992.[472] These two landmark legislation could represent a change from opposition politics to progressive politics and an incentive for women to form the policy at the local level. The overwhelming sentiment of women to this and the entry of approximately 1 million women into the PRIs also inspired the women's movements, before the general elections in 1996, to make a similar claim for reservation for one-third of seats. There have been many discussions on electoral quotas across perspectives and efficacy of the first-generation women's leaders of PRIs. Nevertheless, the appeal was accepted by all major political parties and included in their election embodiments. It was also part of the Government of the Ruling Coalition's Common Minimum Program at the national level.

The United Front government introduced the Constitution (81st) Amendment Bill 1996, at the first session of the now-dissolved parliament. The parliamentary debate on the Bill reflected

[471] FreedomintheWorld2018COMPLETEBOOK.pdf, https://freedomhouse.org/sites/default/files/FreedomintheWorld2018COMPLETEBOOK.pdf (last visited Dec 30, 2019).

[472] The Constitution (Seventy-third Amendment) Act, 1992 | National Portal of India, , https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-thirdamendment-act-1992 (last visited Dec 30, 2019).

strong resistance from several quarters. The political threat to a male-dominated parliament's role, authority, and rights has led to serious disagreements between lawmakers and different stakeholder groups.[473] Despite a courageous public stance, it is reported that no one wishes to reveal himself, he said that 'no internal debate has occurred on how the government plans to deal with this emotional matter' Not many were satisfied as claimed by the women's movement that it would bring 'social justice' for women. Even the embattled prime minister relented, stating that 'rule of such social importance cannot be enforced without consent, 'as it includes mediation and accommodation'. The Bill was sent to Parliament's Joint Select Committee, composed of representatives from both houses under Geeta Mukherjee's chairmanship.[474]

Rajya Sabha or the Legislative Councils and Union Territories were not mentioned in the original Bill. The Joint Select Committee presented its report in December (which was sent to the two Houses on 9 December 1996) and recommended a variety of changes, including quotas, in those states where there are less than three seats. This did not recommend how reserved electoral districts were to be formed and it was left to the government and to the Election Commission. The provision involving quotas for people belonging to other retroactive castes was not approved.[475] Twice in Lok Sabha, and under strain from the alliance measures that have threatened the fate of the Constitution, the constitution stalled. It is worth noting that there was almost unanimity on the 73rd and 74th constitutional amendments, accepted by all political parties as a 'historic step' and as an instrument of democratic decentralization. In accordance with the 81st Constitutional amendment, a broad divide remains between the reactions of the intellectual, elite, politicians and the media. In dissonant tones, the women's movement succeeded in keeping a cohesive front but low.[476] The BJP government has repeatedly reinstated the Bill in Parliament-without success in 1998, 1999, 2002 and 2003. The Congress, when it came to power in 2004, prompted UPA to integrate the Bill into its Common Minimum System and tried to introduce the Bill with little progress. It was opposed by its own partners– Lalu Prasad Yadav-led Rashtriya Janata Dal (RJD), Mulayam Singh Yadav-led Samajwadi Party (SP) and Mayawati-led Bahujan Samaj Party (BSP). The SP leaders had tried to snatch

[473] Sabha Parv, RAJYA SABHA SECRETARIAT NEW DELHI 2012 80.
[474] PARLIAMENT OF INDIA, http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Personnel,%20PublicGrievances,%20Law%20and%20Justice/36th%20Report.htm (last visited Dec 30, 2019).
[475] Mona Lena Krook, Quota Laws for Women in Politics: A New Type of State Feminism? 35.
[476] The Constitution (Seventy-third Amendment) Act, 1992 | National Portal of India, supra note 16

the Bill from the hands of the then Law Minister, HK Bhardwaj when it was passed in the Rajya Sabha in 2008 and tear it down.[477]

STANDING COMMITTEE REPORT

The 2008 Bill was referred to the Standing Committee on Law and Justice.

- The Standing Committee on Employment, Public Grievances, Law and Justice issued its 36th Statement on the Constitution (One Hundred and Eighth Amendment) Bill 2008' on 17 December 2009. The President was Smt Jayanthi Natarajan.
- The Committee found it appropriate to have a reservation to ensure the women's representation and to ensure the integration of the democratic process. It claimed that quotas in Panchayats and municipalities have had positive impacts for women at the grass root and argued that the need for women to be reserved in-state meetings and the parliament has been further enhanced.
- In order for women to gain sufficient political representation in the parliament and state legislatures, the committee suggested that the 15-year cap prescribes for reservation be reexamined.
- Methods have not been made clear in the Act to establish the seats reserved for women. The Commission suggested that the government take this issue fully into account.
- The committee recommended that a quota of women in Rajya Sabha and Legislative Councils and other disadvantaged groups be accepted by the legislature.[478]

MAIN FEATURES OF THE BILL

- The Constitution (One Hundred and Eighth Amendment) Bill aims to reserve one-third of all seats for women in the Lok Sabha and the State Legislative Assembly. The distribution of reserved seats shall be determined by such jurisdiction as the Parliament has approved.
- A third of the total number of seats in the Lok Sabha and the legislature reserved in Scheduled Caste / Scheduled Tribes (SC / ST) shall be reserved for SC / ST women to nearly one-third as possible.

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[477] 1The 14-year-journey of Women's Reservation Bill - India News, , https://www.indiatoday.in/india/story/the14-year-journey-of-womens-reservation-bill-68999-2010-03-09 (last visited Dec 30, 2019).

[478] Women's Day and Reservation: Status of women in India, , PRSINDIA (2010), http://prsindia.org/theprsblog/women%E2%80%99s-day-and-reservation-status-women-india (last visited Dec 30, 2019).

- Fifteen years after the start of this reform Act, the allocation of women's seats shall no longer occur.
- Reserved seats can be distributed in the state or union territories by the allocation of various constituencies. If a state or union territory has only one seat in the Lok Sabha, the seat is reserved for women in each process of three elections at the first general election. If two seats are available, each of them shall be held once in a three-election cycle. Similar rules apply to SC / ST seats. Of the two seats reserved for Anglo Indians in the Lok Sabha, one in a series for three polls will be reserved for women in each of the two elections.
- The report examining the 1996 Women's Reservation Bill suggested that reservations be made to women of Other Backward Classes (OBCs) once the Constitution has been amended to allow for reservations to OBCs. It has suggested that Rajya Sabha and Legislative Councils should be added to the quotas. Neither of these proposals has been implemented into the legislation.

ARGUMENTS IN FAVOR OF WOMEN'S RESERVATION BILL

Women's Reservation Bill is a good idea to have more female MPs in Parliament and more female MLAs in our state assemblies. Most people are fully convinced that women should be actively involved in politics.

- It will increase the number of woman members of parliament and state legislative assemblies.
- Women's issues will be given much greater priority in Parliament and can be easily resolved.
- The introduction of the bill will contribute to gender equality in Parliament and will have an impact on women's empowerment as a whole.
- Parliamentary leadership will be good because of women's managerial skills.
- It will eliminate discrimination against women in Parliament and change the attitude towards women in the public sphere.
- Women in Parliament will act more responsibly.
- It will provide qualified and active people with more electoral incentives.
- Including a vote of women for at least one term in each district over the 15 years is a major step towards a growing gender gap.
- The quick change in women's lifestyle.
- It will be very beneficial to society because the elected representative of women will be closely linked to the social issues of women.

- The current involvement of women heading small regional parties demonstrates their successful political leadership.

IN AGAINST ARGUMENTS

- Women's concerns in Parliament cannot bring about a real change in the status of women in society. It cannot be effective in fighting social problems in any way.
- It is not assured that the socially backward and disadvantaged women who really need them will receive assistance.
- Most MLAs and MPs with parliamentary and state meetings also seek to get the wife and other relatives to serve their seats.
- The rights of competent and successful parliamentary candidates will be curtailed.
- Men will be oppressed by the access of women to social and political activities since reservation means killing other rights.
- Currently, the quota for SC & ST groups in the accounts of Lok Sabha & State Assembly is 22%. If this bill is passed, the minimum quota will be 55%. This will reduce the odds of competitors in the general category.
- Women's reservation bill is unlikely to succeed. If you see the estimates of the seats allotted to the women candidates by the two major parties, you may realize that they are only seeking positions, but they are not enforcing the same. There is nothing like a leader of a woman or a leader of a man when it comes to governance. There is only one term that is a chief in politics. Thus what is ultimately required is an ethical dictator.
- MPs and MLAs may not be able to work dedicatedly because of the rotating process because they are not required to win local people to vote in favor.
- Many minority communities may not take this opportunity because the majority of women in these societies are less likely to use it. This can add to their alleged incompetence.

WOMEN RESERVATION BILLS PASSING OF PARLIAMENT OF INDIA

Women's Reservation Act or The Constitution (108th Amendment) Bill, is a pending act in India that proposes reserving 33% of all seats in the Lok Sabha, India's Lower House, and state legislatures. The law stipulates that the positions to be held in the rotation will be determined in such a way that a seat will only be allocated for three consecutive general elections. In March 2010, this bill was adopted by the Upper Chamber of Parliament's Rajya Sabha. The Lok Sabha and at least 50% of all state legislatures have to do this before the President of India ratifies it. Women's Bill of Reservation will still have to wait before our own members know some of the

steps and forms in which the rule of law can prevail and the legislative decorum can be upheld. It's just the start of the emancipation of women. If women get 33 percent coverage, they're going to take the next move forward with their male counterparts to get on a similar representation.

In Gram Panchayats and Municipal elections, women now enjoy a 33 percent quota. In fact, women in India receive education and work quotas or special care. For example, many law schools in India have a 30 percent reservation for females. The political view behind women's reservations is to promote competition for all their citizens. The claim is that social standards strongly favor males and thus reserve for women should allow men and women equal opportunities. The Bill is expected to offer certain advantages, such as greater women's participation in politics and culture. Because of female feticide and women's health issues, the sex ratio of 1.06 males per female is concerning in India. The Bill is expected to change society in order to give women equal rights.[479] Women are reportedly more immune to corruption, so this bill could prove a factor limiting corruption's growth. In terms of political power, the importance of women within internal party structures is perhaps more significant than the proportion of women fighting Lok Sabha polls. Females in all parties are usually still less represented here. There has not been a deliberate step towards the inclusion of many more women at the decision-making levels and roles within the party except in All India Anna Dravida Munnetra Kazhagam (AIADMK).[480]

The Women's Reservation Act, on the other hand, will lead to a partial approach to the democratic process. We can undermine women's self-respect and contribute to a lower level of respect for women in society. The efficiency of leaders can also be decreased. The fact that males can feel deprived of certain rights may create a new kind of animosity between sexes, and in turn, create social problems. Another concern for the political parties is whether the women are involved in the overall partisan agenda and the rest of the issues relating to all people, in contrast to women alone.[481] There is no way of preventing discrimination against men by finding women who tend solely to women's issues or, in other words, to men. In fact, powerful male party members will be tempted to find female relatives to "reserve" the seat on

[479] Engendering local democracy: The impact of quotas for women in India's panchayats: Democratization: Vol 13, No 1, https://www.tandfonline.com/doi/abs/10.1080/13510340500378225?src=recsys&journalCode=fdem20 (last visited Dec 30, 2019).

[480] Why women votes matter- Cover Story News - Issue Date: Feb 25, 2019, https://www.indiatoday.in/magazine/cover-story/story/20190225-why-women-votes-matter-1455807-2019-02-15 (last visited Dec 30, 2019).

[481] Women Rising: The Unseen Barriers,https://hbr.org/2013/09/women-rising-the-unseen-barriers (last visited Dec 30, 2019).

their own. Therefore, it is believed that reservation will only allow elitist women to gain seats, leading the poor and the backward classes to further inequality and under-representation. Some politicians, such as Mulayam Singh Yadav, Lalu Prasad Yadav, and Sharad Yadav, have fiercely opposed the Bill in its present form.They claim a quota for the women of backward class with the 33 percent, i.e. within a reservation we call for a reservation. Regardless of whether or not the bill comes into force, women are under-represented as ever in the electoral fray and the structures of the party. After independence, very little has improved on one point. The members of the various political parties are still predominantly male; only 5-10% of candidates in all parties and regions make up women. This is the same specific trend found in nearly all the country's general elections. This is the case despite the hubbub of the Bill on women's reservations made even last year on the Constitution (84th amendment). The very parties which are most strongly in favor of calling for the reservation of women put up the same proportion of women in elections as usual, and definitely not more than other parties that oppose the Bill. Nevertheless, today women play an important role in Indian politics. This is most apparent in the prevalence of women leaders and in the reality that they clearly cannot be overlooked, even though some of them growing lead relatively small parties in the national sense.[482]

What is even more relevant is that these women leaders have not arisen in many instances through the traditional dynastic advantage model of South Asia. Clearly, Sonia Gandhi is a clear example of a dynastic monarchy, with a particular almost legendary pattern. One of the misconceptions that the role played by such women leaders quickly destroys is that women have dramatically different leadership from men's political leadership. In reality, most of our women's representatives are great or worse than men. Therefore, all this indicates that women's political advancement not only still has a long way to go, but it may also have little to do with the Indian electoral democracy's periodic carnivals.[483] This does not mean the absence of women's political participation. Instead, it has to be deeper and wider in the context of a few prominent representatives, than its current manifestation. The Women's Reservation Act is too early to tell if it will fulfill this purpose. Finally, the Rajya Sabha bill was passed. To women

[482] Few takers for Lalu's view on women's bill in Bihar - News18, , https://www.news18.com/news/politics/fewtakers-for-lalus-view-on-womens-bill-in-bihar-334904.html (last visited Dec 30, 2019)

[483] Sonia Gandhi: Sonia Gandhi: The woman who would not be queen - The Economic Times, , https://m.economictimes.com/news/politics-and-nation/sonia-gandhi-the-woman-who-would-not-bequeen/articleshow/62095728.cms (last visited Dec 30, 2019).

in India as well as the globe, it is very good news, that India has entered the elite club of countries that have taken such a move.

GENERAL ELECTION 2019

The Bharatiya Janata Party vowed to reserve 33% of parliamentary seats and state assemblies for women in the election manifesto. The Women's welfare and development would be given high priority at all levels of government and is committed to reserving 33% in parliament and state assemblies through a constitutional amendment as per the manifesto. Women are listed 37 times in the 48-page BJP manifesto. The election manifesto of BJP Lok Sabha aims to guarantee gender equality in Indian society.[484]The opposition Congress party also included it in their manifesto and promised to pass in the first session of Parliament.[485] The Odisha Chief Minister Naveen Patnaik declared on Sunday that the Biju Janata Deal (BJD) would reserve 33% of women's seats in the upcoming general election. In 2018, the government of Biju Janata Dal-led Odisha adopted a resolution seeking a quota of 33% for women in parliament and assemblies.[486]The Chief Minister of West Bengal Mamata Banerjee has gone a step further and declared quotas for women by 41 percent.[487]

CONCLUSION

The Women's Reservation Bill's trajectory in India was characterized by a high war drama with phrases repeated many points over and over without agreement. As a consequence, women's empowerment has lost the whole problem. No doubt, the Bill of Reservation was one of the most controversial pieces of legislation ever presented in any house of the Indian Parliament. This is noteworthy as one of the rare instances in which the three major national parties- Bharatiya Janata Party, Congress, and the Left — have formed a political consensus. The passage of the Rajya Sabha Women's reservation bill is not only a warm movement for India

[484] BJP promises 33 percent reservation for women in parliament, REUTERS, April 8, 2019, https://www.reuters.com/article/india-election-women-idUSKCN1RK0M9 (last visited Dec 30, 2019)

[485] Congress manifesto | Lok Sabha Election 2019: Congress releases manifesto for 2019 Lok Sabha polls, promises wealth and welfare, https://economictimes.indiatimes.com/news/elections/lok-sabha/india/congressreleases-manifesto-for-2019-lok-sabha-polls-details-here/articleshow/68684073.cms?from=mdr (last visited Dec 30, 2019).

[486] 033% Quota for Women: Naveen Patnaik declares 33% quota for women in allocation of BJD Lok Sabha tickets, , https://economictimes.indiatimes.com/news/politics-and-nation/naveen-patnaik-declares-33-quota-forwomen-in-allocation-of-bjd-lok-sabha-tickets/articleshow/68342755.cms?from=mdr (last visited Dec 30, 2019)

[487] Wooing women voters in poll-time India The Daily Star, https://www.thedailystar.net/opinion/globalaffairs/news/wooing-women-voters-poll-time-india-1715320 (last visited Dec 30, 2019).

but also an impetus for women's empowerment throughout the world. One of the problems, for example, with the Lok Sabha approval, is that of the legislation.

This matter is urgently needed, as the challenge of enforcing the law based on rights–food, education, safety, sanitation and supply of water, clean energy, demographic change, and jobs-will definitely be increased and incorporated by women.Women's active engagement in local self-governing bodies demonstrates that many women are good leaders and spend more time and effort in them. Improved women's political participation will help them fight the violence, inequality, and disparities they face. Women's organizations need to be constructive and put pressure on the government to implement the bill. Men should also make room for women in the decision-making process without any prejudice, apart from all of these, the key issues related to the policy of reservation must also be discussed with dispassion. In India, which is a male dominant society, women's quotas will definitely act as a catalyst for change. It can only start to change, but progress will come if society changes its attitude towards women. Women's political empowerment is seen as an effective and necessary weapon to eradicate gender inequality and discrimination.

JUDICIAL REVIEWS ON PERSONAL LAWS UNDER ARTICLE 13

- MALLIKA TEWARI & TANISHKA KIRAR

ABSTRACT

The present study intended to focus upon the issues and problems relating to Judicial reviews and judicial actions on personal laws. Doctrinal research method was used to get a clear understanding about the given statement of problem and research questions. The research objectives were achieved by reviewing the existing literature on the pertinent topic. The study is aimed at finding out the duality of judiciary when it comes to recognition of personal laws. Sometimes they are recognised as laws in force and thus are not allowed to overpower Part III, however, sometimes their application is considered to be unlawful with regard to part III. Judicial views regarding personal laws also differ on the basis of religion, which is arbitrary. This is mostly observed in case minority religions. Even if their practices are in violation of Fundamental Rights, no action is taken against them under Article 13. This study aims to find out the reason behind this random approach. Some religion's personal laws do not even get distinct identity (e.g. Hindu Succession Act, 1956 covers Jains, Sikhs, Buddhists and others; even though they have different custom based personal laws. This study will also focus on the reason behind this clubbing and consider secondary sources regarding people's opinion about the Judiciary not touching the topic of their personal laws.

INTRODUCTION

Personal laws are those laws which regulate the relations arising out of marriage, affinity and blood. They also regulate issues related to divorce, maintenance, succession, adoption, minority, guardianship, surrogacy, live-in relationship, etc. Most of the personal laws in India are based on religious scriptures. These laws govern personal relationships within the family setup. As the time progressed these norms were given statutory recognition in the matters of marriage, adoption, divorce, inheritance, custody, etc. Personal laws are of the following types: (i) Religious practices; (ii) Customs and Usages; (iii) Statutes; (iv) Judicial interpretations.

The personal laws which are in force currently have been recognised because of "Right to Practice" religion under Article 25 of the Indian Constitution. During the initial period of acceptance of Indian Constitution, personal laws, whether customary or a religious practice, codified or un-codified got repealed or amended (e.g. Hindu Code Bill).

Article 13 of the Constitution of India deals with the doctrine of 'Judicial Review'. According to Article 13 any law passed by the state which is inconsistent with the provisions of Part III (i.e. Fundamental Rights) would be declared unconstitutional to the extent of that provision. Article 13(3) goes on to define the meaning of laws and laws in force for the purposes of determining the extent and scope of judicial review. However, there is no clarity as to whether personal laws can be challenged on the basis of Part III i.e. whether they are "laws" or "laws in force" under Article 13 of the Constitution of India. The same ambiguity shall be discussed further.

Constitution of India, article 372 whereof provided for the continuance in force of existing laws and for their adaptation by reason of article 372 of the constitution and the adaptation of laws order, 1950, ordinance. The judicial lookout regarding article 372 (3) of the constitution is that temporary statutes will not have their lives automatically extended by virtue of the provisions of article 372 which continues in force the existing laws. With respect to personal laws Article 372 implies that its definition is not exhaustive and that the expression 'all the laws in force' in article 372(1) extends even to customary law, personal law like Hindu and Mohammedan law.

Thus, personal laws are subject to Judicial review, however the decisions regarding their inconsistency with the Fundamental Rights is constitutional or not has been arbitrary.

RESEARCH METHODOLOGY

To meet the objectives of the present study, doctrinal research design has been adopted. The doctrinal method has been used to study the judicial developments in the field of personal laws. The existing literature and precedents have been taken into consideration to find out the answers to research questions.

LITERATURE REVIEW

History:

The laws that apply to a certain group of people or a particular person, Hindu, Muslim and British legal system govern the Indian society are referred as personal laws. Present Indian society is the bequest of three distinct legal systems. In India varying beliefs of people is decided by set of laws which are made by contemplating different customs followed by that religion. Hindu personal laws can be found in "Shruti" containing all four Vedas that is to say rig Veda, Sama Veda, Yajur Veda, Athar Veda. This was the origin of the hindu law through smriti" which is regarded as the first law giver or exponent of the law. Codes of manu,

Yajnavalkya, and Narada. The Muslim law are seen from the sayings and teachings of prophet Mohammad carefully preserved in tradition and passed down from generation to generation by holy men. Digests and commentaries on Muslim law, written by ancient Muslim scholars signifying their origins. Those commentaries include 'Hedaya' which was composed in 12th century and 'Fatawa Alamgiri', compiled and written as per the orders of Mughal emperor Aurangzeb. Moving on to the ruling period; during the Muslim rule in India, states did not interfere in the personal laws of other communities like Hindu and Christians. During the 150 years of British domination, the personal laws of Muslims and Hindus were to a large extent immune from state legislation. However, during the British rule, they made sure not to injure the religious susceptibilities of the Indians. When they consolidated their position in India, they gradually introduced their system even so left the personal laws of Hindus and Muslims to keep going.

Background:

Under colonial rule, matters related to marriage and inheritance, were being governed by their personal laws determined by the faith they belonged to, thus the anglicized laws were preferred over personal laws. However, unlike the Mughal rulers, whose precedent were claimed to be followed by the British, these personal laws were administered by a secular judiciary rather than by members of the religious group themselves. Thus, the application of Hindu and Islamic personal laws, which had been in force since ages, depended upon translation, interpretation and adjudication by British judges.

Coming to the modern period, though secularism was followed the judiciary's approach regarding personal laws differed from religion to religion. Various existing laws were either repealed or amended at the time of drafting of the Constitution of India. However, repealing of personal laws was not easy due to provision of Article 25 which provided a safe cover to personal laws since they fulfilled the criteria of 'practice'.

According to "**JUDICIAL REVIEW OF PERSONAL LAWS VIS-À-VIS CONSTITUTIONAL VALIDITY OF PERSONAL LAWS**"[488] by Ashok Wadje "Ever since the inception of Indian Constitution to till date, higher judiciary of India, including Supreme Court of India, is facing the dilemma of finding out satisfactory compromise between two extremes: 'personal laws'

[488] Ashok Wadje, *JUDICIAL REVIEW OF PERSONAL LAWS VIS-À-VIS CONSTITUTIONAL VALIDITY OF PERSONAL LAWS,* Volume 2 Issue 3, (SAJMS) ISSN:2349-7858.

which are based on religious practices and 'Part III' of the Indian Constitution i.e. chapter on Fundamental Rights".

The researcher agrees with author's views. This article discussed the case of State of Bombay v. NarsuAppa Mali[489], in which the Bombay High Court held that, "Personal laws are not 'laws in force' under Article 13 of the Constitution as they are based on religious precepts and customary practices"

It has always been a challenge for the Judiciary to strike a balance between religion based personal laws and gender equality and fairness of law. In the case of Md. Ahmed Khan v. Shah Bano Begum[490] the Apex Court ruled against the Muslim personal law by providing maintenance claim to a Muslim lady. The article further talks about other landmark cases involving personal laws, however, most of the cases were related to Hindu and Muslim personal laws. This brings us to the question that are other minority religions being ignored when it comes to judicial review of personal laws.

When it comes to codification of personal laws, except for Islam, most other religions were clubbed with Hinduism to codify a common personal law. Based on this a writ petition was also filed in the Supreme Court by noted Sikh scholar Birendra Kaur.

A similar concern was also established in the journal "**Legal aspect of Jain Religion as a separate entity"**[491] the authors Vaibhav Jain and Sanjay Jain have discussed how Hindu personal laws are imposed on Jains even though they have their own religious personal laws. The researcher agrees with the author's observation. *'Jaina dharma'* specifically points towards the totality of conventions and law code in jainmonastic and lay traditions. Jains have their history which somewhat coincide with Hindu but also differs in many religious matters. Since Hindus form most of the population, Jainism has taken and understood fully the ceremonials practises of Hindu. However, it is no footing for applying Hindu law on Jainism. But Jainism has its own history and posterior smrities and commentaries which are recognized in Hindu law.

Jain law a product of legal intervention in India suggests conformity where in actuality is the plurality of ethical and legal codes, conducts, scriptures, caste and religion. The jain reformers also made attempt to restate traditional Jain concepts and distinguished interpretations of Jain law. In ancient times, Jain Prakrit derived from Sanskrit were the languages spoken. Since Jains

[489] State of Bombay v. NarsuAppa Mali, [1951] ILR Bom 775 (India).
[490] Md. Ahmed Khan v. Shah Bano Begum, [1985] AIR SC 945 (India).
[491] Vaibhav Jain & Sanjay Jain, *Legal Aspect of Jain Religion as a Separate Entity,* volume19 Issue 2 IOSR-JHSS,PP 08-19, (2014).

always promoted their religion through common people's language, a majority of ancient Jain literature is found to be written in Prakrit language. The anthology of the Jain law texts fabricated by the modern Jain reformers in 19 and 20 century focussed only on the legal domain which was in the starting spared from the rules of jain personal laws regarding the role of property in contexts of marriage, adoption, succession, inheritance and partition. The process in modern Indian legal history of narrowing the semantic range of the modern term 'Jain law' from 'Jain scriptures' to finally 'Jain custom' may come to head not only in the official eradication of Jain legal culture, which continues to burgeon outside the formal legal system, in cloistral law, ethics and custom.

Through her petition, Sikh scholar Birendra Kaur questioned about the constitutional and past legislative attempts to wipe out identities of separate faiths by putting them under the ambit of Hindu rekigion. According to the petition, constitutional guarantee to each individual to practise religion of her choice was negated. However, The Punjab and Haryana high court had dismissed with caustic observations a petition questioning the constitutional and past legislative attempts to obliterate identities of separate faiths by recognizing them under the broad religious connotation of Hindus. Even so, SC bench of Chief Justice Altamas Kabir and Justices S S Nijjar and J Chelameswar entertained her appeal and also framed the question for adjudication. **The Bal Patil v Union of India**[492] 2005 judgement also grew up many controversies which somewhat stated that "'Hinduism' can be called a general religion and common faith of India whereas 'Jainism' is a special religion formed on the basis of quintessence of Hindu religion. "scholars, who were not familiarized with Jain literature once held the erroneous view that Jainism is an offshoot of Hinduism. In the case of **Sugan Chand bhic v. Magni bhai Gulabchanda**[493], the government of Bombay made argument to make applicable all the benefits of Hindu society without Jain discrimination. Several centuries after Jainism was a distinct and separate religion with its own legal system, and throwing on them the right showing that they are bound by the law as laid down by the Jain law-makers. It seems that considering the question of Jain law, relating to adoption, succession and partition it should also be seen that what the law interprets, and to throw the onus on those who in any particular matter asserts the Jains to adopt the Hindu Law & customs.

[492] Bal Patil & Anr vs Union of India & Ors, (2005), Appeal (civil) 4730 of 1999.
[493] Sugan Chand Bhic v. Magni Bhai Gulabchanda, (1967) AIR SC 506.

Judiciary considered Jainism as a separate religion from the instances of various cases. The madras high court judgement in Gateppa v. Eramma[494] and others; "Jainism as a distinct religion was flourishing several centuries before Christ".

- In Hirachand Gangji v. Rowji Sojpal[495]; "*Jainism prevailed in this country long before Brahmanism came into existence and held that field, and it is wrong to think that the Jains were originally Hindus and were subsequently converted into Jainism*."
- In Bombay High Court consisting of Chief Justice Chagla and Justice Gajendragadkar it was held that Jains have a different and independent entity from that of hindus.
- In the Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt[496]; court realized Janism and Budhism as distinct religions practised in India in contrast with Vedic religions.
- In Commissioner of Wealth Tax, West Bengal v. Smt. Champa Kumari Singhi & Others[497]; it was held that "*Jains rejected the authority of the Vedas which forms the bedrock of Hinduism and denied the efficacy of various ceremonies which the Hindus consider essential. It will require too much of boldness to hold that the Jains, dissenters from Hinduism, are Hindus, even though they disown the authority of the Vedas*"

The study of Jain religion under distinct legal norms, supports that Jainism should be considered as a separate entity in all manners. *Jain dharma* should not be taken as a subset of Hindu law, but it should be granted the existence similar to that of Hindu and Muslim law in legal system in order to grow Jain community completely.

Similarly, an article in 'The Quint'[498] explained the need for separate Sikh marriage Act i.e. Anand Marriage act. The article talks about how blatantly applying the title "Hindu" to other four religions was against the secular spirit of the constitution.

Recently, Naomi Sam Irani has moved the supreme court questioning the validity of provisions of Parsi Marriage and Divorce Act which did not grant her an access to mediation and settlement for divorce.

[494] Gateppa v. Eramma, (1927) AIR Mad 228.
[495] Hirachand Gangji v. Rowji Sojpal, (1939) 41 BOMLR 760.
[496] Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) AIR 282 1954 SCR 1005.
[497] West Bengal v. Smt. Champa Kumari Singhi & Others, (1972) AIR 2119 1972 SCR (3) 11.
[498] Indira Basu,*Need for Anand marriage Act for Sikhs & why it's in the news again* ,The Quint, (Jan 21, 2018), https://www.thequint.com/explainers/explainer-anand-marriage-act-anand-karaj-sikh-hindu-marriage-act-delhi-govt.

In all the irregularities of judicial review of personal laws women are the ones suffering. This was discussed in "**Gender inequality and Religious Personal Laws in India**"[499] by Archana Parashar. The researcher agrees with the author's observations. She pointed out that, "one marked feature of most Religious Personal Laws is that women have fewer rights than men". The article explained the reason behind the Judiciary treating personal laws of various religions differently. The minority status of some communities has been given priority over gender equality.

RECOMMENDATIONS:

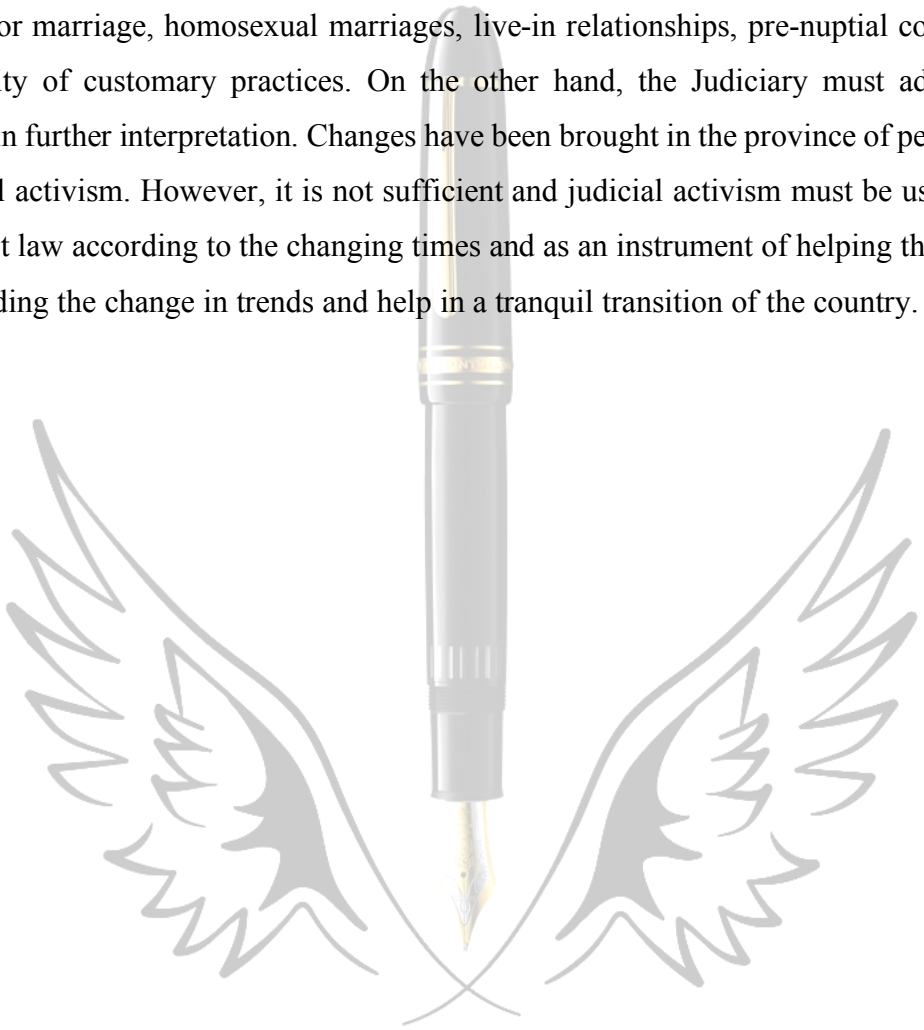
Considering the above given literature review and the recent petitions filed by progressive citizens. From the above given cases and decisions it is clear that the Judiciary has no definite common approach personal laws. The minority religions are usually ignored in such cases. The reason behind this is ascertained to be the state's duty towards protection of minority communities. The belief that preferring Fundamental Rights over personal laws means that one is considering their religion to be inferior is a wrong notion which is still followed among various communities. Thus, people are forced to follow such laws due to fear of facing consequences from the community people. However, cases like that of Naomi Sam Irani indicate that the people belonging to such minority religions are finally standing up for their rights. Thus, the Judiciary's decision differs from religion to religion based on the nature. However, this approach has affected some people in a negative manner, especially women.

In the conflict between personal laws and Part III gender equality takes a back-foot. Usually a traditional and defensive approach is adopted by the people belonging to minority religions. When the choice is between social progress and personal laws people have different views, some prefer codification of personal laws whereas, some prefer the law to stay intact. The latter's approach is offensive, this was evident during the protests during Sabarimala Judgement and the infuriated responses for Triple Talaq judgement. This shows that even though people want to trade personal laws for progressive ones they are restricted by the conservative population.

It has been observed that the judiciary disregards the opinion of the few under the fear of conservative people. The judiciary is willing to take risks for safeguarding Fundamental Rights, when it comes to religions like Hinduism and Islam. This intimidates the secular framework of

[499] Archana Parashar, *Gender inequality and Religious Personal Laws in India,* Volume14 no. 2, BJWS, pp. 103-112, (2008).

the constitution. A uniform civil code might be useful to clear major doubts as to the extent, scope and application of personal laws. The legislature is now supposed to be taking a step in enacting Uniform Civil Code. It has to be clear with respect to marriage, its nature, consent required for marriage, homosexual marriages, live-in relationships, pre-nuptial contracts and applicability of customary practices. On the other hand, the Judiciary must adopt certain restraints in further interpretation. Changes have been brought in the province of personal laws by judicial activism. However, it is not sufficient and judicial activism must be used in order to interpret law according to the changing times and as an instrument of helping the society in understanding the change in trends and help in a tranquil transition of the country.



DOMESTIC VIOLENCE AND LAW

- SHWETA MISHRA & YATISH PACHAURI

INTRODUCTION:

This paper deals with legal provisions, international conventions and judicial interpretations for protecting the rights of women. Before entering into the above areas, it is essential to analyze the status of women historically. Hence in this paper the researcher throws light the problem of domestic violence is being psychological and socio-logical than legal the same has to be studied in its socio-legal dimensions beginning from the institution of family with reference to various theories. Further Domestic violence is the cause of health hazards; even certain amount of light is thrown on these issues also. Domestic violence is predominantly viewed as violation of human rights these aspects are also discussed.

ENACTMENTS AND JUDICIAL DECISIONS:

Half of the Indian population is women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.[500] After having identified the problem of domestic violence under the international framework, in the absence of any specific law to protect women from domestic violence the researcher intends to analyze the Constitutional protection, legislative response and judicial response to the problem of such violence. The Constitution of India includes various rights of women. Constitution makers were aware that women wouldn't get as much equality as that of men so they tried to put all the efforts in making provisions regarding women.

1. THE CONSTITUTION OF INDIA: The Constitution is the primary law of the land. Gender equality, as an ideal, has always eluded the constitutional provisions of equality before the law or the equal protection of law. As late as in 1961 in ***Hoyt v. Florida***, the United States Supreme Court upheld a law placing a woman on the jury list only if she made a special request because, as put by Justice Harlan: 'A woman is still regarded as the centre of home and family life.'

[500] Madhu Kishwar v. Stale of Bihar, (1996) 5 SCC 145.

2. THE INDIAN PENAL CODE, 1860: Many provisions have been made for the protection of women under Indian Penal Code 1860. These provisions are discussed below in its entirety. Causing miscarriage to women,[501] indulging in unnatural sexual activity with women [502] cohabiting deceitfully with women[503], marrying again during the life time of wife,[504]criminal intimidation[505] are the acts which constitute domestic violence.

- CRUELTY BY HUSBAND OR HIS RELATIVES: Demand of dowry at the time of marriage of a girl by the prospective bridegroom and his parents is a very peculiar feature of this country. Today we hear the cases of dowry death and cruelty by the husband and his relatives. So, to curb such evils this parliament came forward and passed legislation. It enacted a new chapter, Chapter20A, which contains the sole provision. Section 498A in the Indian Penal Code, 1860. This section punishes a husband or a relative of the husband of women who subjects her to cruelty. To protect the wife from being subjected to torture by the husband or his relatives, the legislature enacted Section 498A of the Indian Penal Code and Section 113 of the Indian Evidence Act.

INCLUSION OF MALE AS VICTIMS OF DOMESTIC VIOLENCE ACT IN INDIA

Domestic Violence has been accepted by the whole world as a serious issue which not only affect physically but mentally, emotionally too. It's a harsh reality that even Indian men are facing domestic violence by the hands of women but legislature has not taken any strong steps regarding this. Domestic Violence is a serious social issue, but men who face domestic violence in India have no rights, laws to protect them, not even society considers them as victims.

Most abused Indian men are afraid of losing their children or out of shame they don't sue for divorce They also fear for huge financial losses and long drawn litigation in the process because of the insensible attitude of judiciary towards men. This could be the main reason when male suicides rate is much higher than the female suicide rates as 4966 for males and 4049 for females under the various age groups sharing in the category of marriage related issues, love

[501] Sections 312 and 313 of Indian Penal Code, I860.
[502] Section 377 Indian Penal Code, 1860.
[503] Section 493 Indian Penal Code, 1860.
[504] Section 494 Indian Penal Code, 1860
[505] Section 506 Indian Penal Code, 1860.

affairs, etc except dowry deaths as per the date published by the National Crime Record Bureau of India under Ministry of Home Affairs, Government of India. . The system can't change unless we change our societal and moral norms. The society needs to work upon these issues irrespective of gender.

CONCLUSION:

Domestic Violence is not only a socio-legal problem but also psychological problem which can't be solved only by passing of laws and judgments given by judiciary but certain changes needs to be done in the society and people should be taught the moral and ethical values. There provisions of the Act give women protection from fear and living left homeless. But some provisions need to be made for men too as both are the human beings and own their own individuality. The law extends its protection to women are sisters, widows or mothers.

It is, however, difficult to predict that whether the laws passed by the parliament will be beneficial or not. The future will tell us that how the Domestic Violence Act, 2005 played role in curbing the evils from the society. It needs to be seen whether the legislature has failed to fulfill its duty on its part or is it the executive.

ACID ATTACKS: THROUGH THE LENS OF INDIAN JUDICIARY

- NITISH DADHICH & NIMISHA DADHICH

In India where women were once equivalent to goddess; time has turned the tables. Acid attacks have prominently increased in the yester decades with an alarming rate. No one, even the Courts have failed to appreciate the gravity of offence of acid attack and has given an not yet set up an example that can curb this issue because it is not only a crime against the a women but a crime against the entire society. It indelibly leaves a scar on the most cherished possession of a woman that is her dignity, honor, reputation and not the least her chastity.

Even if the acid attack victims are willing to pursue a normal life, there is no guarantee that society itself will treat them as normal human beings given their appearance and disabilities after an attack. They may not be able to work, or be able to find a job, and thus perpetually struggle to survive.[506]

Following points outline the *myriad consequences of acid violence* to victim:

•Severe injuries to face and body

•Surgeries

•Trauma from attack

•Trauma from living with a disfigurement or from the social consequences of the attack

•Trauma associated with domestic violence

•Psychological care

•Social, Familial or marital disruption

•Permanent eye loss

•Reduced earning potential

LAWS HAILING ACID ATTACK AS CRIME

1. Section 326A of IPC: "*Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person,*

[506] *Baseline Survey with International Comparative Analysis of the Legal Aspects of Acid Violence in Uganda,* Commissioned by: Acid Survivors Foundation Uganda with funding support from the US Democracy & Human Rights Fund, Legal Consultant: Rachel Forster , November, 2004

or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim."

2. Section 34 of IPC: "*When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

The landmark Judgments of Hon'ble Supreme Court regarding intention of acid thrower

- "*The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury. If he can show that he did not, or if the totality of the circumstances justifies such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury is the question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion*."[507] The Hon'ble Supreme Court rejected the appeal of the accused and life imprisonment given by subordinate court was upheld due to the gravity of offence of acid attack.[508]

- "*It is necessary to consider the facts and given circumstances of each case; the nature of the crime, the manner in which it was planned and committed, the motive for the commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of*

[507] *Harjinder Singh @ Jinda v. Delhi Administration*(AIR 1968 SC 867); *Virsa Singh v. State of Punjab*(1958 SCR1495)

[508] *Sudershan Kumar v. State* (1970) DLT 566, ILR 1970 Delhi 504

consideration. Therefore undue sympathy to impose inadequate sentence would do harm to the justice system to undermine the public confidences in the efficacy of law and society could no longer endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc." This position was illuminatingly stated by High Court of Tamil Nadu.[509]

ACID ATTACK -ARTICLE 21 WITH AN INTERNATIONAL APPROACH

Article 21 of the Indian Constitution: "*No person shall be deprived of his life or personal liberty except according to procedure established by law"*. The Supreme Court in catena of judgments has recognized that the right to life includes the right to be free from inhuman and degrading treatment. As pronounced in a case[510], the Supreme Court held as under: "*It is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights (ICCPR).*" The Supreme Court has held that Article 21 includes the right to health and the right to health services. The Indian Penal Code was therefore amended by the Criminal Law (Amendment) Act, 2013, to include the offence of acid attack within its ambit. Before the amendment, the laws governing acid attack included: Section 320 – Grievous hurt: Acid attacks are considered grievous hurt as any permanent disfigurement, disability, or destruction of a body part is included in this section.

The compensation is also awarded in the form of a constitutional remedy for human rights violations. It is interesting to note that compensation available under a constitutional remedy is far more readily invoked and of a greater quantum than that which is generally granted under Sec357 of the Cr.PC as said in various cases by various courts including the apex court itself.[511]

The Hon'ble Supreme Court observed – *"The rationale for advocating the award of punishment commensurate with the gravity of the offence and its impact on society, is to ensure that a*

[509] *Sevaka Perumal v. State of T.N* (1991)3 SCC471 : 1991 SCC (Cri)724 : AIR 1991 SC 1463

[510] Francis Coralie Mullin Vs. Union Territory of Delhi &Ors [1981 SCR (2) 516]

[511] *A.K. Singh v. Uttarakhand Jan Morcha*, (1999) 4 S.C.C. 476; *D.K. Basu v. State of West Bengal*, (1997) 1 S.C.C. 416; *Chairman,Railway Board v. Chandrima Das*, (2000) 1 S.C.C. 465; *Saheli, a Woman's Resource Centre v. Commissioner of Police,* (1990) 1 S.C.C. 420; *NilabatiBehera v. State of Orissa*, (1993) 2 S.C.C. 746*; Rudal Shah v. State of Bihar*,(1983) 4 S.C.C. 141; *State of Punjab v. Ajaib Singh*, (1995) 2 S.C.C. 486.

civilized society does not revert to the days of "eye for an eye and tooth for tooth". Not awarding a Just punishment might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted."[512]

That it is humbly submitted that considering the international aspect of brutality, the Court in US remarked that-*"No formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in crime. In absences of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case , is the only way in which such judgment may be equitably distinguished. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime is warranting public abhorrence and it should respond to the society cry for justice against the criminal*."[513]

The in the conference of National Human Rights Commission (NHRC) held at New Delhi on 19th February, 2014; a suggestion came as a conclusion that Acid Attack victims should be given a pension.

The Window theory

Absence of preventive action can lead to chances of an aggravated crime. It is called the broken window theory in criminology. It can be explained with the example that those who throw stones to break windows are likely to commit bigger crimes if the windows are not repaired and no action is taken; *"We need to see that the law is properly implemented. Unless we check the crime, these incidents will not stop. Today they are stalking, tomorrow they will rape".*[514]

Following are few more cases in which the judiciary took the view through the window!!

[512] *M.R v. Bala alias Balram* (2005) 8 SCC 1

[513] *Dennis Councle McGautha v. State of California* 28 L ED 2d 711 : 402 US 183 (1970)

[514] *Sankar Sen, director general of National Human Rights Commission, while speaking at a discussion on 'rising crime against women' organized by University of Engineering & Management (UEM), Jaipur, and Institute of Engineering & Management (IEM), Kolkata*

- "It is the nature and gravity of the crime and not the criminal, which art germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in if duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual but also against the society to which the criminal and the victim belong."[515]
- The Hon'ble Supreme Court while considering punishment[516] observed: *"It will be a mockery of Justice to permit the accused to escape the extreme penalty of law when faced with such evidence and has done such cruel acts. To give lesser punishment to the accused would be to render the justice system of this country. The common man will lose faith in Courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure such serious threats. The duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it urns executed or committed."*
- A three-Judge Bench of Hon'ble High Court of Punjab-Haryana[517], considered the question-whether modesty of a female child of 7 months can also be outraged. The majority view was in *affirmative*. Bachawat, J., on behalf of majority, opined as under: "*The offence punishable under section 354 is an assault on or use of criminal force to a woman the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define, "modesty". What then is a woman's modesty? The essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anesthesia, she may be sleeping, and she may be*

[515] *Ravji v. state of Rajasthan* (1996) 2 SCC 175

[516] *Mahesh v. State OF M.P*(1987) 3 SCC 80

[517] *State of Punjab v. Major Singh* (1967)AIR 63

unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section".

- The Orissa High Court stated[518] as under:"*The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape. On being prosecuted it was held that the act of accused was of grave nature and they had committed the same in a* 'dare devil manner'. *As such, their conviction u/s 354/34 was held proper*."

THE COMPENSATION IS TO BE AWARDED BY THE STATE GOVERNMENT

a) Section 357A &Section 357B of Cr.PC

Sec.357A[519]**: "***(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.*

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) 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.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) 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

[518] *KannucharanPatra v. State of Orissa* (1996) Cri L j 1151

[519] Inserted by Code of Criminal Procedure Amendment Act, 2008

charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

Sec. 357 B[520]**:** "*The compensation payable by the state government u/s 357A shall be in addition to the payment of fine to the victim u/s 326A or sec 376 D of the IPC."*

b) The order of Hon'ble Supreme Court regarding compensation

The quorum consisting of Justice RM Lodha and Justice Fakhir Mohd. passed an order on 6-2-2013 in which a direction was given to central, state and union territories to discuss on measures for the proper treatment of victim, compensation payable to victims by the state and creation of some separate funds for victims of acid attack. Along with the order three subsequent orders were passed on 16-4-2013, 9-7-2013 and 16-7-2013 respectively. The highlights of that order are:-

"*We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared 'Victim Compensation Scheme' (for short 'Scheme'). As regards the victims of acid attacks the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of ₹25,000/- in such scheme, the State of Rajasthan has provided for ₹2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must been enhanced to at least ₹ 3 lakhs as the after care and rehabilitation cost. The suggestion of learned Solicitor General is very fair.*

We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs.3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of ₹1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of ₹2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction."

c) Formation of scheme by National Commission for women

[520] Inserted by Code of Criminal Procedure Amendment Act, 2013

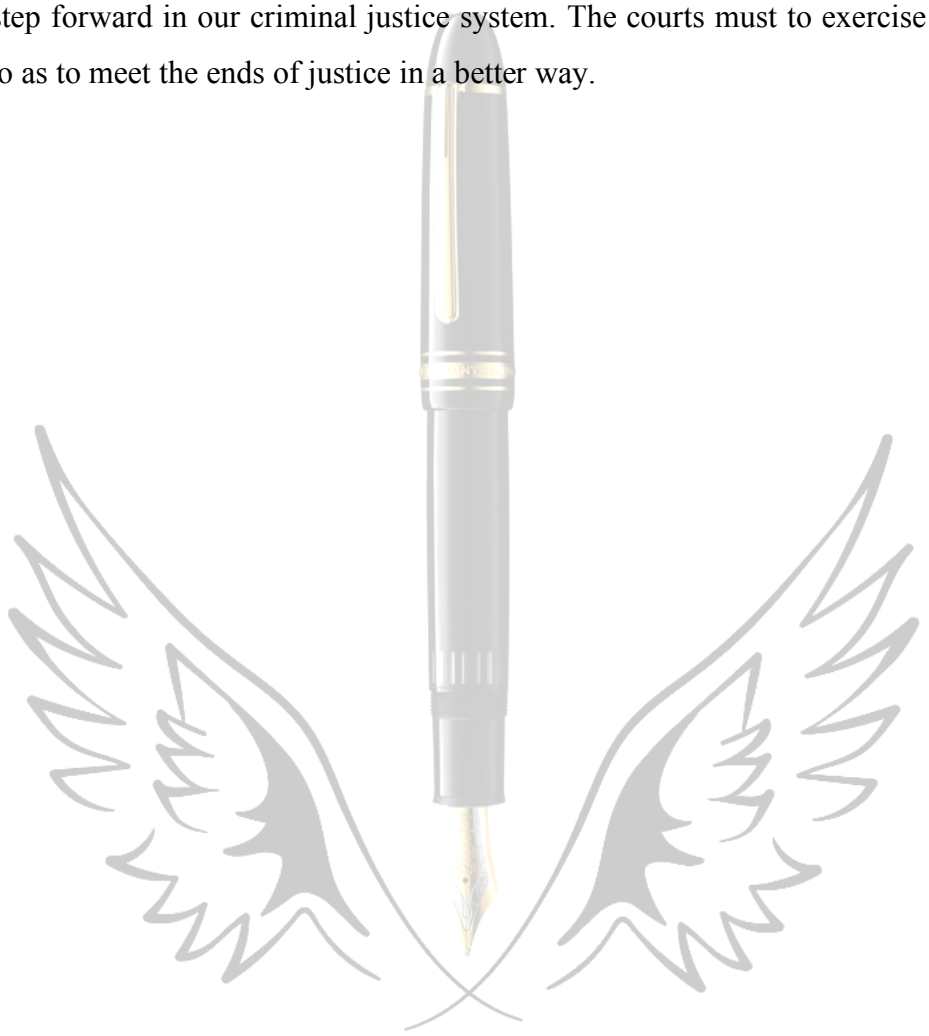
The Clause 15 of the scheme for relief and rehabilitation of Offences (by Acids) on women and children National Commission for Women(29/Jan/2009) laid the following points:

Clause 15(e): On the receipt of the application, the District Board shall satisfy itself about the claim, make a preliminary assessment about the nature of the claim.
Clause 15 (f): After having been prima facie satisfied that a case of acid attack has been made out, the board shall order an interim financial relief of an amount upto **₹ 5,00,000/-** within a period of thirty days from the date of receipt of the application. The payment would directly be sent to the hospital where the acid attack survivor is undergoing the treatment and be utilized for the purposes of treatment to the victim.
Clause 15 (g): Any further sum of money as approved by the Board/monitoring authority, from time to time shall be met towards the treatment of the victim, subject to a **maximum of ₹ 25 Lakhs** inclusive of the interim compensation.
Clause 15 (h): Where death of the victim results The Board shall on the facts and circumstances of the case, pay a lump sum not exceeding **₹ 2,00,000/-** to the legal heir preferably the children of the deceased so as to protect the best interests of the child . This would be in addition to any expenses incurred towards the treatment of the victim.
Clause 15 (i): The Board shall in addition to the above, take such measures for the purposes of the rehabilitation, legal aid or any special needs of the victim in consultation with the monitoring authority or service provider. The board or the monitoring authority shall cater to the special needs and **rehabilitation** of such victims to an amount upto **₹ 5 Lakhs.**
Clause 15 (j): The reliefs provided under the scheme shall **not be subject to convictions or acquittals** or **whether the identity of the persons committing the crime is known or otherwise.**

CONCLUSION & SUGGESTIONS:

It is suggestive that in addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is the weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not

attract the attention of law. In fact, victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature[521] It is indeed a step forward in our criminal justice system. The courts must to exercise this power liberally so as to meet the ends of justice in a better way.



[521] *Rattan Singh v. State of Punjab*, (1979) 4 S.C.C. 719, 721, ¶ 6

THE GATSBY EXPERIMENT: METHODOLOGICAL IMPLICATION

- PARINEETA MODI

In this research paper I intend to analyze symbols and symbolism in the novel *The Great Gatsby* by F. Scott Fitzgerald. I have chosen this novel because there are different types of symbols and symbolism used by the writer throughout the novel.

Symbolism refers to objects, characters, figures which are used to represent ideas or concepts. It is a literary term used in literature to help readers understand a literary work. Symbolism is everywhere; symbolism exists whenever a thing is meant to represent something else. **Symbolism** is a figure of speech that is used when an author wants to create a mood or emotion in a work of literature.

The Great Gatsby: An Introduction Unique

The Great Gatsby, which was published in 1925 is one of the unique pieces of work in American fiction of its time. It is a novel of mastery and tragedy noted for it's remarkable narration. The novel *The Great Gatsby* is known for his imagistic and poetic prose, holds a mirror up to the society to which it belongs to. Fitzgerald's charm in *The Great Gatsby*, in fact, is his ability to confine the mood of a generation during a socially crucial and chaotic period of American history. To understand Fitzgerald's genius more thoroughly, one must be familiar of the politics that underlies in the story. The removal of the story from the historical context is to do a grave injustice. When the novel was published in 1925, it explore life in the early to mid 1920s. It was a time of growth and prosperity, as well as a time of corruption that had entered into all levels of society.

Socially, the 1920s has been marked as an period of great change, particularly for females. In a symbolic show of setting women free, women could have shorted their hair, which was one of the great indicator of traditional femininity. To compliment their masculine look, women started to become more attractive by wearing stylish dresses, so as to reinvent themselves and to live according to their own rules. In this novel Fitzgerald shows women of all classes who are breaking out of their moulds that society had replaced them into. And economically 1920s was the time of great financial gain, at least for the upper class. Between 1922 & 1929 stocks rose, corporate profits increased, and personal wages grew.

For instance, we notice in the novel certain sociological changes grows from the wish to break class barriers

- Myrtle wishes to mount the social ladder, and so she is determined to do it at any cost.
- Daisy tries to break the restrictive society in which she was raised, but she cannot make it happen and so she falls back into the only thing she knows: money.
- Jordan Baker, an emancipated woman , she passes her time as a professional golfer, a profession made possible largely because of social and economic progress in 1920.

Part of what makes Fitzgerald's novel such a favorite creation in the way he is able to analyze society. Through his characters, he not only captures a snapshot of middle class and upper-class American life in the 1920s, but also conveys a sequence of condemnation as well. Through the characterization in *The Great Gatsby*, Fitzgerald explores the human condition as it is reflected in a world characterized by social disruption and uncertainty, a world with a direct underlying historical basis.

SYMBOLISM in *The Great Gatsby*

In *The Great Gatsby* F. Scott Fitzgerald presents a novel with intricate symbolism. Fitzgerald integrates symbolism into the heart of the novel so strongly that it is necessary to read the book several times to gain any level of understanding. The overtones and connotations that Fitzgerald gives to the dialogues, settings, and actions is a major reason why The Great Gatsby is one of the classics of the 20th century.

Three themes dominate the text of *The Great Gatsby*.

They are- time loss, appearance, mutability, and perspective. Most of the novel's thematic structure falls neatly into one of these categories. In order to satisfactorily understand the novel, we must examine the roles of these three themes.

F.Scott Fitzgerald had used following types of symbolism:

- **THE VALLEY OF ASHES**

One of the very first symbol in the novel, The ‘Valley Of Ashes’ resembles something dark and lifeless. As we know **ashes** stand for death & destruction. It is reminiscence of the phrase “Ashes to Ashes” from king James version of the bible (Genesis 3:19).

Moreover the death of Myrtle Wilson in the 'Valley of Ashes' stands for pain which is associated with the valley. Myrtle lives in the Valley, which means that they are not of high social standards as the other characters in the novel. It is described as

"…a fantastic farm where ashes grow like wheat into ridges and hills and grotesque gardens; where ashes take forms of houses and chimneys and rising smoke and finally, with a transcendent effort, of men who move dimly and already crumbling through the powdery air".(Fitzgerald, 26)

- **The Eyes of Doctor T. J. Eckleburg**

The eyes of Dr. T.J. Eckelburg cast an threatening shadow in the novel. The symbolism behind the eyes, located on a billboard dominating the Valley of Ashes, is open to interpretation. George Wilson likens them to the eyes of God. The location of the Eyes of Dr. T.J. Eckleburg looking down on every single thing that takes place in the Valley of Ashes, represents that he is talking about the eyes of God looking down over the world. Nick describes it as a wasteland or dumping ground, not only in any one particular passage but also as Nick's. He is the one who really knows what is going on. Other characters are influenced as blind as these eyes are just painted on a billboard. It is because of Wilson's strong belief in God in this poster is just not an advertisement, but has a deep meaning to him. Through the eyes of Doctor T.J. Eckleburg, his neighbor Michaelis makes fun of Wilson's faith in God and says about the billboard "that's an advertisement"

His empty face may represents the modern belief that God no longer lived, a symbol of distrust of political, religious, and social institutions.

- **THE GREEN LIGHT**

Situated at the end of Daisy's East Egg, the green light is a significant symbol within the book. To Gatsby green light represents his dream which is Daisy. Gatsby associates it with Daisy, and in Chapter 1 he reaches toward it in the darkness as a guiding light to lead him to his goal, to attain her would be completing Gatsby's American dream. The green light also symbolizes society's desire and the impossibility of achieving the materialistic American dream. In Chapter 9, Nick compares the green light to how America, rising out of the ocean, must have looked to early settlers of the new nation.

Fitzgerald write," he stretched out his arms toward the dark water in a curious way, and, far as I was from him, I could have sworn he was trembling. Involuntarily I glanced seaward – and distinguished nothing except a single green light, minute and far away" (Fitzgerald, 24)

AMERICAN DREAM- THE DEATH OF THE AMERICAN DREAM

The novel presents the American Dream within two facets. The first is represented as once being a pure ideal, but now false, and the second is represented through the corrupted hope that it is lost forever to the American people.

Throughout the author deals with upper class society, Nick Caraway shows how modern values have transformed the American Dream of pure ideal to a materialistic power. Caraway shows how the world of high class society lacks behind in sense of morals and consequences.

Gatsby at an early age aspired to do greater things; he wanted to be "better". And this is a true representation of the former 'dream'.

"Jimmy was bound to get ahead. He always had some resolves like this or something. Do you notice what he's got about improving his mind? He was always great for that"(Fitzgerald, 185)

CONCLUSION

In conclusion, *The Great Gatsby* is a book highlighting sociological problems. If *The Great Gatsby* is the Great American novel as it is said to be, the evidence is evident. The character Daisy Buchanan, she is the representation of a careless lover with her unconcerned mood. A good example of her materialism is when she says, "…It makes me sad because I've never seen such - such beautiful shirts before"(Fitzgerald, 99). Nick Caraway, is the superior man of the novel, throughout the novel he is trying to help people to see the reality of things with his temperamental attitude. Jay Gatsby is a very majestic man, of which we don't know much about till the end of the novel. He being the titled character, is a man who will stop without achieving his desires. Each character represents a perspective of Fitzgerald, one good and the other one partially corrupted. Taking place in the 1920's the novel does a good job of showing us what things were like in that era.

Fitzgerald wants to highlight the importance of time to the overall design of the book. Time a most important part for Gatsby's character. Gatsby's relationship with time is a major aspect to the plot. He wants to erase five years from not only his own life but from Daisy's life also. Gatsby's response to Nick, telling him that he can repeat the past, is symbolic of the tragic irony that's behind Gatsby's fate.

Gatsby exclaim that 'Can't repeat the past?' he cried incredulously. 'Why of course you can!' . Gatsby will not get ready to accept Daisy until she erases the past of last three years of her life by telling Tom that she never loved him to his face. Gatsby totally believes what he says and thinks is all true about Daisy. At one part of the story he actually tells Nick how, he and Daisy were going to go Memphis to get married at her white house just like it were five years before. In another scene, when Gatsby and Nick headed to the Buchanans for lunch, Gatsby see Daisy's and Tom's child for the first time. Nick defines Gatsby's expression as one of genuine surprise and suggests that Gatsby before never believed in the girl's existence. Gatsby is so caught up in his dream that he becomes vulnerable to the world's brutal reality.

Fitzgerald superiorly creates a time symbolism in the scene when Daisy and Gatsby meet for the first time in five years. There are many characters in the novel which are important. Since we learnt a little about Daisy's past, she is a good person to start with. Actually, Daisy's appearance blends in with her perspective. The most profound view of Daisy's character comes in the first chapter when Nick was having dinner at Daisy's house. After the dinner, while Jordan and Tom were inside, Daisy removes her mask and confides in Nick for a brief moment. Everything about Daisy is strange, like her eyes and voice. Daisy is always cheerful and makes jokes and pointless, almost idiotic comments. She behaves like a young girl. This conversation with Nick demonstrates her weirdness. She starts telling Nick how they hardly know each other being cousins, then she proceeds to open up and tell him her feelings which she had never revealed to more than two people in the whole world. Daisy told Nick about how she was unhappy and how her experiences had made her bitter and distrustful for everything.

Nick is the only character whose role is hardest to understand. While he is relatively minor in the plot, his role in the novel is immense. Fitzgerald chose a great way to tell the story by using an observant third party. However, while Nick is a spectator, his role is critical. Fitzgerald inserts subtle hints throughout the book that help us understand Nick, and thus the message of the novel.

The way of beginning of the book by Fitzgerald gives Nick's final thoughts on the entire summer and this interesting method reflects Nick's personality. The brightly written discourse about a half of page explains however Nick's experience with Gatsby and the Buchanan's has concluded his interest in the "abortive sorrows and short-winded elations of men."

SOCIOLOGICAL PERSPECTIVE: THE SHAWSHANK REDEMPTION DEBATE

- PARINEETA MODI

INTRODUCTION

There are very few movies which for being deeply human – i.e. *real* – mark a milestone in cinema history. And not watching them, somehow, entails also being amputated intellectually in order to understand and manage our professional and organizational challenges. This happens with that gem of a movie that grows over time, *The Shawshank Redemption,* and that I personally place in the Top 100 movies of all time

And among the many issues that the movie touches on, there is one that I consider to be the common thread and makes the most contributions to our business needs: how the success of a change process depends on proper planning, design and management, which we often forget. And this *leitmotiv* provided by its director, Darabont, with the contrast of two complementary stories: one of a change that fails – the release of the librarian Brooks – and the other, a process that is indeed happily implemented, such as the release of Red (Morgan Freeman) and him finally settling in a Mexican village by the Pacific.

THE CASE OF BROOKS AND THE NEGATIVE PERCEPTION OF CHANGE

Remember the scene: Brooks, who has spent over thirty years behind bars in Shawshank, receives the news that the Review Board has granted parole. What appears positive news at first is however received by our protagonist both negatively and aggressively (he tries to stab a fellow inmate). First lesson: not every change we think is positive for our organization or our people will be beneficially perceived by the recipients of that change. Not having this axiom in mind is the cause of the high failure rate of change projects in companies. Those affected by the change will only collaborate with it if there is a positive balance in the subjective cost/benefit analysis.

In 1947 Portland, Maine, banker Andy Dufresne is guilty of murdering his partner and her lover and sentenced to a pair of consecutive life sentences at the fictional Shawshank State Penitentiary in rural coniferous tree State. Andy befriends jail contraband smuggler, Ellis

"Red" city, Associate in Nursing inmate serving a life. Red procures a rock hammer Associate in Nursing later an large poster of Rita Hayworth for Andy. in operation inside the jail laundry, Andy is usually abused by the "bull queer" gang "the Sisters" and their leader, Bogs.

In 1949, Andy overhears the brutal captain of the guards, writer Hadley, protestant regarding being taxed on Associate in Nursing inheritance, and offers to help him DE jure shelter the money. once a vicious assault by the Sisters nearly kills Andy, Hadley beats Bogs severely. Bogs is distributed to a unique jail and Andy is never attacked over again. defender Samuel Norton meets Andy and reassigns him to the jail library to assist senior inmate Brooks Hatlen. Andy's new job may be a pretext for him to begin managing financial matters for the jail employees. As time passes, the defender begins exploitation Andy to handle matters for a selection of people moreover as guards from totally different prisons and additionally the defender himself. Andy begins writing weekly letters to the authorities for funds to spice up the decaying library.

In 1954, Brooks is paroled, but cannot fits the surface world once fifty years in jail and hangs himself. Andy receives a library donation that options a recording of the marriage of Figaro. He plays Associate in Nursing excerpt over the final public address system, resulting in him receiving solitary. once his unleash from solitary Andy explains that hope is what gets him through his time, a plan that Red dismisses. In 1963, Norton begins exploiting jail labor for structure, profiting by undercutting masterful labor costs and receiving kickbacks. He has Andy launder the money exploitation the alias Randall Stephens.

In 1965, Tommy Williams is incarcerated for law-breaking. He joins Andy's and Red's circle of friends, and Andy helps him pass his G.E.D. exam. In 1966, Tommy reveals to Red Associate in Nursingd Andy that Associate in Nursing inmate at another jail claimed responsibility for the murders Andy was guilty of, implying Andy's innocence. Andy approaches Norton with this knowledge, but the defender refuses to concentrate and sends Andy back to solitary once he mentions the money washing. Norton then has Hadley murder Tommy below the illusion of Associate in Nursing escape attempt. Andy refuses to continue the money washing, but relents once Norton threatens to burn the library, deduct Andy's protection from the guards, and move him out of his cell into worse conditions. Andy is free from solitary once a pair of months and tells Red of his dream of living in Zihuatanejo, a Mexican coastal town. Red feels Andy is being false but guarantees Andy that if he is ever free

he will visit a specific tract near Buxton, coniferous tree State and retrieve a package Andy buried there. Red becomes distressed regarding Andy's state of mind, notably once he learns Andy asked another inmate to supply him with six feet of rope.

The next day at vocalization the guards understand Andy's cell empty. Associate in Nursing angry Norton throws a rock at the poster of Raquel Welch hanging on the wall, and additionally the rock tears through the poster. Removing the poster, the defender discovers a tunnel that Andy duct gland beside his rock hammer over the last seventeen years, hidden by posters of starlets Andy inborn from Red over the years. The previous night, Andy free through the tunnel and used the prison's waste matter pipe to attain freedom, delivery with him Norton's suit, shoes, and additionally the ledger containing details of the money washing. whereas guards search for him the next morning, Andy poses as Randall Stephens and visits several banks to withdraw the laundered money. Finally, he mails the ledger and proof of the corruption and murders at Shawshank to a region newspaper. The police gain Shawshank and take Hadley into custody, whereas Norton commits suicide to avoid arrest.

After serving forty years, Red is finally paroled. He struggles to adapt to life outside jail and fears he never will. basic knowledge his promise to Andy, he visits Buxton and finds a cache containing money and a letter asking him to return back to Zihuatanejo. Red violates his parole and travels to Fort yankee Revolutionary leader, Texas to cross the border to North yankee country, admitting he finally feels hope. On a beach in Zihuatanejo, he finds Andy, and additionally the two friends are happily reunited.

The Shawshank Redemption offers up the argument that standing up and speaking out brings triumph–both universally and personally. The juxtaposition of this answer every from Associate in Nursing objective scan and a subjective scan transcends an easy “message” into a concrete argument. misreckoning it out with look} at the actions of a life steeped on prime of things and additionally the lack of two to return back on whereas not a second look at produce by mental act notions solidifies the Author’s position at intervals the minds of the Audience.

The Shawshank Redemption–both film Associate in Nursingd story from that it came–presents Associate in Nursing unbelievably well-crafted argument, a solid example of problem-solving in motion. to know why this film works so well wants a understanding of story further holistic

in nature, Associate in Nursing understanding that appreciates the various views at conflict and brings them on into one seamless and purposeful model of human discipline.

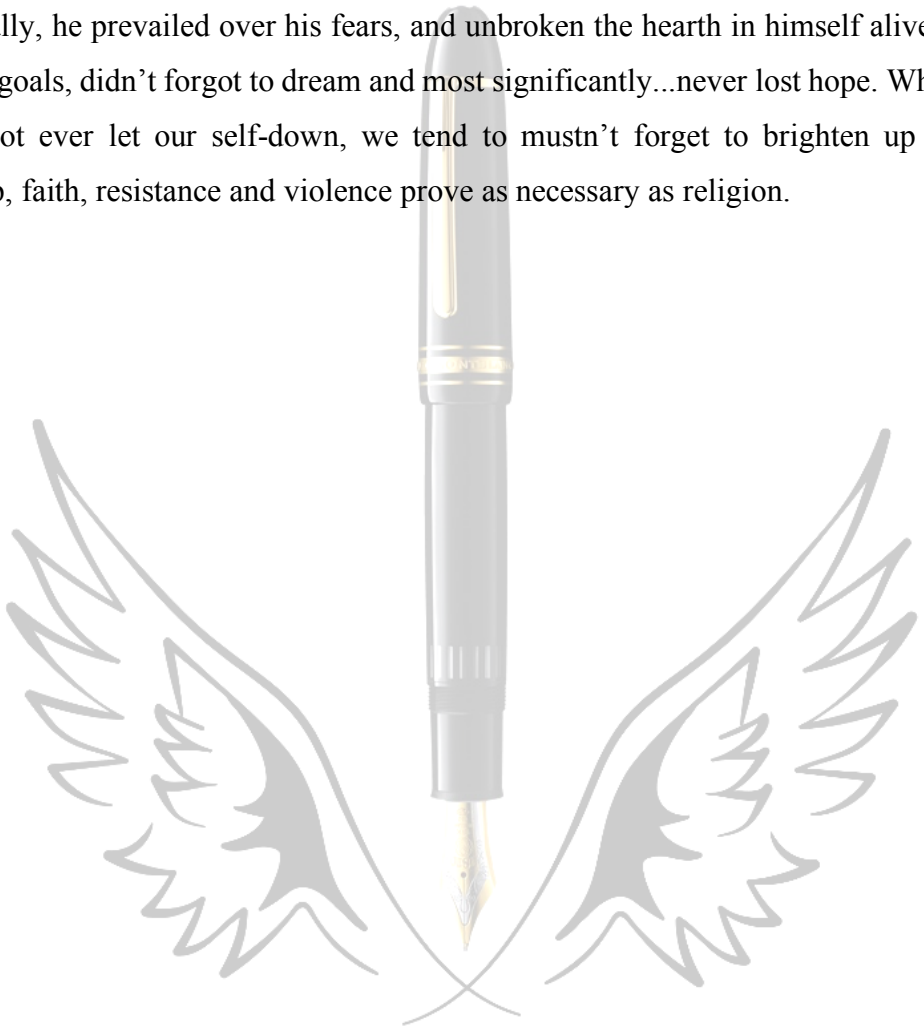
The rising field of narrative science lifts the veil of mystery shrouding this film and begins to spice up the quality of dialogue shut what makes nice stories so nice.

The pinup posters of Rita Hayworth and additionally the various ladies represent the surface world, hope, and every inmate's wish to escape to a standard life. Andy admits the utmost quantity once he tells Red that usually he imagines stepping all the means through the photograph and into another life. further just about, Rita Hayworth very can prompt Andy of his wish to essentially escape of Shawshank because of the well-defined hole inside the concrete that the posters conceal. As a result, Rita Hayworth embodies the sense of hope that keeps Andy alive and sane and distinguishes him from the alternative inmates. though it takes Andy over twenty-five years to hammer his manner through the wall, the mere indisputable fact that he has one factor to work forever him from relapse into bouts of sorrow as a result of the various inmates do. Having a mission and one factor to look forward to—even before he knew he would use the outlet to interrupt out—kept Andy alive and gave him his "inner light-weight."

Redemption, in itself may be a durable word. we've got a bent to are forced upon choices, and usually, someone else forces their choice upon U.S.A.. inside the constant struggle to live, a mean adult is totally sure regarding a pair of things: foremost, people very don't mind you suffering, they'll even fancy it and second, Law is just another word for ' one factor which is able to be bent.' Talking regarding the primary realization, as long as there's one thing for them in it, they very don't mind another ones suffering, albeit its for the proper reasons. That's once the word 'Friend' kicks in. within the novel 'The Shawshank redemption' Andy won't have survived while not his friends in addition to plot his escape. The second realization is simply too ironical. we have a tendency to all knowledge moneymakers and shakers virtually obtain them self out of any drawback, and if they cant, they'll persevere obtaining obviate folks till they notice ones that area unit able to be sold-out. sadly, Andy was stuck in each of those dilemmas, he had folks causing him to suffer, and lawmakers absolutely considering them.

If i used to be to explain this novel in an exceedingly single word, it might be 'Hope'. The novel if understood on a unique reference clearly explains that a person is and constantly are in chaos, perpetually running between worry and pain, while not posing for them or maybe worth them.

it's hope that sustains them, that tomorrow is another day, that the wait are value their while! it's the constant battle of discarding that we have a tendency to battle with our self-every day. Andy spent twenty years of his life with hope. Having been abused each verbally physically and mentally, he prevailed over his fears, and unbroken the hearth in himself alive. He didn't forget his goals, didn't forgot to dream and most significantly...never lost hope. While we tend to must not ever let our self-down, we tend to mustn't forget to brighten up others too. Friendship, faith, resistance and violence prove as necessary as religion.



MULK RAJ ANAND: A JURISPRUDENTIAL PERSPECTIVE

- PARINEETA MODI

INTRODUCTION

Mulk Raj Anand (1905-2004), the red-hot voice of the general population, undeniably remains a father figure in Pan-Indian English writing – one who has made an effective social translation of Mother India. He has without a doubt profoundly felt the beat of Indian culture. Anand is recognized as an author for his working-class humanism, social authenticity, naturalistic approach, imaginative stamina and his 'mulkese' sensible dialect. He chooses the least classes to speak to them in his books. He argues for the persecuted, those who lack wealth, the misused and, in a word,' the minimized' in the general public. The present article is a humble endeavor with respect to the specialist to center around the post provincial parts of the works of Anand in the light of his two age making books – 'Coolie'(1936) and 'Untouchable'(1935).

This time in postcolonial written works colonizers and colonized are introduced as paired contrary energies yet there are a few different appearances to this connection. It isn't just about white men smothering the tans yet tans ‟blows on tans as well. Dalits in Mulk Raj Anand‟s Untouchable can be taken as the subjects of colonization under the administer of Savarna Hindus. This double connection amongst classes and ranks, commanding and overwhelmed, can likewise be contemplated under the focal point of pioneer structure. Standing is "the most telling indication of the postcolonial character of India‟s contemporary issue". It is expressed in The Empire composes back that the rationale of postcolonial talk is to "re establish the minimized in face of the overwhelming". Narayan's neighborhood, however unexpected, protection from the homogenizing worldly requests of domain and Anand's adroitly pioneer, socially dedicated vision. I contend that a type of reckoning that unequivocally anticipates decolonization through

new and transnational artistic structures is an essential element of Untouchable that isn't found in Swami and Friends, regardless of the last's hostile to pilgrim components. Untouchable was planned to be a "scaffold between the Ganges and the Thames" and envisions postcolonial transactions of time that scrutinize worldwide imbalances and depend upon the multidirectional worldwide associations manufactured by innovation. His first primary novel, "Untouchable", distributed in 1935, was a chilling confession of the everyday existence of an individual from India's untouchable position. It is the narrative of a solitary typical day for Bakha, a latrine

cleaner, who inadvertently finds an individual from a higher rank. Bakha scans for solace to the deplorability of the predetermination into which he was conceived, talking first with a Christian minister and after that with an adherent of Mahatma Gandhi, yet before the finish of the book he reasons that it is innovation, as the recently presented flush latrine that will be his guardian angel. While the can may deny him and his group of the conventional occupation they have had for quite a long time, it might likewise free them at last by disposing of the requirement for a station of latrine cleaners.

This only book, which had the power to get attention and Mulk Raj Anand won the title of India's Charles Dickens. His companion, E. M. Forster, whom he met while chipping away at T. S. Elliot's magazine Criterion, composed the presentation. In Anand's second novel, Coolie (1936), he keeps on portraying the predicament of India's poor by recounting a 15-year-old kid, caught in bondage as a youngster worker, who in the long run passes on of tuberculosis.

POST COLONIAL IDENTITY IN ANAND'S NOVELS

Post-expansionism is a scholarly bearing (now and again likewise called a "period" or the "post-pioneer hypothesis") that exists since around the center of the twentieth century. It created from and essentially alludes to the time after expansionism. The post-frontier course was made as provincial nations ended up free. These days, parts of post-expansionism can be found not just in sciences concerning history, writing and governmental issues, yet in addition in way to deal with culture and personality of both the nations that were colonized and the previous pioneer powers. Be that as it may, post-imperialism can take the pilgrim time and in addition the time after expansionism into thought.

A noteworthy part of post-expansionism is the somewhat rough like, unbuffered contact or conflict of societies as an unavoidable aftereffect of previous provincial circumstances; the relationship of the pioneer energy to the (once in the past) colonized nation, its populace and culture and the other way around appears to be to a great degree questionable and opposing. This logical inconsistency of two conflicting societies and the wide size of issues coming about because of it must be viewed as a noteworthy subject in post-imperialism: For hundreds of years the pioneer silencer regularly had been driving his socialized esteems on the locals. In any case, when the local populace at long last picked up freedom, the pilgrim relicts were as yet inescapable, profoundly incorporated in the locals' psyches and should be evacuated. Post-imperialism additionally manages clashes of character and social having a place. Provincial forces came to remote states and wrecked fundamental parts of local convention and culture; besides, they persistently supplanted them with their own ones. This regularly prompt clashes

when nations ended up free and all of a sudden confronted the test of building up another across the country personality and fearlessness.

As ages had lived under the energy of pilgrim rulers, they had pretty much embraced their Western convention and culture. The test for these nations was to locate an individual method for continuing to call their own. They couldn't dispose of the Western lifestyle from one day to the next; they couldn't figure out how to make a totally new one either.

Mulk Raj Anand's Coolie is one of a kind as in it recounts the narrative of the most under-advantaged and abused area of the society, who have no voice for themselves. It draws out the monstrous truth that the universe of satisfaction has a place just with the rich while the poor endure wherever they are,be it Kangra Hills, Bombay or Simla. Colonizer-Colonized Relationship: Anand draws out the malicious impacts of imperialism on the mind of people. He draws out the feeling of inadequacy wired into the brains of Indians, when he says in regards to Munoo's 'subservient soul'. When the foreman reports the organization is on closed down, the coolies beg him as they 'viewed him as God', capable of doing anything. The racial victimization the coolies is depicted when Munoo goes into a shop in Bombay to have a glass of pop water and he is requested to sit on the ground since he is a coolie and as he is pursued away,he feels 'apprehensive and to a great degree liable for encroaching the rich man's reality.' The conduct of all the English men stresses their prevalence complex,as they consider locals as useless 'niggers'. Whenever the coolies in the cotton plants payed their regard in salaam to the foreman Jimmie Thomas, he gave back where its due with a manhandle or a kick. Anand brings out sharp logical inconsistencies here by pointing out that these same authorities like Jimmie Thomas and

Mr.England themselves were poor previously and had an extreme existence which they have now forgotten. He additionally draws out the propensity of the colonized to mimic the colonizer, i.e the national bourgeoise in Frantz Fanon's hypothesis through the characters like Nathoo Ram, Ganpat and Sir Todar Mal who abuses poor people and are glad for their relationship with the British. Interestingly, we see Munoo sees himself as superior to different coolies since he could read and compose and he respects the outcasts and bums on road with disdain as well.At this point, we understand that even the separated individuals are not precisely promoters of correspondence as well. This thought is additionally affirmed in the public mobs that broke out amid the exchange association meeting. Indians have a solid feeling of group to which they distinguish in particular and this temperance was the one misused by the British to 'partition and run the show'. Hostile to colonialist Resistance: Frantz Fanon's Theory Though the story manages the abuses looked by working population, we can see components of frontier

protection being brought out by characters like Ratan,the Trade Union staff and Mohan, another coolie who worked with Munoo in Simla. Ratan,a wrestler, does not take the badgering by the foreman and even the foreman is scared by him and gives him his full wage. Ratan motivates Munoo to go to bat for one's self and furthermore to appreciate life. Ratan enlists Munoo and Hari in the Trade Union.Sauda,another lobbyist of the Trade Union rouses the coolies to understand reality that 'for a considerable length of time they have been the casualties of unions and coercion' and not to overlook their thought of 'izaat'.Frantz Fanon's hypothesis of recovering one's nativism comes into picture as the coolies set out to look ou from their pens of mediocrity complexes.The aggregate and embodiment of the scope of misuse is contained in his words as he says that the poor souls like themselves who are dwindled from their rights are regarded by none including

themselves. This idea is additionally substantiated when all through the story we see Munoo needing to be one of the elite,or be a Babu,'own a couple of boots' yet then he understands his place on the planet is similarly as a humble hireling and a coolie. However, Munoo is enlivened when Sauda tells the that they are 'individuals and not cruel machines' who have each privilege to lead a cheerful life.Here we see, Frantz Fanon' thought of the lumpen-low class as the bearers of upheaval. Hybridity,Loss of character and Mimic Men: Homi K. Bhabha's hypothesis on half breed personalities is brought out through the character of Mrs.May Mainwaring who slipped from an Anglo-Indian origin.Due to her mixture identity,she builds up an 'enormous feeling of inadequacy about her root' to the degree that she was 'fixated on the desire of going to England to whitewash herself'. She tries her best to get herself perceived as a 'pukka',but still flops as he was dismissed at the Viceroy's Ball by a large portion of the white men. Munoo experiences loss of way of life as he is dislodged from one place to other in his journey.But notwithstanding when he is abuseed for being a coolie,he consoles himself that he additionally has a place with the Kshatriya Clan and is a Rajput warrior.He is assuaged when he sees individuals hailing 'from the slopes resembles him.Like all Indians, subservience to the English is wired into his cerebrum and in the meantime he is interested about how the 'angrezi-log' carries on among themselves',like amid the Viceroy's Ball. Other than characters like Babu Nathoo Ram and Sir Todar Mal who are sycophants of the British empire,Major Mechant's character is run of the mill of the 'copy men' of Homi K.Bhabha.Being raised in a Christian School,he goes to England for his studies,marries a white young lady and slices off every one of his underlying foundations to his Mochi(Cobbler) position and even anglicizes his name to Mechant.He turns out to be near Mrs.Mainwaring just like 'an Indian Christian it is anything but difficult to discover fondness with an Eurasian than the

locals or pure blood English'. Conclusion: Throughout the novel,we see the idea of being a 'coolie' is reinforced,as their personality closures and starts there.Although we can see the segregations of the position based Indian culture in the novel,the more conspicuous separation is the bay between the rich and the poor,'which have no association between them. 'Though Coolie envelops all parts of the detestations of colonialism, the story isn't a negative one .Rather,it is a practical view which uncovered the peruser a world he had not seen before similar India through the eyes of a Coolie. Munoo's story is a case of how Edward Said guessed of 'composing back to the power', through the clear photo of the substitute history of pre-Independence India. Through his account composing style and particular characterisations ,Anand draws out a multi-dimensional depiction of not just the broad outcomes of colonization on a huge number of individuals yet in addition underlines the socialist belief systems in an industrialist setting.

AN ANALYSIS OF UNTOUCHABLE AND COOLIE

The situation of the most minimal rank of Indian culture was generally obscure toward the Western gatherings of people who initially experienced Bakha in Mulk Raj Anand's 1935 novel Untouchable. Distributed before the autonomy of India from British pilgrim govern, the novel considers a nearby examination of the concealment of the Untouchable position to be compared with the British persecution of India. The novel has been all around hailed for a considerable length of time as a 'dissent novel', lighting up the loathsome conditions originating from systematized pecking order. The novel touches base before the contemporary enthusiasm for and acknowledgment of Dalit writing, including treasurys altered by Anand himself, and scholarly feedback of the work to a great extent happens before the approach of post-provincial hypothesis, with most pundits concentrating on Anand's utilization of story, his work as a humanist writer, or his likenesses to Western writers, for example, E.M. Forster. While Anand's work was instrumental in featuring the treacheries endured by the enslaved, with Untouchable filling in as the model of this journey, I fight that the novel merits a moment basic look, educated by current postcolonial contemplates.

Untouchable', the principal novel of Anand which relates the narrative of Bakha-a 18-year-old sweeper-isa effective investigate of India's rank based social framework. It is fundamentally a disastrous story of the individual caughtin the net of the deep rooted station framework. All through the novel one occurrence of mishandling the 'sub-human' Bakhafollowed by a large group of insultings. The whole 'sunalterned' group of Bakha is nailed down. Every scene

of'denigration' merits perusing, more delicately.' 'Untouchable' portrays, in the 'continuous flow

method' an average day for Bakha. Theebony cleaned and dapper sweeper kid is one of the children of Lakha, the Jamadar of the sweepers. As theday first lights, his work of lavatory cleaning additionally starts. He is a relentless and effective laborer: "Each muscle ofhis body, hard as shake with regards to play, appeared to sparkle forward like glass". Furthermore, however his activity was dirty,he remained similarly perfect. Emblematically this may propose his underlying self-pride which would laterreceive numerous blows from the predominant operators of the general public. His sister, Sohini is likewise capable after herfashion. One day she goes to the town well to get water. Kali Nath, the cleric of the sanctuary, more as acure for stoppage than in an entrance of liberality, consents to draw water from the well for the assembledoutcastes. Having drawn a bucket of water with impressive trouble, he sees Sohini, feels pulled in to heryouthfulness, and heading out the others, empties the water into her pot and recommends that she should come tothe house later in the day to clean the yard. When she goes there, he makes uncalled for proposals toher, and as she begins shouting, he yells "dirtied" and assembles a horde of angry high-position individuals.

Toward the evening, Bakha 'goes to' the marriage of Ram Charan's sister – the young lady of a higher castewhom he couldn't wed. Slam Charan the washer man's child Chota the calfskin laborer's child and Bakhaforget for once the 'details' of sub-low-standing contrasts, and offer the sugar-plums, and plan to playhockey at night. As Havildar Charat Singh's, once more, standing is overlooked; the Havildar treats Bakhaaffectionately and gives him a hockey stick. Playing hockey against the Punjabis, Bakha scores a goal,which begins a free battle. A young man is harmed, and endeavoring to lift him up Bakha "contaminates" him agreeing tothe kid's mom. When he returns home finally, his dad entirely reproaches him for sitting ceaselessly all theafternoon, and drives him out of the house.Bakha meets Colonial Huchinson, the Christian minister, who takes him home, however hisshrewdest spouse yells at him and he flees in fear. He goes to the 'Gole Maidan', and hears with raptattention to a discourse of Gandhi, the rescuer of the untouchables. He is particularly energized by his words.He additionally tunes in to the perspective of the writer Iqbal Nath Sarshar that the issue of untouchable can be unraveled, ifthe present day flush-lavatory is presented. At that point the sweepers can be free. The writer finishes up,"… from the shame of untouchability and accept the nobility of status that is their perfectly fine of a casteless and awkward society"Bakha is profoundly awed, feels more confident without bounds than whenever since the day-dawn,and comes back to his home to inform his dad concerning the Mahatma and about the machine that will "clear dungwithout

anybody handling it".Defending this epilog in his forward to the book, E.M.Forster appropriately says:"It is the essential peak, and has mounted up with triple impact. Bakha comes back to his dad and hiswretched bed, thinking now about the Mahatma, now of the Machine. His Indian day is finished and the following daywill resemble it, yet on the surface of the earth, if not in the profundity of the sky, a change is at hand.'"Untouchable 'is a strong prosecution of the wrongs of a distorted and wanton conventionality. It is alsoa incredible gem which presents reality with photographic constancy. It tries to blend the sensitivity of the perusers for the outsiders of society or to be more particular for the minimized area of the general public.

It's implied that Anand was not a Dalit, but, his novel has accomplished a hoisted status seldom given in writing—one in which his work has just been talked about regarding its humanist goals, with Anand going about as the 'speaker' for the Untouchable. Unmistakably, this thought isn't just obsolete however exceptionally risky. In any case, to neglect the novel as unimportant because of its creator's standing or the challenges the work presents would likewise be in blunder. Rather, a novel, for example, Untouchable must be seen as the social record that it seems to be—one which not just expert the elevated assignment of enlightening the situation of a persecuted class to a generally joyfully beforehand oblivious gathering of people, yet additionally exhibits the complex ideas of class that are difficult to completely overcome.

Coolie is ideologically stacked for it draws its quality from Anand's social responsibility. English government changed the conventional economy of India into a mechanical economy. Besides it thought about India as a tremendous market for its own particular mechanical products. Along these lines the Imperialist framework is related to an onerous industrialist framework in which the common run the perch. Indian nobility and the medieval class are purchased over to agree with the Empire and the old primitive rank framework is supplanted by the class framework in light of capital and mechanical efficiency. Marx and Engels compose that, "The bourgeoisie, wherever it has the high ground, has put a conclusion to all medieval r raptures. It has torn in half the diverse medieval ties … and has left outstanding g no different nexus amongst man and man than bare self-enthusiasm, than unfeeling money installment". Expansionism constrained India into another financial and social structure with the goal of amplifying benefit ignorant of the repercussions it would have on the conventional financial structure of the province. Marx and Angels include that, "The bourgeoisie can't exist without continually changing the instruments of creation, and in this way the relations of generation, and with them the entire relations of society"

Notwithstanding his ideological slant, Anand is practical that the old position framework can't vanish overnight regardless of whether it has been basically finished whelmed by the fast presentation of industrialization. The parasitic buildups of the old framework has changed and transformed themselves into the class framework. In Munoo's cognizance the thought of rank is still there however even a youthful personality like his has possessed the capacity to fathom the capable class arrangement of rich and poor that dominates the position framework. In any case, as the scene shifts from the residential area of Sham Nagar loaded with the lower white collar class, for example, collaborator bookkeepers to the urban towns of Daulatpur to the city of Bombay lastly, to the slope station of Shimla, the belief system of the colonialist bourgeoisie and the components of the old rank framework turn out to be increasingly inconspicuous, unbending and in the meantime more decline. Inside the center and the lower classes, there are sub-classes in light of salary and inside these sub-classes there are standing and religion division. The m sick laborers in Bombay Textile Mill have a place with the average workers yet even among them there are Hindus and Muslims. In Sim la Mrs. Mainwaring faces the bias against the Anglo-Indian people group from both the English and the Indians to the degree that even the Coolies' encourage Munoo to abandon her administration since she isn't a 'pukka' memsahib. Mohan remarks that the English have a, "rank framework more inflexible than our own. Any Angrezi lady whose spouse gains twelve thousand rupees a month won't go out of a lady whose husband procures five hundred t he rich would prefer truly not to blend with each other"

The procedure of industrialization was not directed in a way helpful for the Indian financial and social life. It was done in a way profiting just the British Empire. In this manner the progressions that occurred in the Indian culture did not totally wipe out the old medieval framework despite

the fact that the class framework supplanted the standing framework yet there remained follows and buildups of station notions if not rank structure. What's more, these conclusions clung parasitically to the philosophy of the class arrangement of the British radicals spread through their instructive and religious institutions, the belief system of the 'Other' ascribing in need and viciousness to the 'local'. This system of hypotheses was utilized by the working class to the lower classes of Indian culture. The lower classes, specifically, the Coolies fell prey to this new and significantly crueler social stratification that conveyed both the standing and class suppositions.

Unnecessary to specify that Anand's novel 'Coolie' distinctively portrays the photo of society in which the evil of frontier administer shows up in different structures. It depicts the social

class refinement between the rich and poor people and furthermore exhibits the colorful however miserable and lamentable existence of Munoo. It is a human disaster caused by destitution, misuse, savagery, eagerness and narrow-mindedness. It isn't the destiny or Almighty who is in charge of the tragedy of Munoo, however the general public in which he is raised. The poor are the ravenous and wiped out, feeble and defenseless at all spots whether residential communities and towns like Bilaspur and Sham Nagar or in a city like Daulatpur or in a cosmopolitan city like Bombay. They have no feeling of sense of pride, no poise. They are nibbled from columns to present and are constrained on live like creatures in the most unhygienic environment. They are continually misused and abuseed and they have been diminished to the territory of 'Subaltern'. The novel is an adventure of a huge number of 'underestimated' individuals who battle a furious fight against the 'killerdemon', starvation set on them by their lords. It is dependably a hard and visually impaired battle to free oneself from the grasp of death. Steady dread and

exhaustion realizes a condition of profound lack of care in the victims. The twist of a wide range of indecencies in the brain of man is the immediate result of the frontier oppression. 'Coolie' portrays the photo of both these social and profound insidiousness. In the principal section of 'Coolie' Munoo experiences childhood in a town in care of his uncle while his parents die battling against neediness and mistreatment. The second part demonstrates the kid in the humiliating employment of a worker in the place of Babu Nathoo Ram. He splits from his stifling life only to fall into another in the Bilaspur pickle production line in the third part. Soul of experience, enthusiasm forever and high yearning lead the kid to the removed metropolitan city Bombay in the fourth part. Here Munoo experiences the pitiful presence of the assembly line laborers and the sudden ejection of public violence. After this in a shocking peak, fate offers him a relative alleviation in the last section for quite a while only to be overcome at long last by an unfortunate end result as Munoo surrenders to a dangerous sickness caused by mal-nourishment and overwork. One thing here is deserving of say that Munoo's ghastly disrespect and wretchedness emerge from theBritish strategy of misuse. The provincial or the industrialist ruler empowered mal-dispersion of riches so that they can buy dependability of a choice of individuals by social and monetary benefits. Along these lines came into existence a class of rich locals sustained by the bosses' support. They figure out how to loathe their poor country menin impersonation of the English. As exploiters they were no less unpleasant than the British. Anand has given right spotlight on this class of individuals and their part in running the lives of the coolies. The English proprietor of thecotton process pays low wages to its specialists, makes no course of action for a conventional living and frequently slices pay in

order to guarantee benefit. As a photo of the Indian life destroyed by British Imperialism and frontier propensity, 'Coolie' is

to a large degree, a novel with a political subject. Anand has risen to be a genuine post provincial essayist when the critics have brought the charge of promulgation against him. Anand's work regularly contains an open indictment against the British rulers. Hari Om Prasad properly comments:"Mulk Raj Anand is thought to be the doyen of Indo-Anglian writing. With him India has gotten anunceasing champion of the reason for poor people and the humble whose compositions capture the basic consideration of the learned individuals towards the brutal, detested and unjustified states of the down trodden and denied of Indian culture.

CONCLUSION

Anand, who is the champion of the underdog, has constantly written to accentuate the fundamental respect of man and to stir empathy and love to the mistreated and oppressed in the hearts of the perusers. His faith in the humanism makes him an author with a mission, his main goal being to compose for the improvement and inspiring of the underdog of the general public. To him a really humanist workmanship is comparable with requirements of our opportunity. Through his works, he additionally communicates his adoration, sensitivity and sympathy for the socially sub-par classes. Every one of the books and short stories that he has composed demonstrate his central point is to feature the different social issues of Indian culture. His central rationale is to utilize the craftsmanship for the improvement of Indian underdog. His rationality of humanism is the aftereffect of his cognizant need to help the workers, coolies and the smothered individuals from the general public by creating in them human respect and mindfulness. He composes for man, for refining and recognizing him and for motivating him without hesitation computed to accomplish the prosperity of humanity in general. From Untouchable to Morning Face Anand reliably holds fast to his point of anticipating the life of the underdog and making Indians mindful of these customary view that hamper them from turning into a dynamic and present day India. Both Untouchable and Coolie manage the social shameful acts of his own chance and through this he needs to kill these issues.

Anand's books are an effective depiction of the social, monetary and political changes of his time. Yet, the point of convergence is that circumstances and again he felt for the mistreated. Being an awesome championof the advanced 'Subaltern Theory' he had a tilt towards poor people and the

down-trodden. With integrity of his heart he shares delight and distress of regular men and ladies in both the books 'Coolie' and 'Untouchable. 'The 'Other' as Munoo ('Coolie') or Bakha

('Untouchable'), or Gangu ('Two Leaves and a Bud'),finds its own particular voice to sing his own particular tune. These unsung legends made them thing in like manner they had a place to the overflowing millions who, as per Anand, were the casualties of progress and its posterity like destitution, imperialism, free enterprise, urbanization, industrialization, communalism, casteism and so on. For Bakha and Munoo joy was however a periodic scene in the general show of torment. Both the characters suffered from some kind of otherworldly and mental emergency however couldn't raise themselves up to enhance thegloom or to build up their self-personality. Bakha couldn't grapple with three arrangements he was given.His trusts were never figured it out. Essentially, Munoo's urban life ended up being unpleasant. He kicked the bucket while suffering from tuberculosis. As indicated by Saros Cowasjee, Anand "couldn't demonstrate that triumph which was amarked highlight of common writing of the thirties in Europe". M.K.Naik observes:" The creator's sympathy for the abused and the down-trodden is unadulterated and extraordinary yet does not degenerate into mix hysterics or dull lecturing; one of the parts of misuse is exhibited in 'Coolie'. This is abuse of the Indian by the white man and poor by the rich."The significance of Annad's books in India will stay unavoidable insofar as we can't relieve ourselves from the scourges of destitution, untouchability and social lack of care. Anand does not perceive unadulterated workmanship for craftsmanship's purpose', but rather he puts stock in the social importance of writing.

IMPACT OF THE 2019–20 CORONAVIRUS PANDEMIC ON EDUCATION

- SHLOK MODI

ABSTRACT

Online classes are not capable of substituting classroom lectures. The former is very seldom able to generate the interaction that is needed in a class. Moreover, the teachers' body language, which is a part and parcel of the classroom lectures and is imperative for their success, is also missing in online classes. The use of technology will not only lead to more discrimination, but also will create some practical problems. It will also lack the desired interaction in the class. The Coronavirus pandemic and therefore the ensuing lockdown has forced schools and colleges across India to temporarily shut and this unprecedented move had created an enormous gap within the education bodies despite the central and government doing their best to support for e-learning and online education. Globally, the Indian Education sector is amongst the largest, with an extensive network of more than 1.4 million schools and 993 Universities, 39931 Colleges, and 10725 Stand Alone Institutions listed on the AISHE web portal. As the Indian education system was mostly based on the offline system and classes. Most of the primary and secondary schooling sector was all based on offline education system has to opt the online classes for empowering the education and for the benefits of the students. Many schools within the country have switched to online classes due to the lockdown, but one in four students is unable to attach because they don't have a laptop, desktop, or tablet, consistent with a survey by economic times

INTRODUCTION

The coronavirus SARS-CoV-2 causes a deadly disease, COVID-19 with a fatality rate between 2-3%. It has created havoc as it has engulfed the whole world, being declared a pandemic by the WHO. Lockdowns that have been imposed in almost all countries to save the citizens from the lethal infection have taken a toll, shattering economies. The disease has not spared even the advanced European countries, let alone the backward African countries and the developing Asian countries. The first and foremost job in the hands of the governments is not to save their people from the infection by imposing lockdown and social distancing only, but also to cope with the lockdown to save the economies. The Indian Government is no exception. The Indian economy was already passing through a recession and experts were saying that the economy

was heading towards depression even before the advent of the corona virus. COVID-19 has dealt a severe blow on the economy. It will be difficult to come out of this situation and depression once the lockdown is over.

Against the backdrop of such a pandemic, it is obvious that the education sector will suffer in all the countries like many other sectors. The Indian education system has been badly affected by the entry of the disease and also because of social distancing measures that were taken to prevent the spread of the disease. The ultimate act on the part of the Central government has been to impose a lockdown on the entire country.

IMPACT OF CORONA VIRUS ON EDUCATION

Even before the lockdown was enforced in the 3rd week of March, 2020, the state governments in their individual capacities declared the schools and colleges and the other educational institutions closed for a certain period of time from the middle of March. The closure was extended for some more time and finally the lockdown was declared. Thus the education system has been hampered for the last one and a half months. This is about regular classes in the educational institutions. Just before the full lockdown, international flights were banned from leaving and entering the country, thereby restricting people from going abroad to attend scheduled international seminars, workshops and also from visiting foreign universities for taking and giving classes and lectures etc. This was followed by cancellation of the national and domestic flights also thus resulting into people not being able to visit the places for educational purpose even inside the country. Finally with the lockdown, the trains also stopped running and thus the scheduled seminars etc had to be cancelled in all the stages, like, national, state and regional, and even local. Not only have seminars been cancelled, even visiting educational institutes for other purposes had to be postponed, for example, taking viva for thesis, projects etc and for other administrative purposes.

With the full lockdown being imposed in the country, the education sector initially came to a standstill. This is an unprecedented and unfamiliar situation, and nobody still knows when the situation will be normal. It is imperative that the lifting of lockdown should obviously not take place in one go, but gradually, as otherwise the very purpose of the imposition of lockdown will be defeated with the spreading of the disease again. It is also true that unless the social distancing measures are removed, bringing back normalcy will be difficult. It is a known fact that the educational institutions are most vulnerable for the spread of the disease due to the mass gathering in the classrooms. Therefore unless, the infection is totally eradicated from the states, it is difficult to bring back the students to the schools, colleges, universities and other

educational institutions. Resuming normal classes in classrooms therefore seems a distant dream at this time.

Gradually the system is getting accustomed to the situation. Distance classes, using various online platforms, have been started in many institutions. It is, however, difficult to say at this moment, how far it has been successful, especially when one is situated in an urban areas and has the advantage of teaching an elite class. As a teacher of one of the elite (and oldest) Universities of the country, I have the advantage of teaching an elite subject predominantly to urban students, where all students have smartphones although all of them may not have desktops and/or laptops. Even the few semi-urban and/or rural students in my class are used to having online chats on their smartphones. Since the hostels are closed now many students have gone back to their homes, some in rural areas where they cannot connect, mainly due to poor internet connectivity in their hometowns. The courses I teach are non-laboratory based, and are largely non-mathematical, so I am able to continue with online classes.

The situation is very different when one looks at rural colleges and universities. Many students in rural areas may not have access to smartphones or computers. Even if they do, the net connectivity may not be as high as in urban areas. In any case, many students of the most elite institutions, the IITs, are not able to have access to online classes from their homes due to these reasons. Therefore some if not all of the universities, and some of the colleges have started online classes. The same can be said about other higher educational institutions, be they governmental, government-aided or autonomous. Private institutions normally draw students from affluent urban classes, and hence do not face problems in dealing with this unprecedented situation.

The school education system portrays a dismal picture. There are many kinds of schools in the country: government, government-aided, private schools run by missionaries as well as those run by public and private trusts. There are also elite “public schools” and innumerable village level elementary schools under the Sarva Shiksha Abhiyan scheme, the latter catering to the below-poverty-level sections of society. A majority of children (by number) attend village elementary and primary schools. Even in the urban areas, many such primary schools give classes to the poorer sections; most slum children attend these schools. In addition to the economic divide and the rural-urban divide there is a language divide as well. Vernacular medium schools largely (though with exceptions) cater to the poor while English medium schools cater to other sections of the society. Here again comes the aspect of the digital divide: most poor students do not have access to smartphones, and even if they do, the net connectivity

is poor and content is often not available in vernacular languages. This gives rise to discrimination in access to education.

Today many schools in urban areas are having online classes, while the majority of rural schools do not. Very young children are not able to learn through online processes as they can neither handle computers nor mobile phones. In many households, there is no computer, and in many, children are not allowed smartphones as well. Both these problems exist regardless of class. Therefore, the digital divide at the school level leads to a gap between the haves and have-nots.

Examinations have either been postponed or cancelled. Cancelling intermediate semesters or class annual exams or Class XI board exams will only weaken the foundations of the students. While it is true that online examinations are not possible at this time given the existing infrastructure in the country, already cancelling the exams kills the impetus of learning. The authorities could have waited for the lockdown to end before announcing such a drastic decision.

India is a vast country with many complexities. The economic divide, the rural-urban divide and the resulting digital divide all have played an important role. The overall response of the country to the pandemic has thus been very mixed in the education sector.

THE FUTURE

Though the coronavirus entered India in the month of January, it was not until March that the seriousness of the situation was felt. For one and a half months now the education system has been in the doldrums. In the meantime the severe economic effects of the lockdown have begun to be felt and there have been consequent social changes. No one knows at present, what the ultimate effect of this economic harshness t will be once the lockdown is over. The threat looms large particularly over low-income families. Many students belonging to low income families may not be in a position to continue with their education due to a loss of income, especially those in the informal and unorganized sectors. This may especially be true for science and other technical education. At the same time, guest teachers and ad hoc or para teachers in private educational institutes may lose their jobs as well.

So far not much political change has been seen as a result of the pandemic. Social changes may emerge due to people staying at homes day after day, forced to spend time within small families and in limited space. The strain induced by the lockdown could have long-term effects, but how this will affect the higher education system is hard to predict right now. There is some evidence that domestic violence has increased, and there may be some effects on students'

education, especially if families break-up as a result of the lockdown. In any case, the resulting economic changes are sure to affect the higher education system indirectly.

ROLE OF TECHNOLOGY

Technology ought not to play a bigger role in teaching of economics in the post-corona period. It has already been mentioned how the digital divide plays an important role; therefore in order to reach all students, classroom teaching is the best option. This is especially true for laboratory-based subjects. While humanities related subjects may be taught online, the teaching will not reach all students. (Lab-based practical classes cannot be held online as it is not possible to set up labs at homes, but that is another story.) My subject, economics, has aspects of both humanities and science, requiring both lectures as well as (computer-based) practical work. The practical part of the course is difficult to conduct online since all students may not own computers and in addition, we need proprietary software etc. For courses with mathematics it is difficult to give instruction online as well.

Online classes are not capable of substituting classroom lectures. The former is very seldom able to generate the interaction that is needed in a class. Moreover, the teachers' body language, which is a part and parcel of the classroom lectures and is imperative for their success, is also missing in online classes. The use of technology will not only lead to more discrimination, but also will create some practical problems. It will also lack the desired interaction in the class.

IMPACT OF ONLINE EDUCATION

Calcutta University is large, catering to more than 20,000 students each year. It also has around 150 undergraduate colleges under its purview. While it is difficult to gauge the impact of the online classes in the institution so early, students of all subjects do not have the access to online connectivity, especially those staying in the rural areas. The practical classes in the lab-based subjects are also not being held online and mathematical papers are difficult to be instructed online. Hence, it can be said that the impact has not been very positive.

EFFECTS ON RESEARCH

Research has been affected in a negative way. While it is true that non-lab based research can be carried on through the students' perseverance and the contact with the mentor through telephone calls or emails, but one-to-one correspondence, with face to face discussion has no substitute. In many cases, where secondary data are needed, the students cannot visit the sources like the institution itself, offices and libraries, as all data are not available online.

Similarly, primary data collection has also stopped since visiting sources is forbidden, and hence research is severely hampered. Mentorship improves only when there is face-to-face correspondence. In the lab-based subjects, research is totally stalled. Doctoral research has been hindered, both in primary and advanced stages.

Similarly, M.Phil research has also slowed down. This is a cause for concern since M.Phil is a time bound project. There is a negative effect on project work as well. Thus on the whole there has been an adverse effect on research at all the levels due to the coronavirus and COVID-19 pandemic, and the resulting lockdown effect on the economy.

PROBLEM FACED BY INDIAN EDUCATION SYSTEM IN LOCKDOWN.

• INTERNET CONNECTIVITY In lockdown bringing the education system online was the 1st step took by many universities/colleges/schools but Internet connectivity is one of the major problems faced by education bodies and students. According to the 2017-'18 National Sample Survey report on education, only 24% of Indian households have an internet facility. While 66% of India's population lives in villages, only a little over 15% of rural households have access to internet services. For urban households, the proportion is 42%[4]. According to Telecom Economic Times, India report by the survey with over 7,600 respondents found that to use the internet at home, 72.60 % of the respondents use mobile hotspot, 15% pc usage broadband, 9.68% pc use WiFi dongle and 1.85% pc have poor to no internet connectivity

. • COMPUTER/LAPTOP/SMARTPHONES While a computer would be preferable for online classes, a smartphone could also serve the purpose. However, the phone could be convenient for apps, but not for completing lengthy assignments or research. While 77% of Indians own a smartphone [2019], only 11% of households possess any type of computer, which could include desktop computers, laptops, notebooks, netbooks, palmtops, or tablets

RECOMMENDED ALTERNATIVES

Examine the readiness and choose the most relevant tools: Decide on the use high-technology and low-technology solutions based on the reliability of local power supplies, internet connectivity, and digital skills of teachers and students. This could range through integrated digital learning platforms, video lessons, MOOCs, to broadcasting through radios and TVs. Ensure inclusion of the distance learning programs, implement measures to ensure that students including those with disabilities or from low-income backgrounds have access to distance learning programs, if only a limited number of them have access to digital devices. Consider

temporarily decentralizing such devices from computer labs to families and support them with internet connectivity. Protect data privacy and data security: Assess data security when uploading data or educational resources to web spaces, as well as when sharing them with other organizations or individuals. Ensure that the use of applications and platforms does not violate students' data privacy. Prioritize solutions to address psychosocial challenges before teaching: Mobilize available tools to connect schools, parents, teachers, and students with each other. Create communities to ensure regular human interactions, enable social caring measures, and address possible psychosocial challenges that students may face when they are isolated. Plan the study schedule of the distance learning programs organize discussions with stakeholders to examine the possible duration of school closures and decide whether the distance learning program should focus on teaching new knowledge or enhance students' knowledge of prior lessons. Plan the schedule depending on the situation of the affected zones, level of studies, needs of student's needs, and availability of parents. Choose the appropriate learning methodologies based on the status of school closures and home-based quarantines. Avoid learning methodologies that require face-to-face communication. Provide support to teachers and parents on the use of digital tools organize brief training or orientation sessions for teachers and parents as well, if monitoring and facilitation are needed. Help teachers to prepare the basic settings such as solutions to the use of internet data if they are required to provide live streaming of lessons. Blend appropriate approaches and limit the number of applications and platforms: Blend tools or media that are available for most students, both for synchronous communication and lessons, and for asynchronous learning. Avoid overloading students and parents by asking them to download and test too many applications or platforms.

Develop distance learning rules and monitor students' learning process: Define the rules with parents and students on distance learning. Design formative questions, tests, or exercises to

monitor closely students' learning process. Try to use tools to support submission of students' feedback and avoid overloading parents by requesting them to scan and send students' feedback. Define the duration of distance learning units based on students' self-regulation skills: Keep a coherent timing according to the level of the students' self-regulation and metacognitive abilities especially for livestreaming classes. Preferably, the unit for primary school students should not be more than 20 minutes, and no longer than 40 minutes for secondary school students. Create communities and enhance connection: Create communities of teachers, parents, and school managers to address sense of loneliness or helplessness,

facilitate sharing of experience and discussion on coping strategies when facing learning difficulties.

CONCLUSION

It is safe to say that the present pandemic will not only affect the economy adversely, but it will also affect the education sector adversely in India. Already, one and a half months is lost. No one is sure how long it will take for the education sector to come out of the abnormal situation prevailing in the country at present. Moreover, education system is especially vulnerable since mass gathering cannot be avoided in our classrooms. Online classes are no substitutes for classroom lectures for a variety of reasons. The digital divide will only leads to discrimination and practical classes based on laboratories cannot be held online. Giving instructions for mathematical courses is also difficult online. The interaction between the teachers and the students is a crucial component of teaching and cannot be replicated in online classes. Research has been severely hampered due to the lockdown, and hence the sooner normalcy returns, the better.

TOWARDS DIGITAL INDIA : E- GOVERNANCE

- SHLOK MODI

ABSTRACT

We are living in arena of technologies and digital world. Digital India is an innovative thought of Mr. Narendra Modi 's government. The Digital India drive is a dream project of the Indian Government which was launched on 1 July 2015 by Prime Minister Narendra Modi to remodel India into a knowledgeable economy and digitally empowered society, along with good governance for citizens with an objective of providing participative, transparent and responsive government. Digital India imagines, universal digital literacy and approachability for all digital resources for citizens by ensuring that the resources and services are accessible in regional languages and providing digital scaffold to participatory governance ensuring convenience, like making all government certificates and documents available on the Cloud with portability. The objective of this paper is to know the impact, challenges of digital India on all aspects of governance and improvement in the quality of life of citizens. The research methodology is descriptive cum analytical in nature and the data for this study is collected through secondary sources such as websites, research journals, newspapers, magazines etc. The study gives an optimistic thought o It is an initiative of government of India to integrate the government Departments and the people of India. It aims at ensuring that the Government services are made available to citizens electronically by reducing paper work. It is an initiative to transform the country into digitally empowers knowledge economy. The motive behind the concept is to connect rural areas with high speed internet network and improving digital literacy. The programme weaves together a large number of ideas and thought into a single, comprehensive vision so that each of them is seen a part of larger goal. It is coordinated by Deity, implemented by the entire government- both at the centre and state. Electronic commerce refers to wide range of online business activities for products and services. E-commerce is the use of electronic communications and digital information processing technology in business transactions to create, transform and redefine relationships for value creation between organizations and individuals. This paper attempts to highlight the different challenges faced by the Digital India Programme. It also describes the different opportunities of the programme for the people of the country.

INTRODUCTION

Digital India was launched by the Prime Minister of India Narendra Modi on 1 July 2015 – with an objective of connecting rural areas with high-speed Internet networks and improving digital literacy by making digital resources/services available in Indian languages.

The vision of this programme is inclusive growth in areas of electronic services, products, manufacturing and job opportunities etc. It aims at preparing the India for the knowledge based transformation and delivering good governance to citizens by involving- both Central Government and State Government. This programme is coordinated by Department of Electronics and Information Technology (DeitY) and will impact ministry of communications & IT, ministry of rural development, ministry of human resource development, ministry of health and others .DeitY would create four senior positions within the department for managing the programme say additional secretary, Digital India; joint secretary, infrastructure development; joint secretary, capacity building and digital enablement; and joint secretary, IT applications in uncovered areas & process re-engineering. It would ensure that government services are available to citizens electronically. It would also bring in public accountability through mandated delivery of governments services electronically.

The Government of India entity Bharat Broadband Network Limited (BBNL) which executes the National Optical Fiber Network project will be the custodian of Digital India (DI) project. The programme will be implemented in phases from 2014 till 2018. The source of funding for most of the e- Governance projects at present is through budgetary provisions of respective ministries/departments in the central or state governments. Requirements of funds for individual project(s) for Digital India will be worked out by respective nodal ministries/departments but according to government estimate it will cost Rs 113,000 crore. .

OBJECTIVES OF THE STUDY

To Study the concept of Digital India Programme.

To study the opportunities of the programme for the people of the country.

To study the various challenges faced by the Digital India Programme in its implementation.

RESEARCH METHODOLOGY

For this research paper, secondary data analysis is usually conducted to gain in-depth understanding of the Digital India initiative. Mostly the paper is based on the information retrieved from the internet via journals, research papers on the same subject

LITERATURE REVIEW

There have been various researches on different aspects of the initiative ranging from the economical to social and ethical dimensions. Some of these researches retrieved through internet searches have been reviewed here.

Microsoft CEO, Satya Nadella intends to become India's partner in Digital India program. He said that his company will set up low cost broadband technology services to 5lakhs villages across the country.

Arvind Gupta intends to say that Digital India movement will play an important role in effective delivery of services, monitoring performance managing projects, and improving governance.

Prof. Singh began with the basic overview of what Digital India entails and led a discussion of conceptual structure of the program and examined the impact of Digital India initiative on the technological sector of India. He concluded that this initiative has to be supplemented with amendments in labour laws of India to make it a successful campaign.

Sundar Pichai, Satya Nadella, Elon Musk researched about Digital India and its preparedness to create jobs opportunities in the information sector. He concluded that creating new jobs should be continued with shifting more

workers into high productivity jobs in order to provide long term push to the technological sector in India.

VISION OF DIGITAL INDIA PROGRAMM :

Digital infrastructure as a utility to every citizen infrastructure. One of the key areas on which the vision of Digital India is centred is digital infrastructure as a utility to every citizen. As per this vision, the Indian villagers are digitally connected through broadband and high speed internet, then delivery of electronic government services to every citizen, targeted social benefits, and financial inclusion can be achieved in reality. A key component under this vision is high speed internet as a core utility to facilitate online delivery of various services. It is planned to set up enabling infrastructure for digital identity, financial inclusion and ensure easy availability of common services centres. It is also proposed to provide citizens with digital lockers where documents issued by Government departments and agencies could be stored for easy online access.

Governance and services on demand

Governance and services on demand which will be available in real time for online and mobile platforms, seamlessly integrated across departments and jurisdictions. All citizen documents

to be made available on the cloud platform; as a result, citizens will not be asked to produce such documents for availing services. In addition, the provision of cashless electronic transactions will help generate business. Geographical Information Systems (GIS) will be integrated with the development schemes.

Digital empowerment of citizens

Universal digital literacy; All digital resources universally accessible; All government documents/certificates to be available on the Cloud; Availability of digital resources/services in Indian languages; Collaborative digital platforms for participative governance; Portability of all entitlements for individuals through the cloud.

KEY PROJECTS OF DIGITAL INDIA PROGRAMME:

The Programme symbolizes the Government of India's vision for connecting and empowering 125 crore citizens; creating unprecedented levels of transparency and accountability in governance; and leveraging technology for quality education, health care, farming, financial inclusion and empowering citizens. Under the Digital India Programme, technology will play a central role to achieve easy, effective and economical governance.

Several projects/products have already launched or ready to be launched as indicated below:

Books Platform (eBasta) is an electronic platform of e- Books for schools. Currently, 501 e-Contents and 15 eBasta (collection of books) are available on this platform.

e-Sign would facilitate digitally signing a document through online authentication mechanism. So far, 1.75 lakh e-Signatures have been issued. e-Mudhra and CDAC are empanelled to offer e-Sign services. e-Greetings Portal It is being used to send e-Greetings by Government departments on various occasions like Gandhi Jayanti, Diwali, Teacher day, Independence day, etc. Over 10 lakh e-Greetings have been sent through this portal. Over 42 greeting categories and 450 cards are available on the portal to send greetings in electronic form.

Digital Locker System Digital Locker facility will help citizens to digitally store their important documents like PAN card, passport, mark sheets and degree certificates. It aims at eliminating the use of physical documents and enables the sharing of verified electronic documents across government agencies. Currently, over ten lakh digital lockers have been opened where citizens have self-uploaded over 11.8 lakh documents and 52.09 lakh documents have been issued.

Jeevan Pramaan Pensioners can now conveniently submit their life certificates online through this portal. The certificates are stored in the Life Certificate Repository for making it available anytime & anywhere for pensioners and the Pension Disbursing Agencies. Over eight (8) lakh pensioners are already registered on this portal.

e-Hospital It aims to reduce the anxiety of patients and their attendees by making available various online services such as appointment, accessing diagnostic reports, payment of fees and enquiring blood availability, etc. e-Hospital is currently functional in four Central Government hospitals namely AIIMS, Dr. RML Hospital, Safdarjung & NIMHANS hospitals, and being implemented in 11 major Central Government hospitals.

National Scholarships Portal It is a one stop solution for end to end scholarship process right from submission of student application, verification, sanction and disbursal to end beneficiary for all the scholarships provided by the Government of India. Over 67 lakh applications have been submitted on this portal for 19 registered scholarship schemes of 7 Ministries / Departments.

National Digital Literacy Mission It aims to provide IT training to enable the citizens to use IT and related applications for their livelihood earning and employability has been approved. The Scheme was launched by Hon'ble Prime Minister at Ranchi, Jharkhand on 21st August, 2014.

Digitize India Platform It allows government organizations in the country to digitize its records and documents through contributions of ordinary citizens. Till now, over 14,088 contributors; 2.6 lakhs documents & 24.1 Lakh snippets have been utilized for digitization.

MyGov Platform It acts as a medium for citizens to exchange ideas/ suggestions with the Government. Through this platform, the Government of India gets feedback, inputs, advice and ideas from citizens for policy decisions, new initiatives like Digital India, Swachch Bharat, Clean Ganga, Make in India, Skill Development, etc. MyGov is growing steadily, with over 15.8 lakh users already registered. MyGov has conducted over 750 activities and is receiving more than ten thousand (10,000) posts per week on various issues.

Approval of new Mission Mode Projects Thirteen new Mission Mode Projects (MMPs) have been approved to offer citizens a wider range of electronic services. These MMPs include Financial Inclusion, Rural Development, Social

Benefits, e-Sansad, e-Vidhaan, Agriculture 2.0, Roads & Highways Information System (RAHI), Central Armed Para Military Forces (CAPF), Women & Child Development, National Mission on Education through ICT (NMEICT), National GIS (NGIS), e-Bhasha and Urban Governance.

Rural BPO Scheme To facilitate ICT enabled employment generation throughout the country, BPOs would be set up in the north-eastern states under North East BPO Promotion Scheme (

around 5000 seats) and in Tier II and Tier III cities of the country under the India BPO Promotion Scheme (over 48,000 seats). The India BPO Promotion Scheme will create an employment opportunity for about 1,45,000 persons. In the Expression of Interest issued, 78 companies have shown interest for 1,25,000 seats in 190 locations of the country.

DISHA (Digital Saksharta Abhiyan) Its objective is to make additional 42.5 lakh persons digitally literate in a period of four years. Under the Disha and National Digital Literacy Mission, 12.25 lakh persons have been trained and 4.75 lakh candidates have been certified (by NIELIT).

Revamping of Existing Mission Mode Projects (MMPs)

Some of the existing MMPs were developed many years ago. Their software applications are being assessed and revamped by leveraging new technology platforms, such as Cloud, Mobile, GIS, etc., to facilitate delivery of integrated services involving multiple departments, and enhance the quality of services that can efficiently cater to the needs of citizens.

NINE PILLARS OF DIGITAL INDIA:

Broadband Highways

This covers three sub components, namely Broadband for All Rural, Broadband for All Urban and National Information Infrastructure.

Under Broadband for All Rural, 250 thousand village Panchayats would be covered by December, 2016. DoT will be the Nodal Department and the project cost is estimated to be approximately Rs. 32,000 Cr.

Under Broadband for All Urban, Virtual Network Operators would be leveraged for service delivery and communication infrastructure in new urban development and buildings would be mandated.

National Information Infrastructure would integrate the networks like SWAN, NKN and NOFN along with cloud enabled National and State Data Centres. It will also have provision for horizontal connectivity to 100, 50, 20 and 5 government offices/ service outlets at state, district, block and panchayat levels respectively. DeitY will be the nodal department and the project cost is estimated to be around Rs 15,686 Cr for implementation in 2 years and maintenance & support for 5 years.

Universal Access to Mobile Connectivity

The initiative is to focus on network penetration and fill the gaps in connectivity in the country.

All together 42,300 uncovered villages will be covered for providing universal mobile connectivity in the country.

DoT will be the nodal department and project cost will be around Rs 16,000 Cr during FY 2014-18.

Public Internet Access Programme

The two sub components of Public Internet Access Programme are Common Service Centres and Post Offices as multi-service centres.

Common Service Centres would be strengthened and its number would be increased from approximately 135,000 operational at present to 250,000 i.e. one CSC in each Gram Panchayat. CSCs would be made viable, multi-functional end-points for delivery of government and business services. DeitY would be the nodal department to implement the scheme.

A total of 150,000 Post Offices are proposed to be converted into multi service centres. Department of Posts would be the nodal department to implement this scheme. e-Governance: Reforming Government through Technology Government Business Process Re-engineering using IT to improve transactions is the most critical for transformation across government and therefore needs to be implemented by all ministries/ departments.

The guiding principles for reforming government through technology are:

Form simplification and field reduction Forms should be made simple and user friendly and only minimum and necessary information should be collected. Online applications, tracking of their status and interface between departments should be provided. Use of online repositories e.g. school certificates, voter ID cards, etc. should be mandated so that citizens are not required to submit these documents in physical form.

Integration of services and platforms, e.g. UIDAI, Payment Gateway, Mobile Platform, Electronic Data Interchange (EDI) etc. should be mandated to facilitate integrated and interoperable service delivery to citizens and businesses. Electronic Databases all databases and information should be electronic and not manual. Workflow Automation Inside Government The workflow inside government departments and agencies should be automated to enable efficient government processes and also to allow visibility of these processes to the citizens. Public Grievance Redressal – IT should be used to automate, respond and analyze data to identify and resolve persistent problems. These would be largely process improvements. e-Kranti – Electronic Delivery of Services. There are 31 Mission Mode Projects under different stages of e-governance project lifecycle. Further, 10 new MMPs have been added to e-Kranti

by the Apex Committee on National e-Governance Plan (NeGP) headed by the Cabinet Secretary in its meeting held on 18th March 2014.

Technology for Education e-Education All Schools will be connected with broadband. Free wifi will be provided in all secondary and higher secondary schools (coverage would be around 250,000 schools). A programme on digital literacy would be taken up at the national level. MOOCs Massive Online Open Courses shall be developed and leveraged for e-Education.

OPPORTUNITIES PROVIDED BY DIGITAL INDIA

Employment

Job creation: With an estimated overall cost of INR 1,000 billion in ongoing schemes and INR 130 billion for proposed and new schemes, Digital India aims to create 17 million direct and 85 million indirect jobs by 2019.46

Digital Training Programmes: The initiatives towards training and digital literacy by the government and private sector players such as NDLM, Digital Literacy Mission etc. have been successful in reaching out to millions of people. This has resulted in an increase in employability of the trained personnel, higher adoption of digital technologies and empowerment of a large section of society.

Universal Accessibility: The DigiLocker service has provided universal accessibility to citizens, by allowing then to access and share documents. Currently, there are approximately 4 million registered users with 5.0 million48 documents uploaded on the digital locker facility.

Healthcare: Digital India has the potential to provide solutions to problems such as poor doctor patient ratio (1:1674)54, fewer quality physicians, insufficient healthcare infrastructure, lack of equal access to healthcare facilities and advice (24% in rural areas)55, and high healthcare costs. The e-hospital program is increasing delivery speed of healthcare services by allowing patients to book appointments online. Social

hence there will be imminent resistance from the working staff.

Delay in development of infrastructure: One of the biggest challenges faced by the Digital India programme is the slow progress of infrastructure development: The BharatNet project was approved in October 2011, with a two year implementation target. As of 2016, under 40% of the target has been achieved.13 Public Wi-Fi penetration remains low. Globally, there is one Wi-Fi hotspot for every 150 citizens. For India to reach that level of penetration, over 8 million hotspots are required of which only about 31,000 hotspots are currently available.14 While the project has seen delays, the exercise needs to be reinforced with both funds and involvement of senior government functionaries towards making it happen on a 'war footing'

Contracting: Implementation of the Digital India program has been hampered by contracting challenges such as the following:

Several projects assigned to PSUs are delayed given challenges related to skills, experience and technical

capabilities. Several RFPs issued by the government are not picked up by competent private sector organizations since they are not commercially feasible

HOW TO OVERCOME THE CHALLENGES FOR SUCCESSFULL IMPLEMNTATION OF DIGITAL INDIA PROGRAMME:

Digital Literacy: Despite rising smartphone penetration and internet user base, digital literacy in India has been low. In order for the benefits of the Digital India programme to reach all sections of the population, improving digital literacy is imperative

Skill Building: A strong skill base is required to support the initiatives and services that are envisaged under the Digital India umbrella. Development of technical skills within ministries and state governments will enable the spread of e- governance services, maintenance and upgradation and decision making on all digital initiatives

Digital Adoption: For Digital India to be successful, all segments of Indian society need to adopt digital technologies. This will not only create demand for Digital India but also achieve its vision of empowering all citizens. Defining the role of the private sector: A framework needs to be defined for participation of the private sector in skill development programs which defines the role of the private sector, expectations in terms of investments, content and job guarantees. Introduction of digital skill programs at an institutional level: Skill training and digital literacy should be introduced as part of institutional trainings in schools, colleges and universities across India. Curriculum and interactive programmes should be mandated to ensure adequate digital skills of all graduates. Increase availability of digital infrastructure at rural and remote locations: The speed at which digital infrastructure (especially fiber networks) is being developed needs to be increased. Existing government infrastructure assets (e.g., post offices, government buildings, CSCs) should be further leveraged for provision of digital services at remote locations

CONCLUSION

The Digital India program is now in the second year of its existence and several projects under the program have now moved from the planning phase to the execution phase. The project has started showing its impact on the lives of citizens and on businesses. Several schemes of the

project have been adoption successfully . The service like DigiLocker is now being used by four million users. The MyGov application which provides a platform for citizens to interact with the government is used by over one million users to interact with the government. India now represents the second largest internet user base in the world. This provides a significant opportunity to transform the lives of the citizens through digital technologies. The Digital India program is likely to benefit citizens over the next few years by generating employment opportunities, increasing speed and quality of service delivery and enhancing social and financial conclusion. Businesses will benefit by realizing higher productivity, an improved ease of doing business and a boost in innovation and investments. The adoption of next generation technologies under Digital India such as telepresence .

RTI – INTRODUCTION AND EVOLUTION

- DANISH FARAZ KHAN

'The government is of the people, by the people and for the people' .

As nations all over the world made the shift towards democracy, there was an ineluctable movement towards the need for transparency in governance. In India, the Right to Information Act was introduced to empower the people against corruption, and bring accountability through transparency in the functioning of the Government. In this research paper, I aim to understand the evolution and transformation of the Right to Information Act of 2005, the threats it has faced in its short regime, the landmark contributions it has made towards creating a sense of transparency for the public and the recent amendment brought about by the current government. Tamil Nadu became the first state in the country to pass a law on freedom of information in 1997. However, it was weak and was followed by more advanced laws in other states. Freedom of Information Act was passed in India in 2002 but this law never came into effect and was replaced by the much stronger "Right to Information Act" in 2005.

Worldwide, it is being contended that the reason for the increasing importance towards transparency has been due to the growth of democracy. In India, however the shift towards transparent governance has come about not through the growth but rather the failures of democracy. One of the major challenges faced by a representative democracy is the concentration of power within a few individuals. Government officials are accountable to executive bodies that are designed to prevent corruption, thereby making the system redundant since these institutions are part of the executive body itself, it is impossible for the public to place their faith in their fairness, or lack thereof. These institutions themselves are part of the system and under the control of Civil Servants, who are in cahoots with those they are supposed to monitor. There is blatant corruption spread through all the levels of the executive, legislative and judicial bodies of the government. The RTI Act was brought about with the idea of creating an external checks and balances system to be looked over by the voters of the country. When it initially came into effect, its purview was so large that the policy set by the UN for transparency still lag in comparison.

The RTI Act has faced threats by the UPA government as well, both of which were unsuccessful. Two attempts were made to try and reduce the scope of the Act under the pretext

of bringing about an amendment to make it stronger. The public refused to fall for these two attempts and the Act kept standing in its original glory.

Recently, the Lok Sab has passed the Right to Information Amendment Act 2019. This amendment has come about with 2 uncomfortable RTI pleas in the background. The first one is regarding the Delhi University college from which PM Narendra Modi passed his BA examination .

The second one is an application to provide details of the NPA in public sector banks and the details of big loan defaulters. I aim to expand on these two RTI applications specifically when talking about the amendment. The amendment introduces changes in the terms and conditions of the appointment of the Chief Information Commissioner at the Centre and Information Commissioners in the states. They are no longer appointed for a fixed tenure and can thus be lured and blackmailed when it comes to the dispersal of sensitive information. I hope to expand on these topics and draw a conclusion about the amendment and what that would mean for democracy in India.

INTRODUCTION

"Power corrupts and absolute power corrupts absolutely" India is one of the fastest growing nations in the world with a booming population of the 1.3 billion and the longest written constitution in the world. The practices of governance not only directly affect the vast population but also set the benchmark internationally for the rest of the world.

The Indian constitution has gone through various amendments in accordance with the changing needs of the nation. Similarly other laws are also amended from time to time as according to the need of the fast growing nation. It is important that the law making and amending powers of the legislature and not used arbitrarily by the government and that the laws being amended from time to time are in conformity with the constitution, especially with the part III of the constitution. If the new laws are not in conformity with the constitution, it is a threat to democracy and weakens the overall aura of what a democracy really should be, as dreamt and delivered to us by the father of our constitution Dr. B.R. Ambedkar who served his duty to the nation by heading the constituent assembly and providing our diverse nation with the constitution which has been inspired by constitutions around the world and serves as a specimen by being the constitution of the largest democracy in the world. Our nation was built on certain values which are promised to us in the constitution, Fundamental rights being the most important rights promised to each and every citizen of the country.

Information empowers the citizens of a nation and enables them to exercise their legal, social, economic and political rights. It is the duty of every democratic government to guarantee the same by creating an easy to access mechanism which enables the free flow of information and ideas, giving people access to them whenever it is needed and without too many procedural or other hassles.

Moreover, Information can easily be said to be the most effective tool in countering government malpractices and corruption, ensuring that the people get to be governed truly in a democratic way, as promised to them by the extensive efforts of the constitution

The same tool was provided to the Indian citizens in the form of the Right to Information Act, 2005 after a long process from it first being passed as a bill, facing heavy opposition as it was being passed and to finally becoming a legal and lawful right of the people. This act was a true gift to the democratic spirit and aimed to shift the emphasis of the government towards transparency and accountability towards the citizens as opposed to governance which was secretive and unwilling to give out information.

The right to information is the right of the people to know how they are being governed. It is one of the key characteristics of 'good governance' which is always the underlying thought a government of a democratic country should have. Good governance is the right of the people and the duty of a government to provide its citizens.

In a time of rigorous reforms being made by the government, it is the duty of the government to provide its citizen with the right to information and knowing what exactly the reforms are that are taking place and what their implications would be on democracy.

The 'right to information' is not a constitutional right expressly mentioned in the constitution. However the Indian constitution covers this right under Articles 19.1.(a) and 21.

Article 21 of the Constitution deals with the protection of life and personal liberty. It states that no person shall be deprived if his life and liberty except according to procedure established by law.

Article 19 of the constitution deals with the protection of certain rights regarding freedom of speech etc. Article 19(1)(a) deals directly with the freedom of Speech and Expression.

As the chapters proceed, the aim is to firstly show how the Right to Information Act, 2005 evolved and came into being by showing its journey from facing heavy resistance by the then government, to becoming a state level right to information, to becoming a roughly drafted Freedom of Information act to finally becoming the Right to information act, 2005.

In furtherance to this, the chapters will contain theoretical analysis about how the Right to information falls under the ambit of the constitution, especially under the abovementioned

articles. The chapters will then focus on the concept of 'good governance' as a fundamental right and the underlying essence of the government and its administration across the country. The importance and need for RTI will be focused upon and the implications of the amendment will be specified in the subsequent chapters, which will lead us to coming towards a conclusion, which would throw light on the true importance of the right to information on a democracy.

As rightfully expressed in these words, it is clear that every democratic government should ideally be a representation of the people. The government should be democratic and accountable to the people that it serves. The Right to information is not a right which is expressly mentioned in the constitution of India, but has been brought forward by the judiciary using Article 21 and 19(a) of the constitution. In mid 1990s, corruption was festering in the government as the government had the weapon of secrecy to mislead the rightfully governed, ie. the people of India. The Judiciary rightfully stepped in on various occasions which led to a movement which finally gave us the Right to information act, which in the words of the then prime minister Dr. Manmohan Singh was "the dawn of a new era in the process of governance" and a tool to ensure "elimination of the scourge of corruption. It was also said that the RTI bill would give true accountability of the government's work to the common man as rightfully deserved by every citizen of a democratic government and a way of truly fulfilling the hopes of the founding fathers of our republic.

Talking about the Indian roots of the Right to information, it all began with the petitions of the press to the Supreme Court of India, where the apex court recognised that access to information by the citizens is the prime tool to fight corruption and malpractices taking place in the government. The court recognised that it is the right of the people to scrutinise the actions of its leaders and hold the government accountable for its actions. The right to free flowing information was held as a must for a diverse society.

In India, the subsequent failures of the government in providing good governance gave birth to the right to information act which when introduced was seen as a regime of transparency, which is a key characteristic of 'good governance', a concept widely accepted in the legal world while talking about the relationship of the people with the government.

The main parties which actively combined forces towards a legislation conferring a right to information have been mentioned below.

i) The rural poor – The importance of transparency was understood by this section of people when they were being wronged by the government officials in receiving their wages. The subject matter that was in question was the economic rights and access to schemes introduced by the government.

The issue came into light when there were reports of rural landless workers who were being cheated by the government officials in receiving wages that the work they had done under government schemes. The government officials claimed that the workers had done less work than they were claiming. When asked for the attendance registers by the workers, they denied them access to them in the name of "confidential government records".

This development started from the State of Rajasthan, where the Mazdoor Kisan Shakti Sangathan (MKSS), after providing Rajasthan with its own Right to Information act,2000, gave a push to a national movement which was called the National campaign on people's right to information (NCPRI).

ii) Activists working for the benefit of society-

Activists which were working for the betterment of the society in conflict affected areas of the country and for the various human rights deprived people of the country came together to fight against the denial of information by the government as to wrongful detentions, abuses and felonies being carried out by the government.

iii) Environmentalist-

The third group comprised of environmentalists who were concerned about the rapid degradation the environment was facing because of the correct developmental measures not being taken by the government. They were of the view that access to information regarding developmental projects would help in reducing the adverse impact these projects have on the environment.

The United Progressive Alliance (UPA), headed by the Congress Party, came to power nationally in May 2004, displacing the National Democratic Alliance government led by the Bharatiya Janata Party. The UPA government has introduced a Common Minimum Program (CMP) which vowed, among other things, "to provide at all times a government free of corruption, transparent and accountable at all times" and to make Right to Information more participatory and meaningful .

A National Advisory Council (NAC) was also formed by the UPA government to oversee the implementation of the CMP. This council had as members representatives of the campaigns of various people, including members of the right to information movement.

Whereas, since 2002, a public interest litigation case initiated by Advocate Prashant Bhushan on behalf of the NCPRI and the Center for Public Interest Litigation has sought to oblige the Government to notify an effective law providing Indians with immediate access to information from public servants.

The case was heard on 20 July 2004 by the Supreme Court. The Order of the Supreme Court set a deadline of 15 September 2004 for the Central Government to notify when the Act will be enforced and, if not, when it will issue interim Administrative Guidelines.

A series of proposed changes to the 2002 Freedom of Information Act were developed by the National Campaign for People's Right to Information (NCPRI) in August 2004.Such reforms, aimed at improving and making the 2002 Act more functional, are based on extensive consultations with groups of civil society working on transparency and other related issues.

Such proposed amendments were forwarded to the NAC, which approved most of them and sent them to India's Prime Minister for further action. The Department of Personnel and Training, the Ministry of Employment, Public Grievances and Pensions eventually released draft rules under the Freedom of Information Act 2002 on 12 August 2004. CHRI issued a Press Release on the Draft Rules on 14 August, 2004. Some intense lobbying was done and it appeared to have successful after a tense and pivotal meeting with the Prime Minister, in the middle of December 2004, the Government agreed to introduce in Parliament a new RTI Bill along the guidelines recommended by the NAC. Government of India introduced a revised Right to Information Bill in Parliament on 22 December 2004.

ANALYSIS OF THE RTI AMENDMENT BILL, 2019

- DANISH FARAZ KHAN

THE AMENDMENTS TO THE RTI ACT

The proposed changes in the Right to Information Amendment Bill, 2019 were –

1. The term of office of the Chief Information Commissioner (CIC) and the Information Commissioners (ICs) at Central and State levels will no longer be for a period of 5 years. The Bill removes this provision and states that the central government will notify the CIC and ICs of their term of office.
2. The salaries of the CIC and ICs at the central level, which were originally kept equal to the salary paid to the Chief Election Commissioner and Election Commissioners, respectively, will now be determined by the central government.

Similarly, the salaries of the CIC and ICs at the state level, which were originally equivalent to the salary paid to the Election Commissioners and the Chief Secretary to the State Government respectively, will now be determined by the Central Government.

3. The Act originally stated that if at the time of appointment, the CIC or ICs are receiving pension or any other retirement benefits from previous government service, their salaries will be reduced by an amount equal to the pension. The Amendment Bill removes these provisions.

REASONING GIVEN BY THE CENTRE FOR AMENDMENT-

The Amendment Bill was introduced in the Lok Sabha on 19th July by the central government. The welfare ministry of State for Personnel, Public Grievances and Pensions minister, Dr. Jitendra Singh stated that the amendment is simply an attempt to streamline and institutionalize the RTI Act of 2005, which he claimed, was drafted and implemented in haste by the then UPA government. He claimed that the then government had left many missing links. The main reason that the present NDA government gave for introducing the Amendment Bill is that the Information Commission is a Statutory body whereas the Election Commission of India is a Constitutional body and thus cannot be offered the same status. The functions that are being carried out by the Election Commission of India and the Central and State Information

Commission are totally different. The Election Commission is a Constitutional body established by clause (1) of article 324 of the Constitution and is answerable for the superintendence, heading and control of the preparation for the electoral rolls and for the conduct of all elections to the Parliament and to the Legislature of each State and of elections to the offices of President and Vice-President held under the Constitution. On the other hand, the Central Information Commission and State Information Commissions are Statutory bodies set up under the provisions of the Right to Information Act, 2005. Therefore, the order of Election Commission of India and Central and State Information Commissions are extraordinary. Consequently, their status and administration conditions should be rationalized accordingly.

On 22nd July, a mere 3 days after the bill was proposed, the Right to Information Amendment Bill was passed in the Lok Sabha. Dr. Jitendra Singh claimed the government is fully committed to transparency and accountability and said that the government is focusing on grievance redressal through citizen involvement. He also assured the members that the government is not misusing its powers. He further stated that there were never any changes proposed in the section of the original act dealing with the appointment of Information Commissions and hence the question of decreased authority does not arise.

Another 3 days after the bill was passed in the Lok Sabha, the Rajya Sabha passed the Amendment Bill on 25th July, 2019. The Bill was not referred to a Select Committee, with 117 members voting against and 75 members voting in favor of referring the Bill to a Select Committee.

The unprecedented speed with which the Amendment Bill was passed though both the houses and the Parliament sparked controversy with the opposition as they claimed that the central government used intimidation tactics to avoid sending the bill to a Select Committee. There was drama in the House which led to an opposition walkout after they claimed that this amendment would destroy democracy. [522]

THE ALLEGED CASE AND CONTROVERSY BEHIND THE AMENDMENT BILL

The opposition and certain media houses have continued to claim that the central government is striving to reduce the autonomy of the Information Commission, thus posing a threat to the

[522] Parliament approves RTI amendment; RS negates demand for select committee – Economic times article

transparency of the government. It has also been alleged that one of the cases that motivated the amendment was the "Modi degree case". In 2016, RTI activists had filed an RTI with Delhi University asking to see the degree and transcripts of PM Modi after making claims that it is fake. The Central Information Commissioner, M. Sridhar Acharyulu had allowed the inspection of the 1978 BA degree records. Delhi University, however denied making any records public stating the privacy concerns of their students and alumni and also said that that the information has no relationship to any public interest". The High Court then stayed the order of the CIC and ordered Delhi University to make the documents public.

The controversy surrounds the fact that soon after the CIC Commissioner Mr. Acharyulu passed the order in the case. He was divested of the charge of the human resource development ministry. Although the Chief Information Commissioner later released a notice enabling him to retain the power to interfere in matters relating to the HRD ministry, RTI activists urged disclosure of the reasons behind the change, widely assumed to be prompted by a nudge from outside the commission.

PREVIOUS ATTEMPTS MADE BY THE GOVERNMENT TO MAKE AMENDMENTS TO THE RTI ACT

1. Government tried to remove 'file noting's' from RTI Act (in 2006)

As per Section 2(f) of the RTI Act, "information" means any material in any form which can be accessed by a public authority under any other law for the time being in force. Several documents and circulars contain 'file noting's' that are statements made by government officials and ministers that give an insight into how the decision has been reached on any project or proposal. This is crucial information in order to make a public issue clear. According to the functional concept of a 'file' provided in the Central Secretariat, Government of India's Manual of Office Procedure, the definition of 'file' includes 'notes' and 'appendices to notes' in the manual. This information was followed by widespread public unrest and the formation of "Save RTI Campaign". This was in response to the government's attempt to reduce the scope of information accessible under the Act. Citizens sent postcards and signed petitions urging that the amendments be dropped. Public opinion was mobilized against the amendments and by the middle of August, both Communist parties had publicly announced that they would oppose any amendments in Parliament. The government soon dropped talks of any such amendments.

2. Government proposed to stop 'vexatious' and 'frivolous' RTI queries (in 2009)

In her speech at the annual RTI National Convention, India's (then President, Pratibha Patil, suggested that "frivolous" RTI queries should be handled appropriately by the government. The government then decided to tackle the so-called "vexatious" and "frivolous" RTI questions secretly. It also sought to keep certain public authorities, such as the Defense, out of bail. This was followed by a letter to the then PM Manmohan Singh by more than 100 activists from the across the country and rest of the world protesting the vagueness of these terminologies. The letter asked for a definition of the words "frivolous" and "vexatious" so that it is not objective enough to be misused by officials. The letter also questioned the promises of 'transparency' and 'accountability' in governance if they were going to exclude the basis on which a decision is taken. Subsequently, the government withdrew its proposed amendment.

As it had been made very obvious in this chapter, the RTI Act of 2005 in its glory was one that threatened every government that had been in power. This was because of the level of transparency that it promised, regardless of who was put under scrutiny. By a proper analysis of the various attempts that have been made to bring about 'amendments' to the Act, we can see that no government has yet made peace with the idea of transparent governance. The reasoning behind suggesting the amendments in both 2006 and 2009 make no sense from a legal standpoint. In 2006, the reason behind wanting to omit the file noting's on documents was so that the process by which a decision was made would not be made clear to the public. Similarly, in 2009, the reason behind leaving the definition of the words "frivolous" and "vexations" open-ended was that these words can letter on be used to the discretion of the government and its officials to refuse to provide information.

Besides, the Centre's reasoning behind the amendment does not quite concur as to how this amendment will prove to be a solution. The power of the RTI bill is proven by seeing just how much threat it has faced from the government and how actively it has been subsequently defended by the public. Any amendments to the original Act is most definitely a threat to the promise of transparent governance.

The current BJP government, upholds its statement of "minimum government and maximum governance". The statement given by the current Central Government claims that the amendment is not done with a view to decrease autonomy or weaken the RTI act.

Earlier, before the amendment, the Chief Information Commissioner was held in a similar position to that of the election commissioner, which is a constitutional position, and is considered to be autonomous and independent. The government, while making the change gave a statement that the Chief Information Commissioner is not a constitutional position and is a statutory one. Despite being what appears to be a direct blow to the autonomy and independence of the central information commission, the government claims that the amendment has been enacted in "good faith" and with no intention whatsoever to weaken the autonomy and independence of the Information commission. Many leaders of the opposition have described it not as an RTI Amendment Bill but as an RTI Elimination Bill. The question that arises is whether the Information Commission can remain autonomous, unbiased and independent despite the central government being the controlling body in charge of the tenure and remuneration of the Chief Information Commissioners.[523]

RTI is a tool that allows the citizens to keep a check on the powers and processes of the central government. With the government itself regulating the CICs tenure, appointment and salary, it is rational to question the autonomy and independence of the statutory body. Furthermore, since the central government itself is the most powerful authority in the country, it is crucial that there be a body outside of its direct purview that the citizens can rely upon in order to get information about their government. It is the absolute duty of the government to ensure that such a tool exists and to strengthen the machinery as much as possible in order to ensure that the theories of natural law and good governance prevail in the country.

In a time, where the NDA government is in such a powerful position, not even facing an adequate opposition, it is safe to say that they are in absolute power of running the nation.

Throughout the ages, it has been observed that power corrupts and absolute power corrupts absolutely.

Therefore, it is the absolute duty of the government to the citizens of the country to ensure that the citizens have an intact machinery that works as a medium between the citizens and the government, holding the government accountable and answerable for their actions and processes.

This machinery was introduced in our country in 2005 as a blessing to the democratic spirit in the form of Right to Information Act after a long struggle in which various activists throughout the country played a major role.

[523] RTI Bill 2019, Article by Prasanna Mohanti for India Today

The aim of my research was to throw light on the fact that autonomy and independence of the National information commission has been curtailed heavily by the 2019 amendment and it has a massive impact on the relationship between the citizens and the government of this democratic country.

As this government is taking bold steps for the advancement of the country, centralisation of power is being witnessed heavily in all sectors. With the amount of power that the government has gained, we have witnessed many changes in the way the government carries out its administration, for which the government needs to be held accountable now more than ever.

At a time like this, the RTI amendment bill, 2019 weakens the only tool that is strong enough to keep corruption in check – Information.

Information is not only a fundamental right, but the flow of true and correct information is the basis on which every healthy democracy should be built.

Curtailing the people's power to inquire and questions the actions of the government, especially in a time where the government has maximum power, does not seem like a step towards the betterment of governance. The national information commission should be an autonomous body, to which even the highest offices should remain answerable to. It is not just supposed to be an authority, but should be the medium through which the voice of the people reaches to the leaders that they have elected in the first place. On the other hand, if we are to take the amendments brought forward by the central government at face value, we need to go into a deeper analysis of their reasoning for making the change.

Multiple statements have been made by the government saying that this amendment bill is in no way an effort to reduce the autonomy of the Information Commission. It is, in fact, a simple switch because it is a statutory body and thus, the Information Commissioners should not hold the same power as those that form a Constitutional Body like the Election Commission of India. However, despite the Information Commission being a statutory body, the role it plays is so significant in maintaining checks and balances in a democracy that it should be held at power with a Constitutional body. It is hard to segregate national interest from personal interest without fixed tenures and independence from the Centre. The people of India will need a strong gesture of faith from the government that it will not use its powers to sway the decisions of the Information Commissioners, to even start to accept the amendments that have been made.

CRITICISMS OF THE 2019 AMENDDMENT BILL

The main aim of the RTI Act, 2005 which was to promote transparency, accountability in the working of every public authority and the citizens' right to secure the access to information is

being crippled by this amendment bill, 2019. This is an attempt to take away the free flow of unbiased information and place before the general public, the filtered information by the public authorities in order to please the government. The government has weakened the sunshine law without providing any credible rationale for bringing an amendment as this will definitely hamper the independent working of the Information Commissioners. They are now no more vested with the independence, transparency, status and authority but will now be functioning as one of the departments answerable ultimately to the central government.

The RTI Amendment Bill was started off in an unconstitutional manner right from the way it was introduced and pushed forward for the following reasons –

a) The Bill was not put to consultation with anybody or persons. The important stake holders who are using RTI were not consulted. The central or state information commissions, past or present were not at all consulted.

b) The copy of the Bill was kept a secret until the agenda for the next day was announced, which said the Bill would be introduced the next morning. The copy was not made available to members, which means no time was given to them to prepare to oppose or support the motion of introduction

c) There was not sufficient time for parliamentarians between the introduction and taking the Bill up for consideration

d) Most interestingly, the members of the House were kept in the dark as to what status and term was being given to the information commissioners. In 2005, Parliament accorded the status of EC to IC and both would get the salary equivalent to the judges of Supreme Court. Now the move to remove this fixed term and fixed salary of the Commissioners is not supported by any plausible reason except above referred mistaken notions of the NDA Government.

e) The Centre is creating uncertainty around commissioners as it has not revealed to what extent the status would be reduced. This leaves scope of frequently changing the term and status of commissioners, which keep them always under the pressure of the Government and hence it will not be in a position to act on its own.

f) The Centre claimed that this would improve transparency, but there is no transparency regarding the Bill itself. The independence of the CIC is seriously undermined by reducing its stature and throwing it into uncertainty, which will adversely affect the transparency further.

This Bill seriously encroaches upon the sovereign authority of states. The Centre not only took away powers from the Legislature, but also from states in determining the status, etc of the state information commissioners.

It said that the terms and status of the state information commissioners will be as prescribed by the Centre. This is against the principle of federalism, which is a basic structure of the Constitution that cannot be amended by Parliament. Till today, the CIC had power to direct a cabinet secretary or defence secretary or home secretary or any other principal secretary to give information. After usurping the power from Legislature to decide terms of the ICs, the central Executive 'may prescribe' by rules a lower status to CIC and state information commissioners, with which, they cannot direct the babus in Secretariat of the Centre and states.

Similarly, sub-section (5) of Section 16 of the Act provides that the salaries and allowances and other terms and conditions of service of the state CICs and State information commissioners shall be the same as that of the Election Commissioner and the chief secretary to the state government, respectively.

CONCLUSION

The Right to Information Act is more than what meets the eye. The focus of this dissertation was to show how the government is of the people, for the people and by the people, and not the other way round. The leaders are in their place because we as a voting nation place our trust and confidence in them in order to let them represent us. It is important for these leaders and administrators, even after being placed in a position of power to be answerable to the citizens in order to concur with the concepts of natural justice and Rule of law.

The right to information is not a complex piece of legislation if implemented in the correct way and with the correct intentions. The Information Commission should not be viewed as a mere statutory body but should gain recognition as a constitutional body, as the foundation of it has been clearly laid down in the constitution in Article 19(1)(a) and Article 21, making it clear that it was intended to have existed in our democratic machinery by the founding fathers of our nation and constitution.

The Right to Information act, 2005 was a symbol of hope and constitutionalism and was something the founding fathers of the largest democracy would have been proud of. The amendment, however, was not done in the same spirit.

It is clear that governments are widely bent on keeping matters out of the public view, making them a breeding ground for corruption and other such dangerous and rampant practices which are not in the favor of the citizens of the country, who deserve to know about the administrative

practices and processes in the simplest possible manner, and with a view to ensure that the common masses have a grasp on what is going on in the country.

The 2019 amendment, from a legal and constitutional standpoint was an attempt to crucify the work done by various activists and stakeholders throughout the years to achieve the Right to Information Act 2005, and does not serve as good precedent.

In a large and diverse democracy like India, where thousands of languages and cultures unite, it is the duty of the government to be answerable to the needs of all without any discrimination, as per Article 14 and Article 15 of the constitution which promise equality before law and prohibition of discrimination on the grounds of race, caste, colour, gender, religion and place of birth.

To ensure this, it is absolutely crucial that the government's actions can be put under scrutiny of the masses with ease. The scrutiny of government actions should be taken in a positive spirit as it is the absolute right of the people to seek answers from the government. A citizen who asks and seeks questions from the government should be encouraged and regarded as a good citizen instead of being shut down and the same spirit should be endorsed throughout the masses in order to place the control of the nation truly in the hands of the masses and not the leaders, who can be corrupted, which is only natural as many great jurists have stated – power corrupts and absolute power corrupts absolutely. The Right to Information in this country needs to be strengthened, which can only be done if amendments are made to further strengthen the independence and autonomy of the Information Commission, and not to weaken it thereby. Only then can a government truly be democratic and practice good governance.

GOOD GOVERNANCE – TRANSPARENCY AND ACCOUNTABILITY

- DANISH FARAZ KHAN

GOOD GOVERNANCE

Governance is defined as the creation and stewardship of formal and informal rules governing the public sphere, the environment in which both state and economic and societal actors interact to make decisions (ODI). Human civilization has been using the notion of "governance" since prehistoric times. Governance can be used in a variety of ways, including corporate governance, global governance, national governance and local governance. Governance elucidates the methods an organization uses to ensure that its components obey the processes and policies it has defined. In a loosely coupled organizational structure, it is the key way to maintain oversight and accountability.

Governance's position at national and local level: key growth factors include education, health, and safety, which are the public goods that central and local governments must provide. The government-managed share of GDP is positively correlated with the rate of development of the country. Government quality is a key component of governance and a prerequisite to effective development of a country.

There has been plenty of work to elucidate governance ideologies. Good governance is, according to Tandon (2002), "the joint responsibility of the state, market and citizens to mobilize public resources and promote public decision-making to advance common public goods." The theoretical concept that describes and prioritizes public goods, organizational mechanisms and structures for the delivery of those public goods, and processes by which such mechanisms and structures function. It emphasizes the articulation of interests among different stakeholders, particularly those that have been excluded and marginalized so far. Governance recognizes that disparities between different public goods priorities and preferred ways of providing the same would necessarily exist in a democratic society and, thus, emphasizes cooperative and dialogical approaches to resolve these differences.

Reports revealed that India's government implements a set of standards for reforming the nation's governance that are basically citizen-centered transparency, accountability, and efficiency of all government institutions, departments, and individuals, with particular attention to those constituents that have so far been fundamentally excluded. Governance is the exercise

of economic, managerial and political authority to manage account affairs at all levels[524]. It consists of the mechanisms and processes at institutions levels (UNDP, 1997)

CHARACTERISTICS OF GOVERNANCE

The main features of good governance as described below:

1. Participation - Studies have reported that male and female involvement is a major factor in good governance. Participation may be either direct or through valid intermediate or representative bodies. It can be proven that representative democracy does not necessarily mean that decision-making should take into account the needs of the most vulnerability in society.
2. Rule of Law - Good governance includes neutrally mandated impartial legal structures. It also requires full protection of human rights, particularly minority rights. Impartial law enforcement includes an independent judiciary and a police force that is unbiased and incorruptible. Essentially, the rule of law is called the formal system in which laws and other legislation are set, interpreted and enforced. This means government decisions need to be based on law and private firms and people need to be shielded from arbitrary decisions. Reliability includes governance free from distortionary incentives through bribery, favoritism, collusion or control by small private interest groups; guarantees ownership and personal rights; and retains some kind of social stability. This provides a degree of reliability and predictability that is vital to making good decisions for firms and individuals.
3. Responsiveness - Governance needs to try to serve all stakeholders within a reasonable period of time by organisations and processes.
4. Consensus Oriented - Good governance involves participation in the culture by different interest groups to find a broad agreement in a society for the benefit of the community as a whole and how it can be done. It also includes a specific and long-term perspective on sustainable human development needs and how to achieve these development goals.
5. Equity and Inclusiveness - A society's wellbeing depends on helping to ensure all its members feel they have a stake in it and don't feel excluded from the society's core. It

[524] www.civilserviceindia.com

ensures that all individuals have the opportunity to improve and sustain their well-being, but particularly the most vulnerable.

TRANSPARENCY IN GOVERNANCE

Transparency is widely accepted as a major principle of good governance.[525]The UNDP has perceived that transparency means "sharing information and acting in an open manner" (1997). In fact, transparency allows investors to gather information that may be crucial to uncovering misconduct and protecting their interests. Transparent systems have flawless procedures for public decision-making and open communication channels between stakeholders and officials. Transparency ensures that decisions are taken and executed in a way that is compliant with rules and regulations. It also includes data being easily accessible as well as being discoverable to those impacted by such decisions and their compliance.

Transparency means that the decision-making principles, procedures and structures are publicly known to all. The Right to Information Act (2015) provision set the stage for transparency in government and its various agencies ' functioning. Under this Act, every citizen has a statutory right to access information from a public agency. It has been argued in its implementation that the government system in India is so impervious that ordinary people do not have much knowledge about how to make decisions and how to use public resources. In reality, the RTI Act is a media for greater transparency about how public agencies work.

A recent report of People's Right to Information Act (PRIA, 2008) on implementation of RTI Act in 12 states established following facts:

1. Information about who the designated Public Information Officers (PIOs) were in the district was not available in 90% of the districts;
2. Almost half of all respondents felt that PIOs were not at all cooperative in giving information even when asked (Kerala and Madhya Pradesh are behaving worse than Uttar Pradesh, Bihar, Orissa and Haryana);
3. Self-disclosure mandated under section 4 of the RTI Act was not made in 90% of the districts in these states.

Self-disclosure of information in the public domain is the key provisions of this Act. It is expected that people will be able to request services and claim rights from appropriate authorities and officials if passable information is available. Disclosure of information only at

[525] World Bank Report (2000)

the state or national level, mostly in English, and mostly by web-based platforms has contributed to the widespread rejection of the very same people in whose name and interests the right to information has been supported. There is a need for transparency to make the public service delivery system effective. This helps the people to collect ready information in such a way that they can assert their rights. Simple knowledge of what entitlements are and who is responsible for implementing them, however, is not enough to ensure that public services are provided to the 'intended' recipients in a passable and effective manner.

ACCOUNTABILITY

To maintaining good governance, transparency becomes a key principle. Simply defined, accountability means being accountable for the results of the tasks assigned to a person; if the task assigned is to select beneficiaries for a program, accountability would indicate whether the choice was made by applying the criteria in a timely manner and in compliance with the procedures laid down within the budgets specified. Accountability also requires a clear description of the tasks to be performed, the time frame and budget required for those tasks to be performed. However, it is also important to be clear about the responsibility for the execution of these tasks; the responsible person and whether they are aware of it. It also notes that whether responsible agencies have the skills and resources necessary to carry out these tasks. Accountability is essential for governance, as it measures the continuing efficacy of public officials and public bodies, ensuring that they meet their full potential, delivering value for money in the delivery of public services, building trust in government, and responding to the society they are intended to serve. Governance has many forms of transparency, including horizontal and vertical accountability. The current understanding is that institutions of accountability such as parliament and the judiciary, provide horizontal accountability, or the capacity of a network of fairly independent powers that may call into question, and eventually punish, wrong ways of discharging a given official's responsibilities. Horizontal accountability is the ability of government institutions to monitor exploitations by other government agencies and branches, or the need for agencies to report sideways. Vertical accountability is the mechanism by which individuals, mass media and civil society try to impose administrative norms for good performance. Social Accountability is an approach to creating accountability focused on civic engagement, primarily a situation in which ordinary citizens and civil society groups directly or indirectly contribute to demanding accountability. Such accountability is called horizontal accountability guided by society. In the notion of individual ministerial duty, public transparency typically defines itself.

LINK BETWEEN TRANSPARENCY AND ACCOUNTABILITY

Accountability is the harmonizing role of transparency; if the governance system is sufficiently clear to encourage accountability, it is linked to transparency and accountability in its organizational mission. There are many advantages of governance through transparency and accountability. Governance transparency and accountability decreases patronage, favoritism, nepotism, and improves staff accountability.

We have been ingrained with the idea that love, good qualities and the sense of achievement always flows from the higher level to the lower level. It is now visualized that the reverse is not true. Hatred, corruption, nepotism and criminal mentality all are qualities which also flow from the higher to lower levels. Thus the rampant corruption, bribery, criminal activity and protection to them, even to the extent of selling secrets to foreign powers are al activities which are there for all to see in our elected MPs, Government and Bureaucrats. Who would expect the lesser mortals like clerks in public organizations like Central Excise, income tax, Defense establishment, Accountant General's Office or the offices of the District Administration to be anything better?

The concept of democracy in itself is a very constructive idea and we have seen countries like USA and UK who could be picked up as role models. That there must be corruption there too cannot be denied, but it must be to quite a miniscule content. Why? This question is not surprising, given the state of the majority of countries but it can be answered because so investigative that it has the advantage of molding popular opinion, of highlighting corruption and the lack of moral values in high places.

The efforts at impeaching Richard Nixon and Watergate, the recent revelations and near impeachment again of Bill Clinton, both presidents of the world's most powerful nation. Several resignations of British Ministers over the decades over relations of moral turpitude were all possible because of a strong media acting as the watchdog of Society and the Country.

So democracy if practiced with the intention of keeping its concept intact is a very favorable proposition but for a country like ours where the concept of even freedom and independence is not clear to the common man, we need a strong monitor. The misuse of our democratic system, the highhandedness of elected representatives, and the attitude of self before others only is readily highlighted in our political scenario.

These are just the tip of the iceberg and anyone interested in the study of the Democratic System in India could be more disheartened than pleased at the rampant misuse prevalent in the political scenario of the day.

As mentioned earlier the reason may be that earlier, before independence, the leaders had a definite goal before them and worked towards achieving that goal. The virtue of sacrificing self interests before the need of the nation was given the highest priority and young men and women were ready to even sacrifice their lives for the cause. It also obviously means that the leaders had presented examples of virtue by practicing what they preached thus helping in the true motivation of others.

The motivation is lost toady, those examples are missing and what is practiced today can only lead to negative values. The dream of Independence has been achieved and the term ahs a different interpretation now. Independence today means the freedom to violate the law, the freedom to misuse power and the freedom to do whatever is necessary to fill one's own coffers. This has now gone into overdrive.

The scene is full of pessimism indeed but there is a bleak ray of hope. Looking back at history we find a similar scenario in the USA about eighty years back. It was the era of the Great Depression and Prohibition, the era of the mafia and Al Capone ruling the roost. With the influx of settlers from all over the world, the exaltations of labour at its peak, brothels and gambling dens were sprouting up all over the country and the bureaucracy was susceptible to bribery. The scene is similar to what we are observing today in our own country but with the media as a backbone, intelligent and intellectual persons came to the fore to take up the cudgels of politics and the results today is for all to see.

Practically, there will be major drawbacks to the democracy movement. Weak governance is constantly seen as the root causes of all corrupt practices in societies. Maintaining good governance faces various challenges. Corruption is the first. A huge percentage of national spending is wasted in corrupt practices in every society. The important factor is the globalization process. Rosabeth Kanter[526], a professor at Harvard University, stated that globalization could be defined as a process of change that stems from the amalgamation of that

[526] Leadership in a globalising world – business chapter at Harvard University

cross-border operation and information technology that enables virtually instant communication at international level. As a consequence of globalization, there are many issues that will affect good governance. Thanks to the borderless world, the influx of foreign labor. International firms enter the domestic market quickly. Political intervention also has an adverse effect on good governance systems. Experts advised that when it comes to political views, it is important for civil servants to have a neutral attitude. Extremism also interferes with good governance. A good governance process is assumed to be a democratic system. It is participatory, open, accountable and equitable, upholding the rule of law. This leads to the development of an institutional framework that respects people's legitimate will. Extremism in many parts of the world has definitely become the threat these days. Extremism is any philosophy deemed far beyond society's normal arrogances or to disturb common moral norms.

CONCLUSION

To sum up, governance is the decision-making system and the decision-making process. Democracy is one of the governance actors. Good governance must be open to administration, and it must have a reasonable legal system to protect members of society. Good governance includes accountability, transparency, accessibility, predictability, engagement, political legitimacy, freedom of association and involvement in the democracy system, an established legal structure based on the rule of law and judicial independence to protect human rights and freedom of information and speech.

Governance is dependable on the rule of law and the spirit of the law, is not the result of illegal or morally questionable behaviour, nor can it be justified. Poor governance could weaken public institutions ' credibility and disrupt policy objectives. The RTI Act is a step forward towards transparency and accountability in the governance of our country.

ANNIHILATION OF SEC 377 - LEGALITY AND REALITY IN HINDUISM

- MARUTI SANKAR

VIKRITI EVAM PRAKRITI

(What seems unnatural is also natural)

A "non-judgmental judgment" passed by the Supreme Court declared Sec 377 of the Indian Penal Code as invalid. It determined that consensual homosexual sex between adults as legal and declared Sec 377 as unconstitutional.

Naz Foundation v. Govt. of NCT of Delhi[527] was the first legal battle in India which fought against Sec 377, which criminalizes homosexual acts. The Delhi High Court held that, treating consensual homosexual acts between adults as a crime (which is constitutional), as unconstitutional. Later, in the case of Suresh Kumar Koushal v. Naz Foundation[528] the Supreme Court reinstated Sec 377 of the Indian Penal Code. A recent judgment passed by the apex court in the case of Navtej Singh Johar v. Union of India[529] presided by a 5 judge bench, decriminalized homosexual sex once again. Sons of proud fathers and daughters of bashful mothers are no longer "criminals". The case was on simple the ground- love has many forms, any law that takes away an adult's freedom to love a person of their choice abridges their fundamental right and ought to be unconstitutional.

Even after validation by law, the resentment in society still exists. Many parents in the country refuse to accept their children as they are. European thoughts and their laws may be the reason. Passing of colonial attitudes as Indian thoughts is very dangerous. The 1901 Dorland's Medical Dictionary defined heterosexuality as an "abnormal or perverted appetite toward the opposite sex." More than two decades later, in 1923, Merriam Webster's dictionary similarly defined it as "morbid sexual passion for one of the opposite sex." It wasn't until 1934 that heterosexuality was graced with the meaning we're familiar with today: "manifestation of sexual passion for one of the opposite sex; normal sexuality."[530] In a contemporary and cosmopolitan country like

[527] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277
[528] Suresh Kumar Koushal v. Naz Foundation, Civil Appeal No. 10972 OF 2013
[529] Navtej Singh Johar v. Union of India ,W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016
[530] Brandon Ambrosino, The Invention of 'heterosexuality'(16th March 2017), BBC Future, https://www.bbc.com/future/article/20170315-the-invention-of-heterosexuality

India, LGBTQ+'s face discrimination and maltreatment. There were instances where parents forced their children to take hormonal therapy, lodged complaints against their child. There were also incidents where lesbians were raped by their family members. Their family members state that as she hasn't been physical with a man she doesn't know how it is, so, they call their cousins to sleep with them. This is unacceptable and bestial. At this juncture, children give up their hope for parents. They lose confidence in filial relationship.

"History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution,"

- *Justice Indu Malhotra*

The Hindu Hindrance

Shiva is often represented as Ardhanarisvara, with a male and a female nature. In many Hindu mythological tales, stories of gods and mortals changing gender occur. Sometimes they also engage in heterosexual activities as different reincarnated genders. Homosexuals and transgenders commonly identify with and worship the various Hindu deities connected with gender diversity such as Ardhanarisvara (the hermaphrodite form of Shiva); Aravan (a hero whom Krishna married after becoming a woman); Ayyappa (god born from the union of Shiva and Mohini – the female incarnation of Vishnu).[531] In India, the followers of Radha Krishna worshiping cult believe that everyone on Earth is a woman and only Lord Krishna is a man. Under the heading of Tritiya-Prakriti, or people of a third sex, the lesbian is first described in the chapter of Kama Sutra concerning aggressive behavior in women. Homosexuals were mentioned in Bhagavatham, this states that homosexuality is said to have existed since the dawn of creation.[532]

There is no sacred text in Hinduism which condemned Homosexuality. It is a pity that India, a land of diversity is not accepting diversified sexualities. Many Hindu-Indians refuse to accept their child as they consider it as "unnatural" and "unholy". The acceptance rate in Hindu families is very less even after the banishment of cruel laws.

Why religion is always a hindrance towards a modern civilization? Is lack of education a problem? Is society not having the maturity to understand one's problem? Is the dominating

[531] Palash Pandey, Vikriti Evam Prakriti(20th June 2018), King In the North, https://minutefrommidnight.wordpress.com/2018/06/20/vikriti-evam-prakriti/
[532] Ibid.

attitude of typical Indian parents a reason? If so the society should be reformed once again. The nation needs reformers like Raja Ram Mohan Roy.

Homosexuality is not condemned in Manu Smriti as people think. We have come across many people who are not willing to support the diversified sexualities. They quote verses from Manu Smriti as follows:

maithunaṃ tu samāsevya puṃsi yoṣiti vā dvijaḥ |

goyāne'psu divā caiva savāsāḥ snānamācaret

This line states that, any twice born committing an unnatural offence with a male should take bath along with is clothes. A man whose feelings are developed to have sex with another man is not unnatural. This is completely organic. Branding of sexual intercourse among homosexuals as lust is unjust.

The concept of marriage

Marriage plays a very prominent role in Indian customs. Homosexuals cannot procreate, since procreation and kinship plays a dominant role, the concept of LGBTQ+ is tagged as "sin". The legal aspect is that in a country like India, existing marital arrangements center around a bundle of rights. These rights determine who you can co-sign on a lease, who you can leave your inheritance to, who you can nominate for life insurance, and so on. These civil liberties are extended by the State to blood relations and legally recognized spouses. In India, such rights currently do not extend to same-sex couples, and this is the legal problem.[533] The concept of marriage in India, especially for Hindus is governed by the Hindu Marriage Act, 1955. Section5 of the Act never specifically mention about gender. Section 5 and Section 7 of the Act used terms like "bridegroom" and "bride" on a neutral basis. There were also other terms like "party" and "person" which are used in the Act. This Act is not gender-based. It is only religion-based. In India, as per law, homosexual marriage is not illegal. It is just unrecognized. Making homosexual marriage officially "legal" in India would be a revolutionary step. The concept of marriage is grandeur and involves families of both the families. But internally, it is related to two individuals and their decision should be respected.

In April 1954 when the proposed Special Marriage Bill was being debated in Rajya Sabha a Congress MP from Bihar, Tajamul Hussain, raised the question of how the law might deal with sex change. According to the report in the Times of India (ToI), Hussain asked "if the husband

[533] Kanav Narayan Sahgal, Same-Sex Marriage In India : Unveilling the Marriage Project (19th May 2020), Feminism In India, https://feminisminindia.com/2020/05/19/same-sex-marriage-india-unveiling-marriage-project/

changed into a woman and the wife into a man what would happen to such a marriage? Would it become void?" Hussain's query was brushed off as irrelevant of that time, but it is not irrelevant today.[534]

Legal recognition of homosexual marriage is a measure of equality. Jaya Verma and Tanuja Chauhan are the first lesbian coupled to tie a knot according to Hindu rituals.[535] In a recent judgment delivered by Madurai bench of Madras High Court[536], it has held that a marriage between a man and Trans woman would be legitimate under the Hindu Marriage Act 1955 and are obliged to register the same in the Registrar of Marriages. The bench broke a new ground and widened the definition of "bride". It stated that the expression "bride" cannot have static or immutable meaning[537]. Rulings like these have given LGBTQ+ greater access to civil liberties.

Conclusion

It is high time for Indian civil society to accept homosexual relationships. It is not a choice of a person to choose their sexuality. It is better to amend all the acts to eradicate the skepticism. It should be a fundamental responsibility of any parent to accept their children's identity. Supporting the idea of treating homosexuality as a mental illness is absurd. It is very overwhelming to see that the judiciary has adapted and accepted the environment. The society should do the same. It takes courage to grow up and be who you are and it is better to appreciate it.

"The world is so obsessed with defining sexuality for everyone and attaching labels to it. Any time any person openly leaves the sexual norm, their sexuality becomes, more often than not, the absolute defining characteristic of that person. It becomes the first thing people think about and often the first thing they mention. Every other part of that person all but disappears."

-Dan Pearce

[534] Vikram Doctor, A Civil Contract: Same Sex relationships and marriage (last updated: 29th February 2020), The Economic Times, https://economictimes.indiatimes.com/industry/media/entertainment/a-civil-contract-same-sex-relationships-and-marriage/articleshow/74408022.cms?from=mdr

[535] Jyotsna Singh, Gay couple hold Hindu wedding, BBC, (May 29, 2001), http://news.bbc.co.uk/2/hi/south_asia/1357249.stm

[536] Arunkumar and Sreeja v. Inspector General of Registration and Ors, WP(MD)No.4125 of 2019

[537] https://indiankanoon.org/doc/188806075/

APPLICABILITY OF DOCTRINE OF SEVERABILITY IN CONTEXT TO THE NATIONWIDE LOCKDOWN DURING COVID-19 PANDEMIC SITUATION IN INDIA

- KHULOOS AZIZ CHAWLA

INTRODUCTION:

Fundamental rights are the most essential aspect of the constitution as they protect the liberties and freedom of the citizens of the country, against any intervention by the state for a dignified living and holistic development of an individual and they also prevent the development of authoritarian and dictatorial rule within the country. Fundamental rights are very essential for the all-round development and are enshrined in Part III of the Indian constitution that applies to every citizen of India. The concept of Fundamental Rights in the constitution is as important as to enforce the provisions when it is violated. If a portion of law is found to be unconstitutional in the country then, it is the rationale to question whether that particular law or a portion of it should be void or not?

As we all are aware of the fact that for the first time in the history of India, a National Lockdown was declared by our Prime Minister Mr. Narender Modi which was an undeclared national emergency that was declared for approximately 74 days from 25th March 2020 to 17th May 2020. The movement was limit down that too of the entire 1.3 billion population of India as a precautionary and preventive measure against the breakout of Coronavirus pandemic in India. The lockdown curtailed and stopped the common people's mobility, be it for any work or schools or to their regular work. The public transport services like buses, metros, cabs were suspended, even the movement of private vehicles was restricted, giving the allowance only to the ones who were associated to the essential commodities. Later some exceptions were given for transportation of essential goods and emergency services. The department of Home Affairs also ordered restrictions that anyone who fails to follow the lockdown can face imprisonment for a period up to a year.

Indian in order to recover from the pandemic, tried many things including successful medical and lockdown protocols of China and European countries were bring followed up. The districts and within them the colonies and areas were categorised and divided as red, orange and green

zones in which the red zone where the areas of Coronavirus positive cases were more or on peak, they were declared as Containment Zones. The lockdown was typically implemented in five phases that worked at the national level, while the distribution of the three zones that is red, orange and green districts functioned at the state and inter-district levels. Demarcation of containment zones was done in almost every areas such as town, village, or municipal or panchayat area, with the main purpose of lowering the human contact which in turn restricted the rights of the people but it was for their interest only.

Neighbourhoods, colonies, or housing societies where any of infected people were spotted are sealed, and access was restricted. Containment zones are where the restrictions on movement and interaction are the most severe. In many cities, the entire demarcated area is barricaded and the entry and exit points closed. Only the very basic suppliers such as vegetable vendors which were recognised and very basic services are allowed inside. This concept was quite effective but soon after the delineation and closing of the red and containment zones, the plan was that entire population will be tested for virus infection and if any person is found infected, then that person has to be shifted to the hospital. If the plan was executed rightly then once the tests will over for the entire population of the containment zone, the zone has to be opened for the public for their day to day affair but this concept was adopted in some areas, and some fell out of it due to lack of resources and ineffective working of the officials.

The Indian Constitution consists of the major provisions and articles for the benefit of the citizens and provide them with the exclusive rights and one such article is Article 19 which is considered to the heart of the Constitution and it states six fundamental freedom rights but also states that "the reasonable restriction is allowed in the interest of the public but the restriction should not be misused or overused"[1]. On the whole when we witness the situation we come across the reality that confirms that the confirmation tests were not conducted for the entire population of the red or containment zones and they were closed indefinitely. Only the few cases were reported whereas other than that, the mobility of thousands of people within that containment zone continues to be locked indefinitely, they are hampered from going around due the complete seal in their colonies and it is a violation of Fundamental Right that enshrined in the Article 19 and Article 21 of Indian Constitution which states that "Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law"[2]. Furthermore, as per our constitution and the rights enriched in it, it is unconstitutional to restrict the people's movement and that too completely for the people in the containment zones for such a long period of time without proper testing. It is

completely arbitrary action in the hands of the government and the protocols drafted by them accordingly.

Article 13 which is mentioned in Indian constitution states Article 13 of The Indian Constitution read, "All laws enforce in India, before the commencement of Constitution, in so far as they are inconsistent with the provisions of fundamental rights shall to the extent of that inconsistency be void"[3], in relation to this doctrine of severability is also there which acts as a saviour in combating violation of fundamental rights, with context to this it is mentioned indirectly but not explicitly. So now understanding the concept as the whole law or act would not be held invalid, but only that provisions of the law or act which are inconsistent with the Fundamental rights will only be termed as Void. This is what the Doctrine of severability basically is. This doctrine comes into force when it is only possible that if the part of the law which is not consistent with the law is separable from the whole law and the other valid provision with the law continues, that means void and valid part can be differentiated easily. If both the valid and invalid part are so closely mix up with each other that it cannot be separated then the whole law or act will be held invalid, then this Doctrine does not serve any meaning in that case. During this situation of COVID-19's pandemic in India that means at this juncture of the Nationwide lockdown which took place throughout the country, it is essential to recollect the concept of the 'Doctrine of Severability' during the Coronavirus Pandemic and nation-wide lockdown in India and its protocol through the lens of Article 13 of the Indian Constitution. So stating this I would like to light the fact that, the doctrine of severability would apply in this lockdown protocol as where the unconstitutional portions of the protocol would be severed and made void.

CONCLUSION:

The Doctrine of Severability in Indian Constitution is a principle which has extended from the pre constitutional era and it is also mentioned in the several other constitutions world-wide. It has been adopted in many countries like United Kingdom, Australia, United States of America, United Kingdom, Malaysia and so as well in our country which is India to protect the fundamental rights of every citizen of the county. It is also known as the test of severability or an acid test to validate any law which is against the Fundamental Rights but that can be enacted either in the present parliament and legislative assembly or was mentioned in the pre-constitutional period. This doctrine has been an relevant in all the times from pre constitutional era to post constitutionals times that means now and in every legal aspect of the governance

for the welfare of the state and the citizens of the country too. Therefore, at this very point of time I could like to conclude by saying that, it is pertinent to validate the unconstitutional portion of guidelines provided by the Ministry of Home Affairs in the Coronavirus protocol which is against the fundamental right of our constitution.

E-COURT SYSTEM: AN APPROPRIATE MECHANISM FOR RESOLVING DISPUTES

- ANKITA NIHANIWAL & KHUSHI AGRAWAL

श्री भगवानुवच

कुतस्त्वा कस्मलमिंड विष्मे संमुपसितथम।

अर्नाय जुस्टम स्वर्ज्ञाम अकीर्तीकरमर्जुन।।

कलेब्या मा सम् गमः पार्थ नेतत्वयुपपधते।

क्षद्र ह्रदय दोर्बल्या त्यक्तो तिस्ट परंतप।।

This Shlok is taken from the book "**The Bhagavad Geeta"** chapter II. The lord says: Whence this faintheartedness may have come upon you at this time of trial? As a decent man, this is not acceptable, it will not lead to heaven and it would bring dishonour. So don't give up your manhood, Partha! What an ill mood turns you into. Arise, O killer of the adversary, give up this weak heart faintness.[538]

INTRODUCTION

COVID- 19 is spreading thick and fast in India, with around 50,000 cases being recorded daily. Nobody knows for how much time this virus is going to stay with us but this is destroying the economy adversely. In these challenging times of COVID- 19, where the judiciary is the most important part, which is responsible for providing justice to every section of the society, it would not be a good option for the courts to become standstill and take a break at this point of time. During the first lockdown, the courts remained closed for almost two months. However, it is a known fact that piles of cases are pending in the courts and new cases are also being filed in the courts during the lockdown, and the judiciary cannot afford to accumulate these cases till the time pandemic is gone. So, as recourse to this situation, the E-Court system has been introduced to continue serving justice even in these catastrophic situations. The Attorney

[538] Anand Kulkarni, Bhagawad Geeta- A Panacea For Covid- 19, April 13, 2020, http://www.businessworld.in/article/Bhagavad-Gita-A-Panacea-For-COVID-19/13-04-2020-188898/

General and other law officers have emphasized that there is a need to strengthen the E-Court system by addressing the connectivity issues and by training lawyers in E-Court Management. With the introduction of the E-Court system, various issues have arisen which are mentioned below:

- Whether E- Court system in India will run efficiently and smoothly when there will be no physical meet between the parties, lawyers, and judges?
- Whether E- Court would help in early disposal of cases and would judiciary be strengthened by the adoption of the E-Court system?

E-COURT: A TOOL TO RESOLVE DISPUTES

Courts were completely shut down during the first lockdown and Judiciary became standstill. However, this E-Court System was brought forward for virtually resolving the cases. But in the beginning, this system brought the chaotic situation in the country as many lawyers went on to strike, as they were being skeptical about the new experience of technology and digitalizing. Many were against this E-Court system as the face to face hearing in Courts was more effective and they were reluctant to adopt the new system.

It is usual saying by the old people **"Emergency makes everyone work hard"**. So, following the situation this alternative of the E-Court system is introduced. On, 6th April 2020 the SC passed the directions for all courts across the country to use video conferencing for judicial proceedings.[539]

This new justice system was need of the hour as this pandemic has provided us with the opportunity of getting efficient through optimum utilization of the technology and which will help us to augment this system keeping in mind the necessity to adhere to social distancing norms. For the successful functioning of the E-Court system, SC ordered to explore video conferencing for the hearings. The HC has expanded its functioning to include hearing on all kinds of Urgent Matters via Video Conferencing. It is expected that regular matters may also be shifted to VC mode in the coming months.[540]

Gradually in the past few months, the position has bettered and cases are heard through online mode. Virtual hearings have shown that the matters can be heard and disposed of quickly. **For**

[539] Rajat Mohan, Justice goes online: Coronavirus lockdown shoes why courts must go digital to resolve issues, June 2, 2020 at 3:50, https://www.financialexpress.com/industry/justice-goes-online-coronavirus-lockdown-shows-why-courts-must-go-digital-to-resolve-issues/1978347/

[540] *Id*

instance, in the state of Chattisgarh, in one day more than 200 cases were resolved through E- Court Lok Adalat.

CRITICAL ANALYSIS OF THE ISSUES INVOLVED

The relevance of the courts and justice delivery system has undergone a huge change due to pandemic. In one way it can be set that E-Courts has received the momentum because of the virus. The courts working have changed as ordinarily, Indian Court involved large crowds but now everything is being done through the virtual platform.

There is this perception that lawyers are always resistant to change and those in the legal world are unsure of technology and reluctant to change. Lawyers in a similar way will have an apprehension that transition is going to be painful and will think they will not be able to adapt to this new system. So the major task here is to change the persisting mind-set towards this transition from 'physical courts' to E- Courts'. Although initially, the transition might be tough gradually it will be for the betterment of society which is possible when there would be co-operation between litigants, lawyers, and judges. By this way, definitely there would be effective and smooth functioning of this system and nobody would face any trouble once this system is completely adopted.

Another issue that always comes up is that people will face technological constraints and are technophobic. However, India is the market with some of the highest Tele-densities in the world. Now, the excuse that infrastructure cannot penetrate the rural areas does not survive anymore.[541] There is an increased level of IT literacy among the general public. So, this system will help in the early disposal of cases if the technology is used in an optimum manner. As said by Justice GS Patel in one of the webinars that lawyers will have to adapt to a new system and they will not have a choice.

MERITS OF E-COURT SYSTEM

- Major advantage of virtual hearing is that there would be a reduction in the cost of the infrastructure as it is going to be cost-effective because there would be a lower requirement for staff and maintenance of physical hearing.

[541] Ajay Kumar, Coronavirus lockdown must catalyse widespread use of virtual hearings in Indian Legal System, July 24, 2020, at 6:44:10, https://www.firstpost.com/india/coronavirus-lockdown-must-catalyse-widespread-use-of-virtual-hearings-in-indian-legal-system-8634201.html

- Another benefit is that the common people, lawyers, and judges will not have to travel to the courts as everything would be accomplished through virtual mode.
- This system will bring a reduction in the physical infrastructure of courts, with this cost-effective method; more judges can be hired at the lower levels. The major issue of vacancies in the courts would be fulfilled by appointing judges.

SUGGESTIONS FOR IMPLEMENTING E- JUSTICE SYSTEM

The way Alternative Dispute Resolution was introduced in our country which is established by UNCITRAL Model laws in the 90th Century. And the major aim of ADR is to resolve the dispute speedily and effectively and to resolve pending cases. Like ADR is statutorily backed by the provision under CPC, 1908 under section 89, **similarly, this system of virtual hearing should also have statutory backing under the relevant or separate code bifurcating that what all matters should be heard through physical hearing and what all matter is required to be heard through virtual hearing and how these courts will function, everything should be set out systematically to avoid confusion.** This will ensure that there is no going back to complete physical hearing model and would help in bolstering this system.

CONCLUSION

To conclude, it can be said that COVID- 19 although has brought huge loss to the country but it has also provided us with the opportunity of implementing this new system of E-Courts. It is a step towards the digitalization of the country and will lead to development in the country. This would be called the new era for the disposal of cases. Coming times may be the time when E- Court might become the first choice of the parties as it has its own merits and demerits. Although at present, there might be people who will be totally against this electronic system, however, it will take time to adapt to new normal but this will definitely bring fruitful results. After the pandemic is over, there can be an adopted combination of both physical hearing and virtual hearing. But there should not be a situation that everything is getting back to old normal that is only physical hearing. Proper training should be imparted to the persons involved in the legal system and even poor people should also be made aware of this system so that justice is served to all the sections of societies. By ensuring this there would be no delay in Justice. Proper laws should be made regarding the E-Court system to avoid confusion. **"Actus Curiae Neminem Gravabit"** and the principle of natural justice should be followed.

REVISE WOMEN'S LEGAL AGE FOR MARRIAGE

- NARAYANI VEER & SAHIL PANCHAL

Marriageable age is the minimum age at which a person is allowed by law to marry, either as a right or subject to parental, judicial or other forms of approval. Age and other prerequisites to marriage vary between jurisdictions, but in the vast majority of jurisdictions, the marriage age as a right is set at the age of majority. In India, the marriageable age for girls is lower than for boys, on the premise that girls mature at an earlier age than boys. This law has been viewed to be discriminatory, This differential age is based solely on stereotypes, the Law Commission of India has observed that there is no such scientific analysis for such distinction. The National Human Rights Commission also pursuant to the national conference on Child Marriage had recommended that India should follows a uniformity in the legal marriage age.

Marriage[542], a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners and accords status to their offspring (if any). Perhaps its strongest function concerns procreation, the care of children and their education and socialization, and regulation of lines of descent according to our personal laws and for this maturity, age and valid consent is the most important element of marriage.

According to Section 2(a) in the Child Marriage Restraint Act, 1929[543] the legal marriage age is 18 for girls and 21 for boys. Child Marriage Restraint Act, 1929 is also known as Sharda Act, 1929. This Act is applicable to every community and religion except Muslims. Muslim organizations of India have long argued that Indian laws, passed by its parliament, such as the 2006 i.e. The Prohibition of Child Marriage Act, 2006 do not apply to Muslims, because marriage is a personal law subject. In Islam[544], the marriage of a minor who has attained puberty is considered valid under personal law i.e. The Muslim Personal Law (Shariat) Application Act, 1937[545]. In 1860, the Indian Penal Code criminalised sexual intercourse with

[542] *Marriage,* BRITANNICA, https://www.britannica.com/topic/marriage
[543] The Child Marriage Restraint Act, 1929, No. 19, Act of Parliament, 1929 (India)
[544] Apurva Vishwanath, *Explained: Why is age of marriage different for men and women? The law, the debate,* THE INDIAN EXPRESS (August 22, 2019 1:24:43 pm), https://indianexpress.com/article/explained/why-is-age-of-marriage-different-for-men-and-women-the-law-the-debate-5925004/
[545] The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937 (India)

a girl below the age of 10 years after that the Age of Consent Bill, 1927 made marriage invalid with a girl under the age of 12 years.

In February, Union Finance Minister Nirmala Sitharaman[546] had, during the Budget Speech 2020-2021 had announced that the legal age of marriage for women in India is likely to be revised from 18-years of age to 21-years of age as the government has formed a high-level committee to go into the matter and submit recommendations by July 31. Earlier, it was increased from 15 to 18 in 1978 as an amendment to the Sharda Act of 1929. Since 1978[547], the minimum legal age for marriage has been 18 for women and 21 for men.

EFFECTS

1. Reduce the Maternal Mortality Rate

MATERNAL MORTALITY RATE is the number of resident maternal deaths within 42 days of pregnancy termination due to complications of pregnancy, childbirth, and the puerperium in a specified geographic area (country, state, county, etc.) divided by total resident live births for the same geographic area for a specified time period, usually a calendar year, multiplied by 100,000. The Maternal Mortality Ratio[548] (MMR) in India is 113 in 2016-18 from 122 in 2015-17 and 130 in 2014-2016, according to the special bulletin on Maternal Mortality in India 2016-18, released by the Office of the Registrar General's Sample Registration System (SRS).

The major cause of deaths of girls who are 15-19 years old is pregnancy-related complications. The number of women and girls in India who died due to issues during pregnancy and childbirth in the year 2017 was as high as 35000, though it has significantly decreased from 103,000 in 2000. Women who are married and impregnated at a very early age lack the recourse to proper education and access to health care, antenatal care, skilled child delivery and the complete vaccination of the infants which explains the lack of child health care.

[546] STP Team, *Indian Government may revise the Legal Age of Marriage for Women,* She The People (June 12, 2020), https://www.shethepeople.tv/news/india-revise-legal-marriage-age/

[547] *Government mulls to revise women's legal age for marriage from 18 to 21,* INDIA TV (June 14, 2020 13:59 PM), https://www.indiatvnews.com/news/india/women-legal-age-for-marriage-india-2020-revise-sharda-act-women-and-child-development-626094

[548] *India registers a steep decline in maternal mortality ratio*, THE HINDU (July 17, 2020 09:03 AM), https://www.thehindu.com/sci-tech/health/india-registers-a-steep-decline-in-maternal-mortality-ratio/article32106662.ece

Because of this in India there is a high Infant Mortality Rate[549], India's infant mortality rate (IMR) is 32 in 2018, according to data released by the Registrar General of India.

2. Higher Education

It will encourage young girls to opt for higher education and professional education. With the help of education it will give them self-individuality and independence to take their own decisions. As per UNICEF[550] (United Nations Children's Fund) study, around 27% of the women in India are married before their 18th birthday. The legal age in India for marriage creates gender inequality and it is against the doctrine of gender equality as it is guaranteed by the Article 14 and 15 of Indian Constitution, but this is also against the dignity of a woman which is an integral part of Article 21. As for boys the legal age is 21 so they can study at least till that age but for girls it is a disadvantage and it creates the gap between two genders.

3. Health[551]

Many young girls don't have a grasp of their sexual and reproductive health or rights. When they get married to older men, it can be difficult for them to voice their needs, particularly around issues like contraception and family planning. They are more likely to experience domestic violence or exploitation even within the context of a marriage. Due to this there is a rise of population in countries, early marriage of women increases the period of their reproductive cycle which increases her capacity to bear a child and due to lack of education she doesn't know about the family planning, hygiene, nourishment of hers and her children.

SUGGESTIONS

Educate Girls

Working directly with girls to give them the opportunity to build skills and knowledge, understand and exercise their rights and develop support networks, using an empowerment approach can lead to positive outcomes for girls and their families by supporting girls to

[549] *India's Infant Mortality at 32 per 1,000 Live Births, Kerala in Single Digits,* THE WIRE (May 10, 2020), https://thewire.in/health/india-infant-mortality-rate

[550] Mumbai Live Team, *Legal Age For Indian Women To Get Married May Soon Be Changed From 18 To 21*, MUMBAI LIVE, https://www.mumbailive.com/en/society/legal-age-for-indian-women-to-get-married-may-soon-be-changed-from-18-to-21-51221

[551] *Child marriage: facts and how to help,* WORLD VISION, https://www.worldvision.com.au/global-issues/work-we-do/forced-child-marriage

become agents of change, helping them envisage what alternative roles could look like in their communities and ultimately helping them to forge their own pathway in life. Also by introducing the Sex Education at school level will help children understand the body structures of men and women and acquire the knowledge about birth. Teach children to establish and accept the role and responsibility of their own gender by acquiring the knowledge of sex. Understanding the differences and similarities between two genders in terms of body and mind will set up a foundation for the future development in their acquaintance with friends and lovers and their interpersonal relationship, sex education is a kind of holistic education. It teaches an individual about self-acceptance and the attitude and skills of interpersonal relationships.

Penalty

Stringent laws should be added by the government, committees should be set up by the government to prevent child marriages. The initiative should be taken up by the ground level i.e. at gram panchayats and municipal corporations to check and report such incidents, also there should be awareness programmes about marital age and about legislations in India. It should be set up by the government which will prevent child marriages in India. The laws regarding Marriage should be Uniform in nature which would be applicable for every community and religion with no exceptions.

According to The Prohibition of Child Marriage Act, 2006[552] - Any male over 18 years of age who enters into a marriage with a minor or anyone who directs or conducts a child marriage ceremony can be punished with up to two years of imprisonment or a fine. This provision should be revised and more stringent punishment should be followed.

Empowering Girls[553]

Every girl has the right to decide her own future, but not every girl knows this – that's why empowering girls is so crucial to ending child marriage. When girls are confident in their abilities, armed with knowledge of their rights and supported by peer groups of other empowered girls, they are able to stand up and say "NO" to injustices like child marriage. Empowered girls are able to re-shape perspectives and challenge conventional norms of what

[552] The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India)
[553] *5 WAYS TO END CHILD MARRIAGE,* PLAN INTERNATIONAL, https://stories.plancanada.ca/5-ways-to-end-child-marriage/

it means to be a girl. Also to create the job opportunities for rural and urban areas and this step is to be taken by the government as it will encourage their parents to let them study and do job.

CONCLUSION

Change is possible if we work together to end what is considered 'normal' for millions around the world. When children are empowered to demand for better and take ownership of their own futures, they can rally their entire community to stand up for their rights and challenge the status quo. Together, let's help girls become empowered, confident women who decide their own futures. However, stricter measures will need to be in place to make sure the laws are implemented across the country, particularly in rural regions where sexism is still rampant.

MACKINNON'S VIEW ON SEXUAL CONSENT AND ITS APPLICABILITY TO LEGAL STANDARD OF CONSENT

- VANSHIKA AGGARWAL

"Politically, I call it rape whenever a woman feels violated." – Catherine MacKinnon. According to Catherine A. Mackinnon rape is violence, it is not just sexual intercourse (MacKinnon 323). Where there is violence, it is not sex, which means forced sexual intercourse is violence. MacKinnon believes that the legal perspective of sexual consent is a male's perspective of consent as they look rape as harm against '*female monogamy'* and not violence to the women's dignity(MacKinnon 172). It means that rape is a crime just because the property, the women, of a man is being used or violated by another man. Such a view of consent ignores the real meaning of sexual consent from the eyes of a woman. This article is an attempt to shed light over what is the meaning of sexual consent in the view of Catherine MacKinnon and whether such a meaning of sexual consent can be applied to the legal standard for sexual consent.

According to the legal standard of sexual consent, consent is seen as a woman's ability to control the situation(MacKinnon 175). This means that a woman has the power to reject sexual intercourse by saying no and thus, she can control the situation. Here, the law assumes that there exists a situation of equality between the two genders while consenting to a sexual act. But according to MacKinnon, the law does not take account of the structure of power between males and females in a male-dominated society. She says, "*The law of rape presents consent as a free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity"*(MacKinnon 175). Women are taught to be submissive and compromising by society. Some women submit themselves to men in fear of being killed or beaten if they don't consent to the sexual act. In Mahmood Farooqui v State Government of Delhi 2017, the prosecutor stated that '*she was scared because of the strength of the appellant but because she did not want to get hurt, she pretended an orgasm*'(Mahmood Farooqui v State Government of Delhi 2017). The prosecutor was under the fear of getting killed by the accused, and thus, she couldn't say *'no'* to his acts. The law should take into account the power structure between the two genders while considering the meaning of sexual consent. However, later, in Rao Harnarayan Singh V. State Air 1958, the Supreme Court of

India accepted this view of sexual consent and held that *"mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent"."* (Rao Harnarain Singh V. State Air 1958)

Law looks for the injury marks to consider whether the victim resisted or refused to consent to the sexual act. In Tuka Ram And Anr vs State Of Maharashtra, 1978, the Supreme Court held that there was no rape because there was no evidence to prove lack of consent as there were no marks of injury on her body. It was assumed that this was a peaceful affair and the story of resistance by the girl was false(Tuka Ram And Anr vs State Of Maharashtra, 1978). In this case, it is assumed that the prosecutor consented to the sexual act as there were no injury marks to prove that she resisted. According to MacKinnon, " *Sexual intercourse may be deeply unwanted, the woman would never have initiated it, yet no force may be present.*"(MacKinnon 177). It means that the woman did not consent to sexual intercourse yet there may be no force present as women are taught to be submissive. Moreover, there is a probability that the woman might not have the strength to resist the act. Thus, the law should not solely depend on injury marks to consider whether the woman consented or not.

The legal understanding of sexual consent assumes that a wife, a prostitute, or a woman who had sexual intercourse before cannot be raped. This assumption arises because, according to the male understanding of female sexuality "*once a woman has had sex, she has nothing to lose"*(MacKinnon 173). The male understanding treats female sexuality as a property that can be 'stolen, sold, bought, bartered, or exchanged by others'(MacKinnon 172). Thus, in other words, once women have sex, she loses her sexuality, and thus she cannot be raped. On the basis of this understanding, the law divides women on the basis of who can consent and who cannot consent. Basically, young virgin girls have the capacity to consent and refuse while women who had sex before are 'assumed to consent'(MacKinnon 175). On 12 October 2016, a sex worker was gang-raped in Bengaluru. The Supreme Court of India, set free the accused on the reasoning that the women, in this case, is a sex worker and her behaviour was different from a normal rape victim. Here, the court didn't even talk about whether she consented to the act or not(Sen, Jahnavi). The court assumed that she cannot consent since she is a sex worker! According to MacKinnon, this type of understanding of consent is wrong as consent should be viewed from the eyes of a woman and not from the eyes of a man. MacKinnon says in 'Rape: On Coercion and Consent', "The law takes the most aggravated case for female powerlessness

based on gender and age combined and, by formally prohibiting all sex as rape, makes consent irrelevant on the basis of an assumption of powerlessness."(MacKinnon 175).

Law also categories women on the basis of age to consider whether she can consent or not. For example, marital rape is legal in India. If the wife is above the age of eighteen, her consent does not matter. In Independent Thought Vs Union Of India (2018), the Supreme Court of India held, "Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."(Independent Thought Vs Union Of India, 2018). This judgment makes the whole idea of consent useless as a married woman above the age of eighteen can be legally raped by her husband. According to MacKinnon, this situation arose because, "*The exemption for rape in marriage is consistent with the assumption underlying most adjudications of forcible rape: to the extent the parties relate, it was not really rape, it was personal.*"(MacKinnon 176). The male understanding of consent assumes that if a woman knows the accused then it is not rape but sex. In other words, a woman can be raped only by someone unknown (MacKinnon 176). MacKinnon rejects this idea of understanding sexual consent as more than 40% of the women raped are raped by someone they know(MacKinnon 176). The law should view the meaning of consent from the eyes of a woman. Instead of telling who can consent and who cannot, the law should uniformly apply the right to say 'no' to all women.

Therefore, the legal standard should view the meaning of sexual consent from the perspective of a woman. Such a consent should not be valid if, firstly, it is taken under fear or coercion, secondly, even if there are no injury marks on the body of the woman, the consent should not be assumed, thirdly, even if a woman had sexual intercourse before, her consent will not be assumed, and fourthly, marital rape should not be considered an exception to rape laws.

KASHMIR: THE UNENDING DILEMMA

- AISHA BEEVI AZEEZ & SOORYA MARIYA KURIAN

A PEEK INTO THE PAST:

The roots of the long standing claims over Kashmir, dates back to the pre-independence period. China had always presupposed Aksai Chin to be part of their territory, upon which they exercise administrative control now, after the 1962 Sino Indian war. The Indian Independence Act of 1947 induced a bitter-sweet feeling -The ecstasy of attaining long sought freedom from British colonial rule was negated by the pain of ripping India to form Pakistan.

At the time of independence, India had over 560 princely states, one of which was Kashmir. Despite its Muslim majority demography, the Hindu king of Kashmir Maharaja Hari Singh abstained from acceding to either nations and signed a standstill agreement with both India and Pakistan. But alerted by the mounting dangers of Pashtun tribes' aggression, the king turned to India seeking help .In return India demanded signing the Instrument of Accession to which the maharaja complied .It must be noted here that the merger agreement was still not signed by Kashmir. Sadly this event culminated in the 1947-1948 Indo-Pakistan war.

August 5, 2019 witnessed, in a first, the bifurcation of an Indian State to two different U. T.s Art 370 was introduced in the draft Indian constitution by N Gopalaswamy Ayyangar as Art 306A after the war. Hence Art 306 A is a precursor to art. 370. This temporary article of 370 crowned Kashmir with its Special status, conferring the power to have a separate constitution, a flag of its own and complete autonomy over its administration. However India retained its power of legislation in three subjects -Defence, External Affairs and Communication.

The article mandated the consultation of the State's Constituent Assembly before the issuance of the Presidents constitutional order. This was duly complied in the 1954 President's order which specified the articles applicable to Kashmir. The order also added the controversial and much debated art.35 A to the Indian Constitution granting special rights to permanent residents. Art 370 was contested in courts many a times in the past. Prem Nath Kaul v J&K[554] (1959)

[554] 1959 AIR749

challenged the Big Landed Estates Abolition Act of 1950, enacted by Maharaja of Kashmir. The S.C held that the plenary legislative powers of maharaja were not curtailed by Art.370. However ,in bona fide belief of having settled issues pertaining to application of Indian laws, the constitution assembly was dismissed in 1956-but without recommending the scrapping of Art 370.The petitioner in Sampat Prakash v. J&K(1968)[555] raised the argument that Art 370 ceased to exist after the dissolution of Constituent Assembly. The Supreme Court answered it in the negative and held that only upon the recommendations of the Constituent Assembly would Art 370 be scrapped.

REVOCATION OF THE STATE'S SPECIAL STATUS:

On August 5th 2019, the Govt. came up with 2 resolutions -The First resolutions takes away the special status of Jammu and Kashmir by way of Presidential order and the second resolution bifurcates the northern state into two Union Territories. It's imperative to examine the legality of the resolutions before making comments. The first resolution took away the special status of Kashmir.

Article 370(3) clearly mandates that the recommendation of the Constituent Assembly of the state shall be necessary before the president issues such a notification(presidential order).Clause 2 of the same article refers to 'Constituent assembly' as the assembly formed to frame constitution which ceased to exist after the Mir Qasim Resolution on January 26th 1957. This lay as a stumbling block for the Govt. to proceed with the constitutional order. Therefore, the in order to circumvent this impediment, the President, prior to the abrogation of Art 370 amended Art 367 which deals with the interpretation of constitution and declared a legal fiction that the constituent assembly in Art.370 shall be read, from now on, as the Legislative Assembly. This was at a time when President's rule was promulgated in Kashmir .Hence the Legislative Assembly of Kashmir would concur with the Indian Parliament. This would mean that the instant resolution has turned a deaf ear to the opinions of the people of Kashmir. The amendment of Art 367 is nothing but a colourable amendment to circumvent the hurdle of seeking opinion of the State's populace. A plethora of petitions have been filed at the Supreme Court. The Govt. has responded with a lame excuse that the abrogation has closed the 'chasm' between India and Kashmir. The Govt. must understand that no legal pathways would integrate Kashmir to India without consulting the people of Kashmir, although the consultation is not binding on the Government.

[555]1970 AIR 1118,1970 SCR (2)365

Controversies also surround the Kashmir Reorganisation Act,2019 as per article 3.Article 3 of the Constitution empowers the Parliament to form a new state by separation of territory or by uniting two or more states or parts of state or by Uniting any territory to a part of state. This article highlights the domineering power of Central Govt. over the State Govts.,despite being a federal nation. However there is a rider which casts an obligation on the president, who has to refer the reorganisation bill to the legislative assembly of the intended State. It is understood that at the time of drafting the bill, Kashmir was under president's rule and parliament would take over the functions of state legislative assembly. The maximum validity of President's rule is 3 years, beyond which would demand an amendment of constitution. The question is whether during the temporary period of president's rule ,the parliament has the right to enact a law that can have a perpetual effect on the Centre -state relation. Again,though the parliament possess power to make laws for a state during state emergency, the question as to whether it has the power to express views on any matter relating to its reorganistion, is to be settled. The consultative process is to get the pulse of the residents of that state and must not be bypassed.

SHUT-START-SHUT

THE UNENDING VIOLATIONS IN KASHMIR:

India being one of the largest democratic country in the world tops the list of Internet shutdown globally in 2019.[556] The act of the Government in imposing various laws pertaining to the shutdown points finger towards the concept of democracy and constitutionalism of India. Even though the main reason that asserted the Govt. to shut down the communications was to prohibit the unrest, after the revocation of Article 370 and 35 A of the Constitution, but that really doesn't provide a rationality to the Internet shutdown and other restrictions imposed. The very act had results in great chaos and violates the very fundamental rights of the Kashmiri people. For a democracy to block access to internet for a long term doesn't adhere to its basic principles of being democratic, rather it gives an image of authoritarian regimes such as China and Myanmar who had cut off the internet for a longer period. When the Central Govt. revoked the autonomy and statehood of the Kashmir, they not only snapped all communications but also detained the region's mainstream politicians. The life of common people in Kashmir became miserable and pathetic due to the imposition of various laws. The central Govt. after

[556] Report of Software Freedom Law Centre's Tracker in 2019

revocation of Art.35 A and 370 imposed various laws pertaining to the internet shut down which includes Temporary Suspension of Telecom Services(Public Emergency or Public Rules), 2017 , Section 144[557] of Criminal Procedure Code, 1973 , The Indian Telegraph Act, 1885 and The Information Technology Act, 2000

It is pertinent to note that the very act of snapping all sort of communications, restricting the free movement of people and detaining the politicians not only results in a clear cut violation of Article 19(1)[558], but also Article 21[559] and Article 21A[560] of the Constitution of India. The Right to Dignified life is only possible when the individual can fulfil his basic needs such access to food, water, education etc. The imposition of restriction has gravely violated the educational rights of the children and also laid a worst impact on their childhood.

The Article 19(2)[561] of the Constitution of India empowers the State to impose reasonable restrictions on the exercise of the rights conferred for certain reasons but the main issue that aroused was, Whether the Act of imposition of the restrictions by the Central Govt. comes within the ambit of Article 19(2). The judgement delivered by the Hon'ble Supreme Court of India in the case of Anuradha Bhasin v. Union of India[562], dealt with the above issue in relation with the Internet Shutdown in the State of Jammu & Kashmir. Even though the Court observed 'Internet as an integral part of the freedom expression' but refrained from declaring the right to access the internet as a fundamental right. However the Court questioned the State about the reasonableness of restriction, test of proportionality and cautioned against the excessive utility in the doctrine of proportionality in regard with the National Security. The S.C held that such restriction cannot exceed necessary duration nor it could be indefinite. The Court delivered that an indefinite ban on Internet is impermissible but fails to direct the restoration of the same. The

[557] Power to issue order in Urgent Cases of Nuisance or Apprehended danger.

[558] Article 19: protection of certain rights regarding freedom of speech, etc.-(1) All citizens shall have the right-
(a) To freedom of speech and expression
(b) To assemble peaceably and without arms
(c) To form associations or unions (or co-operative societies)
(d) To move freely throughout the territory of India.
(e) To reside and settle in any part of the Territory of India;
(g) To practise any profession, or to carry on any occupation, trade or Business.

[559] Article 21: Protection of Life and Personal Liberty.

[560] Article 21A: Right to Education

[561] Article 19(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 interest 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.

[562] Anuradha Bhasin v. Union Of India, Writ Petition (civil) no. 1031 0f 2019

judgment didn't provide for an immediate relief but also left an open door for the executive to argue by justifying these restrictions on the ground of national security and other bare reasons.